

ORDINANCE NO. 7648

AN ORDINANCE AMENDING ARTICLE XVII OF CHAPTER 15 OF THE CODE OF ORDINANCES OF THE CITY OF MANHATTAN, ESTABLISHING A CONTRACT FRANCHISE AND AUTHORIZING DELTA COMMUNICATION, LLC DBA CLEARWAVE FIBER TO CONSTRUCT, MAINTAIN AND OPERATE AS A TELECOMMUNICATIONS SERVICE PROVIDER IN THE PUBLIC RIGHT-OF-WAY IN THE PROVISION OF TELECOMMUNICATION SERVICES.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF MANHATTAN, KANSAS:

Section 1. That Article XVII of Chapter 15 of the Code of Ordinances of the City of Manhattan shall be re-titled as follows:

Article XVII. – Delta Communication, LLC

Section 2. That Section 15-345 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-345. - Definitions.

For purposes of this article, the following words and phrases shall have the following meanings:

Cable service is defined as set forth in 47 U.S.C. Section 522(6), and amendments thereto.

City means the City of Manhattan, Kansas.

Contract franchise means this ordinance and the related franchise agreement, granting the right, privilege and franchise to Grantee to provide Telecommunications services within the City.

Facility or facilities means any portion or component of the Network located in, along, over, upon, under, or through the public right-of-way.

Franchise fee means the fees established under this article for each grant of access to the public rights-of-way.

Grantee means Delta Communications, LLC dba Clearwave Fiber authorized to do business in the state of Kansas, a telecommunications service provider, providing telecommunications services and/or operating Facilities within the City. References to Grantee shall also include as appropriate any and all successors and assigns.

Network means the Grantee's fiber network including the cables, wires, lines, conduits, manholes, ducts, appliances, optic fiber, and any associated converters, equipment or other facilities, designed, constructed or occupied for the purpose of

producing, receiving, amplifying or distributing telecommunications service to or from locations within the City.

Law(s) means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, permits, approvals or other applicable requirements of the City or other governmental entity or agency having joint or several jurisdiction over any aspect of this Contract franchise or the parties' activities hereunder, whether now existing or hereafter adopted, including but not limited to a city right-of-way management ordinance and the city's zoning and land use laws to the extent they are not inconsistent with state and federal law regulating use of the public rights-of-way, and any related laws, rules, or regulations and amendments thereto relating to the use and occupancy of the public rights-of-way.

Local exchange service means local switched telecommunications service within any local exchange service area approved by the state corporate commission, regardless of the medium by which the local telecommunications service is provided. The term Local exchange service shall not include wireless communication services.

Provider means a local exchange carrier or a telecommunications carrier as those terms are defined in K.S.A. 66-1,187, and amendments thereto.

Public right(s)-of-way ("ROW") means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

Telecommunications service(s) means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Section 3. That Section 15-346 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-346 - Grants.

- (a) **Telecommunications Service Provider Grant.** This Contract franchise hereby grants to Grantee Delta Communications, LLC dba Clearwave Fiber, the nonexclusive contract, right, privilege, and franchise to locate, construct, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain, facilities along, across, upon and under the ROW for the purpose of providing telecommunications services, and other services permitted by law.

- (b) **Affiliate Contract Franchise.** Nothing in this Contract franchise is intended to preclude the City from seeking or authorize the City to seek, a franchise from an affiliate or third-party providing telecommunications services, except to the extent such affiliate or third party is utilizing internal space within and/or the use and capacity of the Grantee.
- (c) **No Conveyance of Title.** This Contract franchise shall not convey title, equitable or legal, in the ROW, and gives only the right to occupy the ROW, for the purposes and for the period stated herein. This Contract franchise does not:
 - (1) Grant the right to use facilities or any other property, telecommunications related or otherwise, owned or controlled by the City or a third-party, without the consent of such party;
 - (2) Grant the authority to construct, maintain or operate any facility or related appurtenance on property owned by the City outside of the ROW; or
 - (3) Excuse Grantee from obtaining appropriate access or attachment agreements before locating its Facilities on the facilities owned or controlled by the City or a third-party.
- (d) **Cable Service; Open Video System.** This Contract franchise does not provide the Grantee the right to provide Cable service to the City and inhabitants thereof. If, during the term of this Contract franchise, the Grantee desires to provide Cable service within the corporate boundaries of the City, the Grantee shall follow the requirements of K.S.A. 12-2021, et seq., as amended, in providing notice and paying a video service provider fee to the City. In the event that K.S.A. 12-2021, et seq. is repealed or amended in such a way as to provide direct franchising authority to the City, the Grantee shall promptly notify the City of its intent to provide Cable service and renegotiate this Contract franchise in accordance with applicable law prior to providing such service. Nothing in this Contract franchise is intended to preclude the City from seeking, or authorize the City to seek, a franchise from the Grantee or any subsidiary, affiliate, or third party providing Cable services, to the extent any such franchise is permitted under applicable law at the time such service commences. The Grantee and the City agree that nothing in this franchise is intended to authorize the City to seek from the Grantee, nor to require the Grantee to obtain, a franchise to offer "open video systems" as that term is used in section 653 of the Telecommunications Act of 1996 (codified at 47 U.S.C. 573). The Grantee and the City further agree, however, that this article does not authorize the Grantee to offer "open video systems" without paying a fee on the gross revenues of the system operator for the provision of Cable service in lieu of a Franchise fee, pursuant to and in the manner described in 47 U.S.C. 573(c)(2)(b) and without complying with Federal Communication Commission (FCC) regulations promulgated pursuant to 47 U.S.C. 573.
- (e) **Compliance with Laws.** This Contract franchise is subject to the terms and conditions of all applicable federal, state and local laws, existing now or in the future, and the parties shall comply with any such Laws in the

