

DEPOSIT AGREEMENT

This Deposit Agreement (“**Agreement**”) is dated and effective as of June 5, 2018 (the “**Effective Date**”), by and between the **City of Manhattan Beach**, a California municipal corporation (“**City**”) and the individuals set forth on Exhibit A attached hereto and incorporated herein (each such individual, a “**Depositor**,” and collectively, the “**Depositors**”).

RECITALS

A. Depositors have requested City to form an assessment district (the “**District**”) for the purpose of financing undergrounding of above ground utilities in District 4 in the City of Manhattan Beach (the “**Improvements**”). The proposed boundaries of the District are described in Exhibit B, attached hereto and incorporated herein.

B. Depositors desire that City promptly work with Southern California Edison, Frontier Communications and Charter Communications to develop and finalize plans and pricing for the Improvements, and to then promptly undertake a vote of the property owners for District approval in accordance with Proposition 218.

C. Proposition 218 and the Proposition 218 Omnibus Implementation Act (Government Code Section 53750 *et seq.*) require notice and a hearing of the proposed assessment, and the absence of a majority protest in opposition to the assessment (the “**Proposition 218 Vote Approval**”) before the assessment can be levied (the “**District Formation Process**”).

D. In order to expedite the District Formation Process, Depositors are willing to advance City the Deposit (as defined below), subject to the terms and conditions set forth herein, in order for City to undertake certain activities (as described below) relating to the **Proposition 218 Vote** (as defined below).

NOW THEREFORE, in consideration of, and incorporating the recitals set forth above, the representations, warranties, conditions and covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE 1 DEFINITIONS

1.1 Defined Terms. When used in this Agreement, the following terms shall have the respective meanings specified therefor below.

(a) “**Business Day**” means any day, other than a Saturday, a Sunday or a day on which Manhattan Beach City Hall shall be authorized or required by Law to close.

(b) “**District Formation Process**” shall have the meaning ascribed in Recital C.

(c) “**Failed Vote**” means a “majority protest” in opposition to the proposed District, as that term is defined in Government Code Section 53753(e)(4), as that section currently exists or is subsequently amended.

(d) “**Governmental or Regulatory Authority**” shall mean any governmental instrumentality, subdivision, court, administrative agency, commission, official or other governmental authority of the United States or any state, municipality, locality or other government or political subdivision thereof, or any quasi-governmental or private body exercising any governmental or quasi-governmental regulatory, taxing, importing or other governmental or quasi-governmental authority.

(e) “**Law**” shall mean any statute, law, ordinance, rule or regulation of any Governmental or Regulatory Authority.

(f) “**Depositor Representative**” means Nicholas Tell.

(g) “**Person**” means and includes an individual, a partnership, a joint venture, a corporation, a limited liability company, a limited partnership, a trust, an incorporated organization and a Governmental or Regulatory Authority.

(h) “**Petition**” means a petition complying with Streets and Highway Code Section 5896.5(a), in form acceptable to the Director of Public Works, executed by at least the number of property owners in District 4 specified in Section 5896.6.

(i) “**Proposition 218 Vote**” shall mean a noticed hearing and ballot proceeding in accordance with Government Code Section 53753.

(j) “**Proposition 218 Vote Approval**” shall have the meaning ascribed in Recital D.

(k) “**Survey Validation Process**” shall mean the process by which City validates that homeowners within the proposed district boundaries know and understand the estimated range of cost for undergrounding overhead utilities and are in favor of district formation at that estimated cost. The Survey Validation process requires that at least 60% of property owners in the proposed district that returned ballots vote in favor of proceeding with design and assessment engineering services to obtain the actual cost of relocating overhead facilities to underground facilities.

(l) “**Tax Return**” means any return, declaration, report, claim for refund, information return or statement or other document relating to State or federal taxes, including any schedule or attachment thereto, and including any amendment thereof.

