

ORDINANCE NO. 1659

AN ORDINANCE GRANTING THE FRANCHISE, PRIVILEGES, AND RIGHTS TO SKT, INC., TO OPERATE, MAINTAIN AND UPDATE A DIGITAL TELECOMMUNICATIONS SYSTEM VIA AN EXISTING CABLE TELEVISION SYSTEM OPERATED BY CLEARWATER CABLE VISION, INC., PURSUANT TO ORDINANCE NO. 1859, IN THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF BELLE PLAINE, PRESCRIBING THE TERMS AND CONDITION OF SAID GRANT.

WHEREAS, The City seeks to:

1. Adequately compensate itself for occupancy and maintenance of the City Right-of-way by all Communications Services.
2. Fully protect the public and the City from any harm caused by private, commercial use of Right-of-Way, including but not limited to reducing the risk of loss of service or personal or property injury from errant excavation,
3. Protect the regulatory authority of the City in a manner consistent with federal and State law, and
4. Promote the entry and occupancy of Right-of-Way by communications providers in a competitively neutral manner, maximize the available space for such providers by requiring coordination, co-location, and planned construction of infrastructure in the Right-of-Way;

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

SECTION 1. Definitions. For the purposes of this Ordinance, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another is intended. Words used in the present tense include the future tense, words in the singular number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

- A. "City" means the City of Belle Plaine, Kansas.
- B. "Facilities" means any portion of a System located in, along, over, upon, under, or through the Right-of-Way.
- C. "Franchise" or "Agreement" means the Franchise that is governed by this Ordinance and agreed to by Franchisee.
- D. "Franchisee" means the SKT, Inc. who is granted a Franchise pursuant to this Ordinance and that entity's agents and employees.
- E. "Franchise Fee" means the fee imposed by the City on a Franchisee pursuant to this Ordinance.
- F. "Public Project" means any project planned or undertaken by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature.
- G. "Public Project for Private Development" means a Public Project, or that portion thereof, arising solely from a request or requirement of a third party (non-City or governmental) primarily for the benefit and use of a third party.
- H. "Right-of-Way" 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 area on, above and below present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. This term shall not include any county, state, or federal right-of-way or any property owned or controlled by any person or agency other than the City, except as

provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency. Right-of-Way shall not include property owned or held by City and not typically considered Right-of-Way such as City Parks and City Buildings.

I. "Telecommunications System" or "System" means the cables, wires, lines, optic fiber, and any associated converters, equipment, or other facilities designed, constructed or occupied by a Franchisee or others for the purpose of producing, receiving, amplifying or distributing communications service to or from locations within the City.

J. "Local exchange access line" or "access line" means the physical voice grade telecommunications connection or the cable or broadband transport facilities, or any combination of these facilities, between the end user customer's premises and a service provider's network, that when the digits 9-1-1 are dialed, provides the end user customer access to a public safety answering point through a permissible interconnection to the dedicated 9-1-1 network. Each such connection provided to an end user customer shall constitute a separate "local exchange access line" or "equivalent local exchange access line".

K. "Gross Receipts" means only those receipts collected from within the corporate boundaries of the city enacting the franchise and which are derived from the following: (A) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (B) recurring local exchange access line services for pay phone lines provided by a telecommunications local exchange service provider to all pay phone service providers; (C) local directory assistance revenue; (D) line status verification/busy interrupt revenue; (E) local operator assistance revenue; and (F) nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills.

All other revenues, including, but not limited to revenues from extended area service, the sale or lease of unbundled network elements, non-regulated services, carrier and end user access, long distance, wireless telecommunications services, lines providing only data service without voice services processed by a telecommunications local exchange service provider, private line service arrangements, internet, broadband and all other services not wholly local in nature are excluded from gross receipts. Gross receipts shall be reduced by bad debt expenses. Uncollectible and late charges shall not be included within gross receipts.

SECTION 2. Nonexclusive. Nothing herein contained shall be construed as giving to the Telephone Company any exclusive privileges, nor shall it affect any prior or existing rights of the Telephone Company to maintain a telecommunications system or related business within the City.

SECTION 3. Grant.

A. The City hereby grants to SKT, Inc., (hereinafter referred to as "the Telephone Company" or "the Company") a franchise which conveys the right, privilege, and authority to construct, operate, and maintain Facilities in, through and along the City's Right-of-Way for the purposes of supplying Digital Telecommunications Services on a nonexclusive basis within the City.