exercise of their rights and performance of their obligations under this Contract franchise.

- (f) **Applicability of Public Health, Safety, and Welfare Requirements and Regulations.** The authority of the Grantee to use and occupy the ROW shall always be subject and subordinate to the reasonable public health, safety, and welfare requirements and regulations of the City. The City may exercise its home rule powers in its administration and regulation related to the management of the ROW provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. The Grantee shall comply with all Laws and lawful city regulations, in effect now or as may be adopted in the future, governing the use of ROW.
- (g) **Other Grant Conditions.** As a condition of this grant, the Grantee is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, but not limited to, the City, the FCC or the Kansas Corporation Commission (KCC). The Grantee shall not provide any additional services for which a franchise is required by the City without first obtaining a separate franchise from the City or amending this Contract franchise.

Section 4. That Section 15-347 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-347 - Term.

- (a) This Contract franchise shall be effective for a term of five (5) years from the effective date of this Contract franchise. Thereafter, this Contract franchise shall automatically renew for three (3) additional five-year terms, unless a party notifies the other party of its intent to terminate the Contract franchise prior to 180 days before the termination of the current term. The additional terms are a continuation of this franchise and not a new franchise or amendment. But, in no event, shall the City be permitted to terminate the Grantee's right under this Contract franchise to place Facilities in the ROW unless the Grantee abandons all of the Network, or unless the terms of this Contract franchise are breached, or unless the Grantee violates any related permits governed by local, state, or federal laws.
- (b) Upon written request of either the City or the Grantee, this Contract franchise shall use good faith efforts to renegotiate the relevant provisions of this Contract at any time in accordance with the requirements of K.S.A. 12-2001 and K.S.A. 17-1902, as amended, upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or the Grantee, including but not limited to the scope of the Contract franchise granted to the Grantee or the compensation to be received by the City.
- (c) Amendments under this section, if any, shall be made by Contract franchise as prescribed by statute. The Contract franchise shall remain in effect according to its terms pending completion of any review or renegotiation provided by this section.

Section 5. That Section 15-348 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-348. - Compensation.

- (a) In consideration of this Contract franchise, the Grantee agrees to pay the City the Franchise fee of five percent (5%) of Grantee's gross revenue (as defined in K.S.A. § 12-2001(c)(6)) derived from its grant as a telecommunications service provider within the corporate boundaries of the City. The Grantee shall pay its Franchise fee on the 15th day of the second month following the month in which the gross revenue is collected. The Grantee shall make such payment without requirement for invoice or reminder from the City. No acceptance by the City of any Franchise fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise fee payment be construed as a release of any claim of the City.
- (b) The Franchise fee required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 and 17-1902, and amendments thereto. The Franchise fee is compensation for use of the ROW and shall in no way be deemed a tax of any kind.
- (c) The Grantee shall reimburse the City for the publication costs related to the adoption or amendment of this Contract franchise.
- (d) If any Franchise fee, or any portion thereof, is not postmarked or delivered on or before the due date described in subsection (a) of this section, interest shall accrue from the due date until received, at an annual rate of ten percent (10%), or if lower, the highest percentage allowed by law.
- (e) The Grantee shall keep accurate books of account at its principal office in Savannah, GA, or such other location of its choosing, for the purpose of determining the amounts due to the City pursuant to this subsection. The City shall have access to, and the right to examine, at all reasonable times, all books, receipts, files, records and documents of the Grantee necessary to verify the correctness of compensation paid to the City, and to correct the same, if found to be erroneous. The City may only exercise its right to examine the books, receipts, files, records, and documents one time per year at a mutually agreeable time. If the statement of fees paid by the Grantee is incorrect, the Grantee shall promptly make payment upon such corrected statement. The City agrees to hold in confidence any non-public information it learns from the Grantee to the fullest extent permitted by law. If the City requests information which Grantee deems confidential, the City agrees to use good faith efforts to negotiate an agreement or other terms to protect such Grantee information. Grantee acknowledges that the City is subject to KSA 45-215, et seq, the Kansas Open Records Act (KORA), and that any duty of confidentiality or disclosure shall be subject to the City's obligations under KORA or any other provision of law or operation thereof. Subject to any agreement with Grantee to the contrary, City shall have no duty or obligation to give notice to Grantee prior to or after complying with

a valid open records request, subpoena or other operation of law related to the products or services contained in this agreement.