ARTICLE 2 **The Deposit**

2.1 The Deposit. Depositors shall contribute to City an amount to be determined in accordance with this Section (the “**Deposit**”). Each Depositor shall pay the amounts as set forth opposite such Depositor’s name on Exhibit A, as it may subsequently be amended (for each Depositor, his or her “**Funded Amount**”). The Deposit consists of multiple components which

include the Initial Deposit, the Second Deposit, the AE Deposit, and any Supplemental Deposits. All payments shall be made by wire transfers of immediately available funds to an account designated by City or by personal delivery of one or more cashier or personal checks (made payable to City). No payment shall be deemed complete until all personal checks, if any, have cleared.

(a) Within thirty Business Days of the Effective Date, Depositors shall contribute to City **One Hundred Thousand Dollars (\$100,000)** in the aggregate (the “**Initial Deposit**”). Each Depositor shall pay the amounts as set forth opposite such Depositor’s name on Exhibit A. The parties acknowledge that the amount of the Initial Deposit is the total of the estimated costs for obtaining design plans from Southern California Edison, as set forth in Section 3.1. In the event the full amount of the Initial Deposit has not been paid to City within thirty (30) days after the Effective Date, City shall return to the Depositor Representative any portion of the Initial Deposit received by City, and this Agreement shall automatically expire.

(b) Once Southern California Edison has completed its draft design plans and they are ready to be forwarded to Frontier Communications and Charter Communications for additional design work, Depositors shall contribute **Eighty-nine Thousand, Seven Hundred and Twenty Six dollars (\$89,726)** in the aggregate (the “**Second Deposit**”). Each Depositor shall pay the amounts as set forth opposite such Depositor’s name on Exhibit A to reflect the share of the Second Deposit for each Depositor. The parties acknowledge that the amount of the Second Deposit is the total of the estimated costs for obtaining design plans from Frontier Communications and Charter Communications as set forth in Section 3.1. In the event the full amount of the Second Deposit has not been paid to City within thirty (30) days after written notice from City to the Depositor Representative that the Second Deposit is due, City shall proceed in accordance with Section 2.1 (f).

(c) Within 120 days after the Effective Date, Depositors shall submit to City the signed Petition. City shall have no obligation to provide the notice of cost of assessment engineering services per Section 2.1 (d) until Depositors submit the Petition. City shall have no obligation to proceed with assessment engineering services until the City Clerk has confirmed that the Petition has been executed by the requisite number of qualified signers per Streets and Highways Code Section 5896.7, and executed the certificate of sufficiency required by that section.

(d) Once City has determined the cost of the assessment engineering services, City will notify the Depositor Representative of that amount (the “**AE Notice**”). Depositors may contribute the total amount of funds necessary for assessment engineering services in the aggregate (the “**AE Deposit**”). Each Depositor may pay the amounts set forth opposite such Depositor’s name on Exhibit A; at that time, Exhibit A shall be amended to reflect the share of the AE Deposit for each Depositor. The parties acknowledge that the amount of the AE Deposit is the total of the estimated costs for assessment engineering services. In the event the full amount of the AE Deposit has not been paid to City within thirty (30) days after delivery to the Depositor Representative of the AE Notice, City shall proceed in accordance with Section 2.1 (f).

(e) In the event the costs for obtaining design plans from the utilities increase beyond the amounts set forth in Section 3.1, or the cost for assessment engineering increases beyond the amount of the AE Deposit, City will notify the Depositor Representative of that

amount, and the Depositors may deposit with City the amount identified by City as necessary to pay for such increased costs (the “Supplemental Deposit”). At that time, Exhibit A shall be amended to reflect the share of the Supplemental Deposit for each Depositor. In the event Depositors decline or fail to pay the Supplemental Deposit within 30 days of written notice from City, City shall proceed in accordance with Section 2.1 (f).

(f) In the event the Depositors fail to deposit any amounts required under paragraphs (b), (d), or (e) of this Section 2.1, City shall conduct a Validation Survey for District 4 property owners to confirm the level of support for district formation. City shall have a minimum of sixty (60) days to initiate the Validation Survey after actual construction pricing has been received for District 12 and/or 14 following bidding by the utility companies. Depositors acknowledge that City will use actual construction pricing from District 12 and/or 14 to estimate construction pricing for District 4, which is required to initiate the Validation Survey. Should the Validation Survey show at least 60% support among property owners in District 4 that return ballots, then City will advance any additional funds required for the District Formation Process and Proposition 218 Vote.

