

ORDINANCE NO. 2430

AN ORDINANCE GRANTING TO IDEATEK TELCOM, LLC, A CONTRACT FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM IN THE CITY OF DERBY, KANSAS AND PRESCRIBING THE TERMS OF SAID CONTRACT FRANCHISE.

This Contract Franchise (“Franchise or Agreement”) is entered by and between the City of Derby, Kansas, a municipal corporation (the “City”), and IdeaTek Telecom, LLC (“IdeaTek”).

RECITALS

A. **WHEREAS**, IdeaTek owns, maintains, operates and/or controls telecommunications and Internet Facilities serving IdeaTek’s customers. Such Facilities are in public rights-of-way (hereinafter “ROW”), among other locations, in the State of Kansas.

B. **WHEREAS**, pursuant to the laws of the State of Kansas and the ordinances of the City of Derby, Kansas, the authority to use the public rights of way within the City of Derby, Kansas, is vested within the reasonable police powers of the City; and

C. **WHEREAS**, IdeaTek wishes to place and maintain a telecommunication and broadband Internet system within certain portions of the City’s Right of Way pursuant to the terms of this Contract Franchise.

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF THE CITY OF DERBY, KANSAS:

SECTION 1. DEFINITIONS.

For the purposes of this Ordinance the following words and phrases shall have the meaning given herein. When not inconsistent within the context, words used in the present tense include the future tense and words in the single number include the plural number. The word “shall” is always mandatory, and not merely directory.

- a. “City” means the City of Derby, Kansas.
- b. "Contract Franchise" - means this Ordinance granting the right, privilege and franchise to IdeaTek to provide telecommunication services within the City.

c. "Facilities" means any lines, conduits, manholes, ducts, wires, cables, pipes, poles, towers, vaults, appliances, optic fiber, and all equipment and all appurtenances and improvements thereto, whether existing above or below ground.

d. "Gross receipts" shall have the meaning as that term is defined in K.S.A. 12-2001(c)(6).

e. "IdeaTek" means IdeaTek Telcom, LLC, a competitive telecommunications local exchange service provider providing local exchange, broadband Internet services, and other telecommunications services within the City. References to IdeaTek shall also include, as appropriate, any and all successors and assigns.

f. "Laws" ("Law") 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 agreement 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.

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

h. "Public Right-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 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, or facilities or property owned by the City even if located within the ROW.

i. "Telecommunications services" 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 2. GRANT OF CONTRACT FRANCHISE.

a. There is hereby granted to IdeaTek a nonexclusive Contract Franchise to construct, maintain, extend and operate its Facilities along, across, upon or under the Public Rights-of-way for the purpose of providing local exchange services, broadband Internet, and other telecommunications services to customers located within the corporate boundaries of the City, for the term of this Contract Franchise, subject to the terms and conditions of this Contract Franchise.

b. The grant of this Contract Franchise by the City shall not convey title, equitable or legal, in the Public Right-of-way, and shall give only the right to occupy the Public Right-of-way, for the purposes and for the period stated in this Contract Franchise. 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 whether inside or outside of the Public right-of-way, specifically including, but not limited to, poles, street lights, buildings, towers, park property, City Hall property, or other facilities;
- 3) Excuse IdeaTek from obtaining appropriate access or attachment agreements or permits before locating its Facilities on Facilities or property owned or controlled by the City or a third party;
- 4) Grant to any licensee or lessee of IdeaTek or other third party a right of access or authority to the City's right-of-way without said licensee, lessee, or third party obtaining all necessary permits and authorizations from the City in accordance with Ordinance No. 2293 of the City or any then current ordinance or regulation of the City dealing with management of the ROW and, if determined necessary by the City, a contract franchise for said licensee, lessee, or third party.
- 5) Grant the right to place a Wireless facility as defined in K.S.A. 66-2019(b)(18) within the Public Right of Way to the extent restricted by Law.
- 6) Provide any additional services without first obtaining a franchise or other agreement when required by the City and authorized by Law. Grantee shall not knowingly allow the use of its Facilities or system by any licensee, lessee, or third party in violation of any federal, state, or local law.

c. As a condition of this grant, IdeaTek 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). IdeaTek shall also comply with all applicable laws, statutes and/or city regulations.

d. IdeaTek shall not provide any additional services for which a franchise or deployment or other agreement is required by the City and such requirement is permitted by Law without first obtaining a separate franchise or deployment or other agreement from the City or amending this Contract Franchise. In particular, this Contract Franchise does not provide IdeaTek the right to provide: (i) cable service as a cable operator (as defined by 47 U.S.C. §522(5)) within the City; (ii) operation of an open video system without payment of fees permitted by 47 U.S.C. §573(c)(2)(B) and without complying with FCC regulations promulgated pursuant to 47 U.S.C.