- (f) Any dispute concerning the amount under this section shall be resolved in the manner set forth in K.S.A. 12-2001, and amendments thereto. Subject to any limitations in the laws of the state of Kansas, the Grantee's payment obligations shall survive the expiration or termination of this Contract franchise.

Section 6. That Section 15-349 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-349 Installation of the Facilities.

- (a) Pursuant to K.S.A. 17-1902, and amendments thereto, and subject to the provisions of this Contract franchise, the Grantee shall have the right to construct, maintain, and operate the Facilities along, across, upon, and under the ROW. Nothing in this Contract franchise shall be interpreted as granting the Grantee the authority to construct, maintain or operate any facility or related appurtenance on property owned by the City outside of the ROW.
- (b) The Grantee shall construct and maintain the Facilities in a skillful and workmanlike manner that does not obstruct or hinder the usual travel or public safety on such ROW, and that does not obstruct or interfere with the legal use of the ROW by other utilities. The Grantee shall participate in the Kansas One-Call utility location program. The Grantee shall be solely responsible for communicating with Kansas One-Call, or for taking other necessary measures to determine the location of public improvements or other facilities located in the ROW. The Grantee shall install Facilities in accordance with traffic control plans for temporary construction work that are approved by the City, which approval shall not unreasonably be withheld, conditioned or delayed. The Grantee shall coordinate the placement of its Facilities in the ROW in a manner that minimizes adverse impact on public improvements, as reasonably determined by the city engineer.
- (c) The Grantee shall be the City's point of contact and all communications relating to this Contract franchise shall be through the Grantee. The Grantee shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of the Grantee in the event of an emergency. The Grantee shall provide the City with the local contact's name, address, telephone number, fax number and e-mail address.
- (d) Notwithstanding any other ordinance or resolution adopted by the City, the Grantee shall follow the following process:
 - (1) The Grantee shall submit to the City its plans and specifications for the installation of the Facilities. Approval of plans and specifications and the issuance of any permits or approvals by the City shall not release the Grantee from the responsibility for, or the correction of, any errors, omissions, or other mistakes that may be contained in the plans, specifications, or city permits or approvals. The Grantee

shall immediately notify the City and other relevant parties if the Grantee discovers errors, omissions, or mistakes, and the Grantee shall obtain any correct city approval, if necessary.

- (2) The City shall approve plans and specifications that comply with the requirements of this article. The City must respond to the submission of such plans and specifications within fifteen (15) working days from the date of submission of a complete application with any applicable permit and license fee. The location, aesthetic requirements, depth of the fiber underground, and any other requirements shall be approved by the City in writing prior to the instillation of any Facilities at a specific location, and such approval shall not be unreasonably withheld, conditioned or delayed. The City shall have the authority to prohibit the use or occupation of a specific portion of the ROW by the Grantee due to a reasonable public interest necessitated by public health, safety and welfare, so long as the authority is exercised in a competitively neutral manner and is not unreasonable or discriminatory. A reasonable public interest shall include the following:
 - a. The prohibition is based upon a recommendation by the city engineer, is related to public health, safety, and welfare and is nondiscriminatory among service and infrastructure providers, including incumbent providers;
 - b. The Grantee has rejected a reasonable, competitively neutral and nondiscriminatory justification offered by the City for requiring an alternate method or alternate route that will result in neither unreasonable additional installation expense nor a diminution of service quality;
 - c. The City reasonably determines, after affording the Grantee reasonable notice and an opportunity to be heard, that a denial is necessary to protect the public health and safety and is imposed on a competitively neutral and nondiscriminatory basis; or
 - d. The specific portion of the ROW for which the Grantee seeks use and occupancy is environmentally sensitive as defined by state or federal law or lies within a previously designated (as of the date of submission of the Facility permit application) historic district as defined by local, state or federal law.
- (e) The Grantee shall cooperate with the City and follow all legally binding City policies and state and local ordinances with respect to aesthetics.
- (f) In addition to the approvals required by this section, the Grantee must obtain and is responsible for any necessary permit, license, certification, grant, registration, and any other authorization or approval required by the City (collectively, the “permits and approvals”) relating to the installation, maintenance, and repair of the Facilities or Network and for the use and occupancy of the ROW, including, but not limited to, all permits and

approvals required under a city ROW ordinance or zoning regulation and that are not inconsistent with state and federal laws regarding the regulation of the public ROW. The City shall process each valid and administratively complete application for requested permits and approvals in accordance with the time requirements of applicable laws, and shall not unreasonably or unlawfully withhold or delay any permits and approvals. The Grantee shall comply with any condition or requirement set forth in any permit and approval, if they comply with the laws.