In the event the Survey Validation process fails, City shall return any portion of the Deposit that has not previously been expended or obligated, the remaining amount of the Deposit shall be treated as a donation to City and this Agreement shall terminate, unless amended by mutual consent of the parties.

(g) Notwithstanding Section 2.1(f) or any other provision of this Agreement, in the event that (i) Depositors fail to submit the signed Petition by the date specified in Section 2.1(c), or (ii) if submitted, the City Clerk is unable to confirm that the Petition has been signed by the requisite number of qualified signers per Streets and Highways Code Section 5896.7, City shall return any portion of the Deposit that has not previously been expended or obligated, the remaining amount of the Deposit shall be treated as a donation to City and this Agreement shall terminate, unless amended by mutual consent of the parties.

(h) The City Manager and the Depositor Representative are authorized to amend Exhibit A to this Agreement to address the AE Deposit and any Supplemental Deposit, as needed.

2.2 Interest. The Deposit shall bear no interest.

2.3 Reimbursement Procedure. Unless amended by mutual consent of the parties, the following terms and conditions shall apply:

(a) In the event a Proposition 218 Vote on the District Formation Process is not initiated for any reason on or before December 1, 2019 (the “**Vote Outside Date**”), then the Deposit shall be returned to Depositors within ten Business Days after the Vote Outside Date.

(b) In the event a Proposition 218 Vote on the proposed District is initiated on or before the Vote Outside Date and the Proposition 218 Vote Approval is obtained at the conclusion of such vote, and notwithstanding such approval the District Formation Process is not completed within 60 days after the date the Proposition 218 Vote Approval is determined complete, the Deposit shall be returned to the Depositors within ten Business Days. City’s obligation to return the Deposit to Depositors is automatically suspended if such delay is the result

of litigation challenging the Proposition 218 Vote or the District Formation Process until such litigation is resolved and the District is formed or terminated. If as a result of such litigation the District is never formed, or is terminated, City shall have no obligation to return the Deposit, and the Deposit shall be treated as a donation to City. If any such litigation is resolved in favor of City, and notwithstanding such favorable resolution the District Formation Process is not completed within 60 days after the final resolution, the Deposit shall be returned to the Depositors within ten Business Days. If any such litigation is resolved via a settlement agreement, and notwithstanding such settlement agreement City does not complete a new Proposition 218 Vote (if required) and complete the District Formation Process within 365 days after the date the settlement agreement is approved by the court, the Deposit shall be returned to the Depositors within ten Business Days.

(c) In the event City causes a Proposition 218 Vote on the proposed District to be initiated on or before the Vote Outside Date but the Proposition 218 Vote Approval results in a **Failed Vote**, City shall have no obligation to return the Deposit. In such case, the Deposit shall be treated as a donation to City.

(d) Any Deposit proceeds not needed or used to cover the costs set forth in Section 3.1 shall be promptly returned to Depositors.

(e) If the District is formed and assessments are levied in connection therewith, the amounts deposited by Depositors pursuant to this Agreement shall be reimbursable to Depositors from the proceeds of the assessment, to the extent permitted by law.

(f) Any return of all or any portion of the Deposit pursuant to Section 2.1 or this Section shall be made by wire transfer or check of immediately available funds to the Depositor Representative for and on behalf of Depositors. City shall have no obligation regarding the distribution of portions of the returned Deposit to individual Depositors. Upon the return of the Deposit, or portion of the Deposit, to the Depositor Representative pursuant to Section 2.1 or this Section, this Agreement shall terminate unless amended by mutual consent of the parties.

ARTICLE 3 **COVENANTS**

3.1 Use of Deposit. City shall use the proceeds of the Deposit strictly for paying for the following expenses to cover the following costs for obtaining design plans from the utilities and implementing the Proposition 218 Vote:

Southern California Edison - \$100,000

Spectrum - \$56,000

Frontier Communications - \$33,726

Assessment Engineering Services - in an amount to be determined at a later date.