§573; and (iii) the deployment or installation of wireless services within the ROW of the City without a deployment or license agreement as authorized by K.S.A. 12-2001(t).

e. This authority to occupy the public right-of-way shall be granted in a competitively neutral and nondiscriminatory basis and not in conflict with state or federal law.

SECTION 3. USE OF PUBLIC RIGHT-OF-WAY.

a. Pursuant to K.S.A. 17-1902, and amendments thereto, and subject to the provisions of this Contract Franchise, IdeaTek shall have the right to construct, maintain and operate its Facilities along, across, upon and under the public right-of-way. Such Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

b. IdeaTek's authority 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. IdeaTek shall comply with all laws, rules, and lawful City regulations in effect now or as may be adopted in the future governing the use of the ROW, specifically including City of Derby Ordinance No. 2293 as the same may be amended or replaced, the City's zoning, land use, and subdivision regulations and amendments thereto.

c. IdeaTek shall participate in the Kansas One Call utility location program.

SECTION 4. COMPENSATION TO THE CITY.

a. In consideration of this Contract Franchise, IdeaTek agrees to remit to the City a franchise fee of 5% of Gross Receipts. To determine the Franchise Fee, IdeaTek shall calculate its Gross Receipts and multiply such amount by 5%.

1) IdeaTek shall pay on a quarterly basis without requirement for invoice or reminder from the City, and within 45 days of the last day of the quarter for which the payment applies, the Franchise Fee due and payable to the City. If a Franchise Fee, or any portion thereof, is not postmarked on or before the due date, interest thereon 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.

2) Once per quarter, IdeaTek shall submit to the City a statement, executed by an authorized officer of IdeaTek or his or her designee, showing the amount of Gross Receipts for the period covered by the payment, and the manner in which the Franchise Fee was calculated.

3) 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. Any dispute concerning the amount due under this Section shall be resolved in the manner set forth in K.S.A. 12-2001 and amendments thereto. Subject to any limitations of Kansas Statutes, IdeaTek's payment obligations shall survive the expiration or termination of this Contract Franchise.

4) 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.

SECTION 5. RECORD REVIEW.

The City shall have the right to examine, upon written notice to IdeaTek, no more than once per calendar year, those records necessary to verify the correctness of the compensation paid pursuant to this Contract Franchise ordinance.

SECTION 6. RESOLD SERVICES.

IdeaTek shall collect and remit compensation as described in Section 4 on those access lines that have been resold to another telecommunications local exchange service provider.

SECTION 7. INDEMNITY AND HOLD HARMLESS.

a. It shall be the responsibility of IdeaTek to take adequate measures to protect and defend its facilities in the Public Right-of-way from harm or damage. If IdeaTek fails to accurately or timely locate facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq., it has no claim for costs or damages against the City and its authorized contractors unless such parties are responsible for the harm or damage caused by their gross negligence. 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 IdeaTek's facilities.

b. IdeaTek shall indemnify, defend and hold the City, its agents, representatives, officers, officials, employees, and contractors harmless against any and all claims, lawsuits, judgments, costs, liens, losses, damages, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of IdeaTek, any agent, officer, director, representative, employee, affiliate or subcontractor of IdeaTek, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining Facilities in the Public Right-of-way.

c. IdeaTek or City shall promptly advise the other in writing of any known claim or demand against IdeaTek or the City related to or arising out of IdeaTek's activities in the Public Right-of-way.

SECTION 8. INSURANCE REQUIREMENTS AND PERFORMANCE BOND.

a. During the term of this Contract Franchise, IdeaTek shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the State of Kansas. Should IdeaTek elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. IdeaTek shall provide not less than the following insurance:

(1) Workers' compensation as provided for pursuant to the laws of the state of Kansas with an employers' liability limit equal to the amount required by law.