- (g) Except as may otherwise be provided by this article, where reasonable and appropriate and where adequate public ROW exists, the Grantee shall place all Facilities underground, and/or replace all above-ground Facilities with underground Facilities, in conjunction with City capital improvement projects and/or at specific locations requested by the City, provided that such placement is practical, efficient, and economically feasible as determined by both parties. Above-ground pedestals, vaults, or other above-ground Facilities, may be installed only if approved by the City where alternative underground Facilities are not technically or financially feasible or where underground requirements are otherwise waived pursuant to this section, and shall generally be located behind the sidewalk where feasible and shall be screened from public view. The underground requirements of this subsection shall not apply to the maintenance and repair of existing Facilities, as determined by the city engineer.
- (h) If there is an emergency necessitating response work or repair, the Grantee may begin that repair or emergency response work or take any action required under the circumstances, provided that the Grantee notifies the City promptly after beginning the work and timely thereafter meets any permit or other requirement had there not been such an emergency.
- (i) In granting this Contract franchise, the City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of Facilities on any particular segment of the ROW. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Grantee.
- (j) The Grantee shall take all reasonable measures necessary to maintain accurate as completed records in electronic format, of all facilities constructed, reconstructed, or relocated in the ROW. The Grantee shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete information regarding the nature and horizontal and vertical location of its facilities located within the ROW when requested by the city or its authorized agents for a public project. Such location and identification shall be at the sole expense of the Grantee without expense to the City, its employees, agents, or authorized contractors.
- (k) The Grantee may trim trees overhanging the ROW that may come into contact with the Grantee's Facilities with the prior approval of the City's forester.

Section 7. That Section 15-350 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-350. - Removal of facilities due to public project and other causes.

- (a) Upon receipt of a written demand from the City, the Grantee, at its sole cost and expense, shall remove and relocate any part of the Network constructed, installed, used and/or maintained by the Grantee under this Contract franchise, within the reasonable time frame set forth by the City, whenever the City reasonably determines that the removal and/or relocation of any Grantee Facility is needed for any of the following purposes:
- (1) Due to any work proposed to be done by or on behalf of the City or any other governmental agency, including, but not limited to, any change of grade, alignment or width of any street, sidewalk or other public facility, installation of curbs, gutters or landscaping and installation, construction, maintenance or operation of any underground or aboveground facilities such as sewers, water mains, drains, storm drains, pipes, gas mains, poles, power lines, telephone lines, cable television lines and tracks; or,
 - (2) Because any part of the Network or Facility is interfering with or adversely affecting the proper operation of City-owned light poles, traffic signals, or other City facilities; or,
 - (3) Because the City is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the ROW; or,
 - (4) To protect or preserve the public health, safety and welfare.
- (b) The City shall cooperate with the Grantee in relocating any portion of the Network removed pursuant to this section in a manner that allows the Grantee to continue providing service to its customers, including, but not limited to, expediting approval of any necessary permits and approvals required for the relocation of that portion of the relocated Network. The City may not charge permitting or other fees for a removal occurring under this section. The City shall provide extensions for relocations reasonably requested by Grantee. Any damages suffered by the City or its contractors as a result of the Grantee's failure to timely relocate or adjust its Facilities shall be borne by the Grantee. The parties understand and agree that neither the City nor the Grantee is entitled to compensation for any relocation of the Grantee's Network that may be required by this section. The Grantee acknowledges that it is not entitled to relocation assistance or any other compensation or benefits under the Uniform Relocation Assistance Act or any other applicable provision of law upon termination of this Contract franchise.

Section 8. That Section 15-351 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-351 - The Grantee and City access to the Facilities.

- (a) The Grantee will be given reasonable access to each of the facilities in the ROW for the purposes of routine installation, repair, maintenance or removal of its Facilities. When applicable, Grantee must comply with Chapter 30, Article IV of the Code of Ordinances, City of Manhattan, Kansas.
- (b) The City shall have commercially reasonable access to observe and inspect the Facilities, and any work conducted by the Grantee during the installation, maintenance and/or repairs of the Facilities.

Section 9. That Section 15-352 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-352. - Maintenance and repair.