3.2 Proposition 218 Vote. City shall proceed forward in “good faith” such that the Proposition 218 Vote can be held as soon as reasonably possible.

3.3 Tax Forms. From and after any Failed Vote, City agrees to furnish or cause to be furnished to Depositors, upon reasonable request, as promptly as practicable, such information documents as is reasonably necessary in connection with the filing of any Tax Returns related thereto. City shall have no obligation to create any documents it does not generate in the ordinary course of business. This Section shall survive the termination of this Agreement.

ARTICLE 4 **DISCRETION OF CITY**

Depositor understands that formation of the District shall be in the sole discretion of City. No provision of this Agreement shall be construed as a promise, warranty or agreement by City to form the District. Except as set forth in Section 2.3, City shall have no liability to Depositor pursuant to this Agreement for its decision not to form the District.

ARTICLE 5 **DEFAULT**

5.1 Events of Default. Any one or more of the following shall constitute an “**Event of Default**” as the term is used herein:

(a) Failure of City to return the Deposit or portion of Deposit when due and payable and such failure continues unremedied for a period of ten calendar days after written notice thereof shall have been given by the Depositor Representative to City;

(b) Violation by City of the covenants in Sections 3.1 or 3.3 of this Agreement;
or

(c) City becomes bankrupt, or admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors, or applies for or consents to the appointment of a trustee or receiver.

5.2 Repayment. If an Event of Default shall occur, the full amount of the Deposit shall be returned to Depositors.

5.3 Remedies Cumulative. The remedies provided in this Article 5 are in addition to, and not in limitation of, any other rights and remedies Depositors may have upon an Event of Default (whether by statute, rule or Law). Depositors may exercise any or all of the remedies provided by this Agreement and any forbearance or failure to exercise, and any delay by Depositors in exercising, any right, power or remedy hereunder shall not impair any such right, power or remedy or be construed to be a waiver thereof, nor shall it preclude the further exercise of any such right, power or remedy.

ARTICLE 6 **MISCELLANEOUS**

6.1 Depositor Representative.

(a) Depositors hereby appoint the Depositor Representative as their representative hereunder to take any action, and to exercise any rights, powers and remedies, on

behalf of Depositors in connection with or pursuant to this Agreement as instructed or directed by Depositors representing a majority of all Funded Amounts, except the Depositor Representative may not amend this Agreement to increase the amount of the Deposit by any Depositor without their consent. Each Depositor agrees that (a) any action taken by the Depositor Representative in accordance with the foregoing sentence and (b) the exercise of such other powers as are reasonably incidental thereto, shall in each case be authorized and binding upon all Depositors.

(b) The Depositor Representative shall not be liable for any action taken pursuant to this Section 6.1 and each Depositor hereby waives and shall not assert any right, claim or cause of action based thereon, except, in each case, to the extent of liabilities resulting from the gross negligence or willful misconduct of the Depositor Representative in connection with his or her duties set forth herein.

6.2 Governing Law. The interpretation and construction of this Agreement, and all matters relating hereto, shall be governed by the Laws of the State of California applicable to agreements executed and to be performed solely within such State.

6.3 Jurisdiction; Agents for Service of Process. Any judicial proceeding brought against any of the parties to this Agreement on any dispute arising out of this Agreement or any matter related hereto may be brought in the courts of the State of California, or in the United States District Court for the Central District of California, and, by execution and delivery of this Agreement, each of the parties to this Agreement accepts the jurisdiction of such courts, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement. The prevailing party or parties in any such litigation shall be entitled to receive from the losing party or parties all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party or parties.

6.4 Notices. All notices and other communications required or permitted by this Agreement shall be in writing and shall be (a) delivered to the appropriate address by hand, (b) by nationally recognized overnight service or by courier service (costs prepaid), or (c) sent by registered or certified mail, return receipt requested, in each case to the following addresses and marked to the attention of the person (by name or title) designated below (or to such other address or person as a party hereto may designate by notice to the other parties hereto):

if to City, to:

City of Manhattan Beach
3621 Bell Avenue
Manhattan Beach, California 90266
Attention: Stephanie Katsouleas, Director of Public Works
Phone no.: (310) 802-5303
Facsimile no.: (310) 802-5301
Email: skatsouleas@citymb.info

and if to Depositors, to:

Attention: Nicholas Tell

Phone no.:
Facsimile no.: _____
Email: _____

6.5 Assignment; Parties in Interest. This Agreement may not be transferred, assigned, pledged or hypothecated by any party hereto without the express written consent of City or the Depositor Representative, as applicable. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns.