(2) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from IdeaTek's operations under this Contract Franchise.

b. IdeaTek 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 evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice. IdeaTek shall make available to the City on request the policy declarations page and a certified copy of the policy in effect, so that limitations and exclusions can be evaluated for appropriateness of overall coverage.

c. IdeaTek 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 performance bond in the amount of Twenty Thousand Dollars (\$20,000.00) payable to the City to ensure appropriate and timely performance in the construction and maintenance of Facilities located in the ROW. The required performance 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 9. REVOCATION AND TERMINATION.

In case of failure on the part of IdeaTek to comply with any of the provisions of this Contract Franchise, or if IdeaTek should do or cause to be done any act or thing prohibited by or in violation of the terms of this Contract Franchise, IdeaTek shall forfeit all rights, privileges, and franchise granted herein, and such rights, privileges and franchise hereunder shall cease, terminate and become null and void, and this, Contract Franchise shall be deemed revoked or terminated,

provided that said revocation or termination, shall not take effect until the City has completed the following procedures:

- 1) Before the City proceeds to revoke and terminate this Contract Franchise, it shall first serve a written notice upon IdeaTek setting forth in detail the neglect or failure complained of, and IdeaTek shall have sixty (60) days thereafter in which to comply with the conditions and requirements of this Contract Franchise.
- 2) If at the end of such sixty (60) day period the City deems that the conditions have not been complied with, the City shall take action to revoke and terminate this Contract Franchise by an affirmative vote of the City Council present at the meeting and voting, setting out the grounds upon which this Contract Franchise is to be revoked and terminated; provided, to afford IdeaTek due process, IdeaTek shall first be provided reasonable notice of the date, time and location of the City Council's consideration of said revocation and termination, and shall have the right to address the City Council regarding such matter.
- 3) Upon any determination by the City Council to revoke and terminate this Contract Franchise, IdeaTek shall have thirty (30) days to appeal such decision to the District Court of Sedgwick County, Kansas. This Contract Franchise shall be deemed revoked and terminated at the end of this thirty (30) day period unless IdeaTek has instituted such appeal. If IdeaTek does timely institute such an appeal, such revocation and termination shall remain pending and subject to the court's final judgment.
- 4) Provided, however, that the failure of IdeaTek to comply with any of the provisions of this Contract Franchise or the doing or causing to be done by Grantee of anything prohibited by or in violation of the terms of this Contract Franchise shall not be a ground for the revocation or termination thereof when such act or omission on the part of IdeaTek is due to any cause or delay beyond the control of IdeaTek or to bona fide legal proceedings.
- 5) Further provided, however, that nothing herein shall prevent the City or Ideatek from invoking any other remedy that may otherwise exist at law.

SECTION 10. RESERVATION OF RIGHTS.

- a. The City specifically does not waive its right and authority to participate to the full extent allowed by law in proceedings concerning IdeaTek's operation of Telecommunications service within the City.
- 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 and other authority established pursuant to 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, IdeaTek 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 IdeaTek'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 IdeaTek waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or IdeaTek 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 11. FAILURE TO ENFORCE.

The failure of either the City or the IdeaTek to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Contract Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City or IdeaTek unless said waiver or relinquishment is in writing and signed by both the City and IdeaTek.

SECTION 12. TERM AND TERMINATION DATE.

- a. This Contract Franchise shall be effective for a term beginning on the effective date of this Contract Franchise ordinance and ending on December 31, 2029. Thereafter, this Contract Franchise will renew for up to five additional two (2) year terms, unless either party notifies the other party of its intent to terminate or renegotiate the Contract Franchise at least ninety (90) days before the termination of the then current term. The additional term shall be deemed a continuation of this Contract Franchise and not as a new franchise or amendment.

- b. Upon written request of either the City or IdeaTek, this Contract Franchise shall be renegotiated at any time in accordance with the requirements of state law 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 IdeaTek, including but not limited to the scope of the Contract Franchise granted to IdeaTek or the compensation to be received by the City hereunder.

- c. If any clause, sentence, section, or provision of K.S.A. 12-2001, and amendments thereto, shall be held to be invalid by a court or administrative agency of competent jurisdiction, provided such order is not stayed, either the City or IdeaTek may elect to terminate the entire Contract Franchise. In the event of such invalidity, if IdeaTek is required by law to enter into a Contract Franchise with the City, the parties agree to act in good faith in promptly negotiating a new Contract Franchise.

d. Amendments under this section, if any, shall be made by Contract Franchise ordinance as prescribed by statute. This Contract Franchise shall remain in effect according to its terms, pending completion of any review or renegotiation provided by this section.

e. In the event the parties are actively negotiating in good faith a new Contract Franchise ordinance or an amendment to this Contract Franchise upon the termination date of this Contract Franchise, the parties by written mutual agreement may extend the termination date of this Contract Franchise to allow for further negotiations. Such extension period shall be deemed a continuation of this Contract Franchise and not as a new Contract Franchise ordinance or amendment.