- (a) The Grantee shall pay for the electricity and other utilities services it consumes in its operations at the rates charged by the servicing utility companies.
- (b) The Grantee shall, at Grantee's sole cost and expense, perform all maintenance and repairs reasonably needed to maintain its Facilities in good condition and neat and orderly appearance, and in compliance with all applicable Laws. In the event any Facility requires replacement because such part cannot be repaired, the Grantee shall, at the Grantee's sole cost and expense, replace the irreparable Facility. The Grantee shall not cause rubbish, garbage or debris on or around the Facilities and shall not permit any rubbish, garbage or debris to accumulate on or around any enclosed areas around the Facilities. If the City gives the Grantee's written notice of a failure by the Grantee to maintain the Facilities, the Grantee shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice.
- (c) The Grantee shall be responsible for any damage, ordinary wear and tear excepted, to street pavement, existing facilities and utilities, curbs, gutters, sidewalks, landscaping, and all other public or private facilities, to the extent caused by the Grantee's construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of facilities in the ROW. The Grantee shall promptly repair such damage and restore the ROW and any affected adjacent property to a safe and satisfactory condition to the City in accordance with the City's applicable street or ROW restoration standards, or to the property owner if not the City. If the Grantee fails to make the repairs required by the City, the City may affect those repairs and charge the Grantee the cost of those repairs. If the City incurs damages as a result of a violation of this subsection, then the City shall have a cause of action against the Grantee for violation of this section, and may recover its damages, including reasonable attorney fees, if the Grantee is found liable by a court of competent jurisdiction. The Grantee's obligations under this section shall survive for one (1) year past the completion of such reparation and restoration work and return of the affected part of the ROW by the

Grantee to the City, or such longer period as may be established by the City's ROW ordinance, rules or regulations or other applicable Laws.

Section 10. That Section 15-353 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-353. Non-interference.

- (a) The Grantee shall operate its Network in a manner that will not cause interference with the City non-public safety communications systems and to the services and facilities of other licensees or lessees of City property located at or near the Facilities that were in operation prior to the installation of the Network or that are in operation prior to any modifications the Grantee may make to the Network.
- (b) The Grantee's Network and Facilities shall not cause interference with public safety communications systems operated by City or any other public agency, regardless of the date such systems or any components thereof have been placed in service.
- (c) If such interference with the Facilities described in subsections (a) or (b) of this section occurs, the Grantee shall, upon receipt of written notice from the City, immediately commence commercially reasonable, diligent, efforts to correct or eliminate such interference. If such interference cannot be corrected by the Grantee to the reasonable satisfaction of the City within the cure period set forth in the City's notice, which notice shall not be less than 30 days, absent an emergency or danger to public health and safety requiring shorter notice, such interference shall be deemed a material breach under this Contract franchise and the City may terminate the Contract franchise. Interference caused by actions of the Grantee's customer(s) remains the responsibility of the Grantee.

Section 11. That Section 15-354 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-354 - Indemnity and hold harmless.

- (a) It shall be the responsibility of the Grantee to take adequate measures to protect and defend its Facilities in the ROW from harm or damage, commensurate with those duties enumerated and defined by the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq., as amended. If the Grantee fails to accurately or timely locate Facilities when requested, it has no claim for costs or damages against the City and its authorized contractors unless such party is responsible for the harm or damage by its negligence or intentional conduct. The City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near the Grantee's Facilities.
- (b) The Grantee shall indemnify, defend, and hold harmless the City, its agents, representatives, officers, officials, employees and contractors, from and against liability, claims, demands, losses, damages, fines, charges,

penalties, administrative and judicial proceedings and orders, liens, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense to the extent resulting from activities undertaken by the Grantee pursuant to this Contract franchise, except to the extent arising from or caused by the gross negligence or willful misconduct of the City, its agents, representatives, officers, officials, employees or contractors.

- (c) If the Grantee and the City jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the City under state law and without waiving any defenses of the parties under state or federal law.
- (d) The Grantee waives all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network resulting from any event or occurrence except for any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network, resulting from the gross negligence or willful misconduct of the City or resulting from the City's failure to comply, if applicable, with the duties of an excavator as specified in the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq.
- (e) The City will be liable, if at all, only for the cost of repair to damaged portions of the Facilities arising from the gross negligence or willful misconduct of the City, its employees, agents, or contractors. The City, its agents, officers, employees, or contractors, shall not be liable for any damage from any cause whatsoever to the Facilities, specifically including, without limitation, damage, if any, resulting from the City's maintenance operations adjacent to the Facilities or from vandalism or unauthorized use of the Facilities, except to the extent such damage is caused by the gross negligence or willful misconduct of City, its agents, officers, employees or contractors. The City will in no event be liable for indirect or consequential damages.
- (f) In no event shall Grantee be liable for indirect or consequential damages in connection with or arising from this Contract franchise, or its use of the Network or ROW.
- (g) This section is solely for the benefit of the City and the Grantee Delta Communications, LLC dba Clearwave Fiber and does not create or grant any rights, contractual or otherwise, to any other person or entity.
- (h) The Grantee or the City shall promptly advise the other in writing of any known claim or demand against the Grantee or the City related to or arising out of the Grantee's activities in a ROW.