6.6 Non-Liability of Officials and Employees of City. No representative, agent, attorney, consultant, or employee of City shall personally be liable to Depositor in the event of any default by City under the terms of this Agreement.

6.7 Authority to Execute. The persons executing this Agreement on behalf of the parties warrant that they are duly authorized to execute this Agreement.

6.8 Release. Except for City's obligations as set forth Sections 2.1(f), 2.3, 3.1, 3.3, or 5.2 of this Agreement, or in the event of City's sole negligence or willful misconduct, Depositors hereby fully and irrevocably release, waive, acquit and discharge City and its elective or appointive boards, council members, officers, and employees of and from any and all claims, rights, grievances, demands, damages, debts, liabilities, obligations, costs, expenses, causes of action, or damages of any nature, including attorneys' fees, whether known or unknown, existing or potential, anticipated or unanticipated, or which may hereafter be sustained, to the extent that such claims arise out of, or are related to, this Agreement.

6.9 Attorneys' Fees. If any party brings an action to enforce the terms hereof or declare its rights hereunder, the prevailing party in any such action shall be entitled to its reasonable attorneys' fees to be paid by the losing party as fixed by the court.

6.10 Counterparts. This Agreement may be executed in two or more counterparts, all of which taken together shall constitute one instrument. The delivery of an executed copy of this Agreement by PDF shall have the same force and effect as delivery of an original document and each party may use PDF signatures thereon as evidence of the execution and delivery of such document by the parties to the same extent that an original signature could be used.

6.11 Entire Agreement. This Agreement contains the entire understanding of the parties hereto regarding the subject matter contained herein. This Agreement supersedes all prior agreements and understandings between the parties regarding such subject matter.

6.12 Amendments. This Agreement may not be changed, and any of the terms, covenants, representations, warranties and conditions cannot be waived, except pursuant to an instrument in writing signed by the Depositor Representative (subject to Section 6.1) and City, or in the case of a waiver, by the party waiving compliance.

6.13 Severability. In the event that any term, provision, agreement, covenant or restriction of this Agreement would, under applicable Law, be invalid or unenforceable in any respect, such provision shall be construed by modifying or limiting it so as to be valid and enforceable to the maximum extent compatible with, and possible under, applicable Law. If any

term, provision, agreement, covenant or restriction of this Agreement is held by a court of competent jurisdiction or other authority to be invalid, void or unenforceable, the remainder of the terms, provisions, agreements, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

6.14 Third-Party Beneficiaries. Each party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any Person other than the parties hereto, except to the extent Persons who are not parties hereto are entitled to rights or benefits under this Agreement in which case such Persons shall have the benefits and rights under and be entitled to enforce such provisions.

6.15 No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by all parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

IN WITNESS WHEREOF, the parties have executed or caused this Agreement to be executed as of the date first above written.

[signatures begin on next page]

CITY OF MANHATTAN BEACH,
a California municipal corporation

DEPOSITORS:

By: _____
Bruce Moe, City Manager

By: _____
Name: [_____]

ATTEST:

Liza Tamura, City Clerk

By: _____
Name: [_____]

APPROVED AS TO FORM:

Quinn M. Barrow, City Attorney

By: _____
Name: [_____]

By: _____
Name: [_____]

By: _____
Name: [_____]

By: _____
Name: [_____]

By: _____
Name: [_____]

By: _____
Name: [_____]

By: _____
Name: [_____]

By: _____
Name: [_____]

Exhibit A

Depositors and Funded Amounts

[To come.]

<u>Name</u>	<u>Initial Deposit</u>	<u>Second Deposit</u>
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TOTAL	\$100,000	\$ 89,726
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Exhibit B

District Boundaries

[To come.]