SECTION 13. POINT OF CONTACT AND NOTICES.

IdeaTek 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 IdeaTek in the event of an emergency. IdeaTek shall provide the City with said local contact's name, address, telephone number, and email address.

All other notices between the parties shall be in writing and shall be made by personal delivery or by depositing such notice in the U.S. Mail, Certified Mail, return receipt requested. Any notice served by U.S. Mail or 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. "Business day" for purposes of this section shall mean Monday through Friday, City and/or IdeaTek observed holidays excepted.

The City: City of Derby, Kansas Attn: Deputy City Manager 611 N. Mulberry Rd, Suite 300 Derby, KS 67037 kielmangus@derbyweb.com	IdeaTek: IdeaTek Telcom Attn: Contract Notifications PO Box 407 Buhler, KS 67522 Daniel@ideatek.com
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or to replacement addresses that may be later designated in writing.

SECTION 14. TRANSFER AND ASSIGNMENT.

This franchise shall be assignable, subject to all terms and conditions of this contract franchise ordinance, in accordance with the laws of the State of Kansas. IdeaTek shall provide the city written notice of any transfer of assignment within thirty (30) days, including notice of the name and address of the assignee and contact information. IdeaTek's obligations under this contract franchise 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 any transfer or assignment.

SECTION 15. CONFIDENTIALITY.

Information provided to the City under K.S.A. 12-2001 shall be governed by confidentiality procedures in compliance with K.S.A. 45-215 and 66-1220a, et seq., and amendments thereto. IdeaTek agrees to indemnify and hold the City harmless from any and all penalties or costs, including attorney's fees, arising from the actions of IdeaTek, or of the City at the written request of IdeaTek, in seeking to safeguard the confidentiality of information provided by IdeaTek to the City under this Contract Franchise

SECTION 16. COMPETITIVE NEUTRALITY

The City agrees that under K.S.A. 12-2001 and K.S.A 17-1902, and other state and federal laws, this Contract Franchise ordinance must be competitively neutral and may not be unreasonable or discriminatory.

SECTION 17. ACCEPTANCE OF TERMS.

IdeaTek shall have sixty (60) days after the final passage and approval of this Contract Franchise to 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 some officer authorized by law to administer oaths; and when so accepted, this Contract Franchise and acceptance shall constitute a contract between the City and IdeaTek subject to the provisions of the laws of the State of Kansas, and shall be deemed effective on the later of the date IdeaTek files acceptance with the City or publication of this Contract franchise in accordance with Statute (the "Effective Date").

SECTION 18. SEVERABILITY.

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

SECTION 19. FORCE MAJEURE.

Each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond IdeaTek's or the City's control.

SECTION 20. GENERAL PROVISIONS.

- a. Subject to Section 14, this Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successors, assigns and transferees.
- b. This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof.

- c. This Agreement shall be interpreted and enforced according to, and the parties' rights and obligations governed by, the domestic law of the State of Kansas or applicable federal law, without regard to laws regarding choice of applicable law. Any proceeding or action to enforce this Agreement, or otherwise directly related to this Agreement shall occur in the federal court with jurisdiction over Sedgwick County or the state courts located in Sedgwick County, Kansas.
- d. All of the terms and conditions in this Agreement related to payment, removal due to termination or abandonment, indemnification, limits of City's liability, attorneys' fees and waiver shall survive termination of this Agreement.
- e. This Franchise Agreement ordinance is made under and in conformation with and is subject to the laws of the State of Kansas.

[signature page to follow]

PASSED BY THE CITY COUNCIL, this 28th day of April, 2020, and SIGNED BY THE MAYOR.

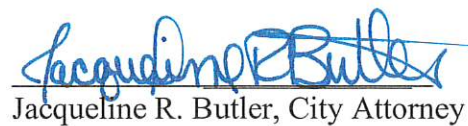



Randy White, Mayor

ATTEST:


Hillary Lawrence, City Clerk

APPROVED AS TO FORM:


Jacqueline R. Butler, City Attorney