Section 12. That Section 15-355 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-355. - Insurance requirement and performance bond.

- (a) During the term of this franchise, the Grantee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers with an A.M. Best rating of no less than A-:VII and that are licensed to do business in the State of Kansas. The Grantee shall provide not less than the following insurance:
- (1) Workers' compensation as provided for under any workers' compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.
 - (2) Commercial general liability with limits of insurance not less than \$2,000,000 each occurrence, \$2,000,000 annual aggregate, \$2,000,000 completed Operations/Product Aggregate covering claims for bodily injury, property damage, personal and advertising injury, completed operation/product liability and contractual liability arising the activities and operations of the Grantee and independent contractors operating on their behalf. The City shall be included as an additional insured. The insurance for the additional insured shall be as broad as the insurance for the named insured and apply on a primary/noncontributor basis and include protection for completed operations/products claim. Coverage for the additional insured shall include defense expense. If in order to accomplish the required limits of insurance, the Grantee must purchase an excess liability/umbrella policy, such policy shall be written on a follow form basis and be as broad as the underlying insurance. The City shall be included as additional insured to the policy.
 - (3) Business Auto Liability Insurance with limits of insurance not less than \$1,000,000 Combined Single Limit for bodily injury and property damage covering ownership or use of all owned, hired and non-owned autos used in connection with the Grantee operations and activities. The City shall be included as additional insured to the auto liability policy.
- (b) As an alternative to the requirements of subsection (a), the Grantee may demonstrate to the satisfaction of the City that it is self-insured and as such the Grantee has the ability to provide coverage in an amount not less than \$1,000,000 per occurrence and \$2,000,000 in aggregate, to protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death or property damage occasioned by the Grantee or alleged to so have been caused or occurred.
- (c) The Grantee shall, as a material condition of this Contract franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance or evidence of self-insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force. and will not be cancelled without first giving the City thirty (30) days prior written notice, however, ten (10) days' notice when due to non-payment of premium. The Grantee shall make available to the

City on request the policy declarations and endorsement pages, so that limitations and exclusions can be evaluated for appropriateness of overall coverage.

- (d) The Grantee shall, as a material condition of this Contract franchise, prior to the commencement of any work and prior to any renewal of this franchise, deliver to the City a performance bond in the amount of \$100,000, payable to the City to ensure the appropriate and timely performance in the construction and maintenance of Facilities located in the ROW as set forth in this article; to ensure the Grantee's repair and restoration of its damage to its Facilities or the ROW as set forth in section 15-352 (Maintenance and Repair); and to ensure the Grantee's removal of its Facilities, as set forth in section 15-359 (Default; abandonment; expiration or termination of contract franchise). The required performance and maintenance bond must be with good and sufficient sureties, issued by a surety company authorized to transact business in the State of Kansas, and satisfactory to the city attorney in form and substance.

Section 13. That Section 15-356 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-356. - Taxes.

The Grantee agrees that it will be solely responsible for the payment of any and all applicable taxes, fees and assessments levied on its ownership, use and maintenance of the Network and this Contract franchise. Pursuant to Article 5a of Chapter 79 of the Kansas Statutes Annotated, and amendments thereto, the City hereby advises, and the Grantee recognizes and understands, that the Grantee's use of the ROW and/or the Grantee's Facilities may create a possessory interest subject to real property taxation and that the Grantee may be subject to, and responsible for, the payment of real property taxes levied on such interest. The Grantee will cooperate with the county appraiser in providing any information necessary for the appraiser to make a property tax determination. The Grantee reserves the right to challenge any such assessment, and the City agrees to reasonably cooperate with the Grantee in connection with any such challenge.

Section 14. That Section 15-357 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-357. - Nondiscrimination.

The Grantee will not, on the grounds of race, sex, sexual orientation, gender identity, familial status, military status, disability, religion, age, color, national origin or ancestry, discriminate or permit discrimination against any person in the use of the ROW or in activities under this Contract franchise.

Section 15. That Section 15-358 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-358. - Transfer and assignment.

This Contract franchise shall be assignable in accordance with the laws of the State of Kansas. The Grantee shall provide the City written notice of any transfer or assignment within thirty (30) days, including notice of the name and address of the assignee and contact information. The Grantee's obligations under this Contract Franchise with regard to indemnity, bonding and insurance shall continue until the transferee or assignee has taken the appropriate measures necessary to assume and replace the same, the intent being that there shall be no lapse in any coverage as a result of the transfer or assignment. Notwithstanding the foregoing, the Grantee may assign or transfer its rights, privileges and obligations to a parent, affiliate or wholly-owned subsidiary company with written notice to City or to an entity that succeeds to substantially all of its assets, whether by merger, sale or otherwise. Notwithstanding anything to the contrary, Licensee shall have the authority to sublease or sublicense use and capacity of the Grantee's services to its third-party customers and similar entities with notice, and such sublease or sublicense shall not constitute a transfer, assignment, lease or sublease as defined by this Contract franchise.

Section 16. That Section 15-359 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-359. - Default; abandonment; expiration or termination of contract franchise.

- (a) A "default" shall be deemed to have occurred if a party fails to cure a breach, within thirty (30) days after written notice specifying such breach, provided that if the breach is of a nature that it cannot be cured within thirty (30) days, a default shall not have occurred so long as the breaching party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.
- (b) Upon a party's failure to timely cure a breach after city notice, and upon expiration of the above cure periods, then the other party may terminate this Contract franchise and pursue all remedies provided for in this Contract franchise and/or any remedies it may have under applicable law or principles of equity relating to such breach. In addition to the remedies set forth herein, the City shall have the right to terminate this Contract franchise if (i) the City is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the ROW; or (ii) if the Grantee's licenses are terminated, revoked, expired, or otherwise abandoned. Such termination rights under subsection (b)(i) shall be subject to the Grantee's rights to just compensation, if any, from the federal, state or local government requiring such removal for any taking of a protected property right.
- (c) In the event the Grantee ceases to operate and/or maintain and abandons the Network, any Facility, or parts thereof, for a period of ninety (90) days or more, the Grantee shall, at its sole cost and expense and within ninety (90) days from the date of abandonment, vacate and remove the Network or the abandoned part thereof. If such removal disturbs the facility or adjacent

property (including ROW or city real property), the Grantee shall also, at its sole cost and expense, restore or repair the ROW, each facility, and any adjacent property to its original condition, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment or other aesthetic improvements made by the Grantee to the facility or adjacent property. Alternatively, the City may allow the Grantee, in the City's sole and absolute discretion, to abandon the Network, or any part thereof, in place and convey it to the City. As a condition to any obligation of Grantee under this subsection (c), City shall provide Grantee notice that City believes Grantee has ceased to operate and/or maintain and has abandoned the Network, any Facility, or parts thereof. If Grantee responds and demonstrates that it continues to operate and/or maintain the Network, this provision shall not apply.

- (d) Upon expiration or termination of this Contract franchise for any reason, the Grantee shall have the right to remove any and all of its Facilities within sixty (60) days after such termination or expiration, or to transfer any and all of its Facilities to another entity authorized to place facilities in the ROW. The Grantee has the duty, immediately upon any such removal, to restore the ROW from which the Facilities are removed to as good a condition as the same were before removal was performed. If the Grantee fails to remove or transfer its Facilities within sixty (60) days, the City may, at its option, remove any or all of the Facilities at the Grantee's expense, or take ownership of any or all of Facilities for the City's use and/or disposal.

Section 17. That Section 15-360 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-360. - Notices.

Except in emergencies, all notices by one party to the other shall be made by personal delivery, by depositing such notice in the U.S. mail, certified mail, return receipt requested, or by facsimile. Any notice served by certified mail, return receipt requested, shall be deemed delivered five (5) calendar days after the date of such deposit in the U.S. mail unless otherwise provided. Any notice given by facsimile is deemed received by the next business day. "Business day" for purposes of this section shall mean Monday through Friday, City and Grantee [franchise holder name]-observed holidays excepted. Emergency notices shall be provided by telephone, with written notice immediately following by facsimile.

Notices shall be addressed to the City as follows:

City Clerk
1101 Poyntz Avenue
Manhattan, Kansas 66502
785-587-2409 (fax)

Notice to Grantee [Delta Communications, LLC dba Clearwave Fiber] shall be addressed to the company as follows:

Clearwave Fiber
Attn: Market Development & Government
Relations
1375 Chatham Parkway
Savannah, Georgia 31405

With copy to:
General Counsel at the same address.

Notice shall be given as required by the terms of this Contract franchise. Notice shall be provided to the above-named addressees unless directed otherwise in writing by the City or the Grantee. Both the Grantee and the City shall provide to the other contact information with telephone and facsimile numbers for use in emergencies.

Section 18. That Section 15-361 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-361. - Acceptance.

Prior to the effective date of this franchise, the Grantee shall file with the City clerk its acceptance in writing of the provisions, terms and conditions of this Contract franchise, which acceptance shall be duly acknowledged before an officer authorized to administer oaths; and when so accepted, this Contract franchise and acceptance shall constitute a contract between the City and the Grantee subject to the provisions of the laws of the state of Kansas.

Section 19. That Section 15-362 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-362. - Reservation of rights.

- (a) The City specifically reserves its rights as a public entity with responsibilities towards its citizens, to participate to the full extent allowed by law in proceedings concerning the Grantee's rates and services, and the maintenance of the Grantee's property in good repair.
- (b) In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, its home rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- (c) In granting its consent hereunder, the Grantee does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, or under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- (d) In entering into this Contract franchise, neither the City's nor Grantee's present or future legal rights, positions, claims, assertions or arguments

before any administrative agency or court of law are in any way prejudiced or waived. By entering into the Contract franchise, neither the City nor Grantee waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Grantee may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-franchise ordinances and/or rulings.

Section 20. That Section 15-363 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-363. - Entire Agreement; Modification; Waiver.

This Contract franchise constitutes the entire agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties, oral or written, relating to the subject matter hereof are merged into and superseded by this Contract franchise. The parties agree that the provisions in this Contract franchise are the project of joint draftsmanship and that should any of the terms be determined by a court, or in any type of quasi-judicial or other proceeding, to be vague, ambiguous and/or unintelligible, that the same sentences, phrases, clauses or other wording or language of any kind shall not be construed against the drafting party. Any modification or amendment to this Contract franchise shall be of no force and effect unless it is in writing, signed by the parties, and adopted pursuant to the requirements of state law. No waiver of any of the provisions of this Contract franchise shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the party making the waiver.

Section 21. That Section 15-364 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-364. - Severability.

If any clause, sentence, or section of this Contract franchise, or any portion thereof, shall be declared by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared to be invalid; provided, however, the City or the Grantee may elect to declare that the entire agreement is invalidated if the portion declared invalid is, in the judgment of the City or the Grantee, an essential part of this Contract franchise.

Section 22. That Section 15-365 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-365. - Survival of Terms.

All of the terms and conditions in this Contract franchise related to payment, removal due to termination or abandonment, indemnification, limits of City's liability, attorneys' fees and waiver shall survive termination of this Contract franchise.

Section 23. That Section 15-366 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Sec. 15-366- Governing law and venue.

- (a) As a condition of this Contract franchise, the Grantee is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the FCC or the Kansas Corporation Commission (KCC), subject to the Grantee's right to challenge in good faith such requirements as established by the FCC, KCC or other City regulations. The Grantee shall also comply with all applicable laws, statutes and/or city regulations, subject to the Grantee's right to challenge in good faith such laws, statutes, and/or city regulations.
- (b) The obligations and undertakings of both parties hereto shall be performed at Manhattan, Riley County, Kansas. In the event that any legal proceeding is brought to enforce the terms of this Contract franchise, the same shall be brought in state or federal courts, as appropriate, having jurisdiction for Riley County, Kansas.

Section 24. That Section 15-367 of the Code of Ordinances of the City of Manhattan is hereby amended to read as follows:

Section 15-367 - Effective date of franchise.

This ordinance shall take effect upon its final passage and publication in the official city newspaper.

Section 25. That Sections 15-368-15-370 of the Code of Ordinances of the City of Manhattan are hereby amended to read as follows:

Section 15-368 - 15-370. Reserved.

**PASSED AND ADOPTED BY THE GOVERNING BODY OF THE CITY OF
MANHATTAN, KANSAS, THIS ____ DAY OF _____, 2023.**

Mark J. Hatesohl, Mayor

ATTEST:

Brenda K. Wolf, CMC, City Clerk

(PUBLISHED IN *THE MANHATTAN MERCURY* ON JUNE 10, 2023)

ORDINANCE NO. 7648 SUMMARY

On June 6, 2023, the City of Manhattan, Kansas adopted the following ordinance:

AN ORDINANCE AMENDING ARTICLE XVII OF CHAPTER 15 OF THE CODE OF ORDINANCES OF THE CITY OF MANHATTAN, ESTABLISHING A CONTRACT FRANCHISE AND AUTHORIZING DELTA COMMUNICATION, LLC DBA CLEARWAVE FIBER TO CONSTRUCT, MAINTAIN AND OPERATE AS A TELECOMMUNICATIONS SERVICE PROVIDER IN THE PUBLIC RIGHT-OF-WAY IN THE PROVISION OF TELECOMMUNICATION SERVICES.

The Ordinance authorizes a telecommunication services franchise with Clearwave Fiber, as more specifically described in the Ordinance. The complete text of the Ordinance may be obtained or viewed free of charge at the office of the City Clerk, City Hall, 1101 Poyntz Ave., Manhattan, KS 66502, Monday – Friday, 8 a.m. – 5 p.m., and is available for at least one week following the publication date of this summary at www.cityofmhk.com. This Summary certified to be legally accurate and sufficient by City Attorney Katharine Jackson.

City Attorney

Date certified: _____