B. The Telephone Company shall operate its telecommunications system via the Clearwater Cable Vision, Inc. cable television system in the City and is doing so in such manner that imposes little or no incremental burden on public rights-of-way. The plant, construction and appurtenances used in or incidental to the offering of cable television, telecommunications, and other services and to the maintenance of such system and business by the Telephone Company in the City shall remain as now planned and constructed, subject to such changes as may be considered necessary by the City in the exercise of its inherent powers and by the Telephone Company in the conduct of its business.

C. The Telephone Company shall continue to exercise its right to place, remove, construct and reconstruct, extend and maintain its plant and appurtenances along, across, on, over, through, above and under all the public streets, avenues, alleys, bridges, utility easements and all public grounds and places within the limits of the City.

SECTION 4. Excavations; Underground Facility Locating Service.

A. Prior to any underground excavations by Franchisee in the public streets, roads, alleys, sidewalks or other public places, Franchisee must submit written plans for approval by the City.

B. The City shall promptly, and in no event more than 30 days, with respect to facilities in the public right-of-way, process each valid and administratively complete application of a provider for any permit, license or consent to excavate, locate lines, construct facilities, make repairs, effect traffic flow, or for other similar approvals, and shall make reasonable effort not to unreasonably delay or burden the Company in the timely conduct of its business.

C. If there is an emergency necessitating response work or repair, the Company may begin that repair or take any action required under the circumstances, provided that the Company notifies the City promptly after beginning the work and timely thereafter meets any permit or other requirements, had there not been such an emergency.

D. The Franchisee must continue to participate fully in Kansas One Call to insure that damage and/or interference with other underground facilities' occupants is minimized. The City will notify the Telephone Company either directly or through voluntary participation in Kansas One Call of its excavation plans in public right-of-way, to avoid damage to Company facilities pre-existing in public right-of-way.

SECTION 5. Tree Protection. In the attachment, installation, removal, reattachment, reinstallation, relocation or replacement or otherwise of the Facilities, the Franchisee shall comply with the tree pruning ordinance of City.

SECTION 6. Relocation of Facilities.

A. The Franchisee shall not be responsible for the expenses of relocation to accommodate any new Public Project for Private Development. The expenses attributable to such a project shall be the responsibility of the third party upon the request and appropriate documentation of the Franchisee. Before such expense may be billed to the third party, the Franchisee shall be required to coordinate with the third party and the City on the design and construction to ensure that the work required is necessary and done in a cost effective manner. Upon the request of the Franchisee or the third party, the allocation of expense attributable to the project shall be made in the reasonable determination of the City. Eligible third parties may request to have the City specially assess those expenses billed by the Franchisee under this section.

B. The City will use its best efforts, but is not required, to continue to provide a location in the Right-of-Way for the Franchisee's Facilities as part of a Public Project, provided that the Franchisee has cooperated promptly and fully with the City in the design of its Facilities as part of the Public Project.

SECTION 7. Franchise Fees.

A. The telephone Company agrees to pay to the City as full compensation for granting the rights and privileges herein a sum equal to three per cent (3%) of the gross receipts of the Telephone Company from subscribers in the City of Belle Plaine. No sales, excise, use or other tax levied upon the phone service shall be included in the calculation of franchise taxes.

B. The Telephone Company shall calculate, report, and pay to the Governing Body of the City all such gross receipts quarterly. The first report and payment to be made on or before October 31, 2017. Subsequent reports and payments shall be due quarterly thereafter.

C. 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

D. The City or its designated representatives shall have the right to inspect, examine or audit, during normal business hours and upon reasonable written notice, all documents, records or other information that pertains to this Franchise, no more than once per calendar year.

E. If the City and the telecommunications local exchange service provider cannot agree on the gross receipts fee, or are in dispute concerning the amounts due under this section for the payment of the gross receipts fees, either party may seek appropriate relief in a court of competent jurisdiction, and that court may impose all appropriate remedies, including monetary and injunctive relief and reasonable costs and attorney fees. All claims authorized in this section must be brought within three years of the date on which the disputed payment was due.

F. The gross receipts fee imposed under this section must be assessed in a competitively neutral manner, may not unduly impair competition, must be nondiscriminatory and must comply with state and federal law

G. In order to facilitate compliance with the provisions of this sub-section of this Ordinance, the parties agree that in the event that the Franchise Fee imposed by the City on the incumbent local exchange carrier providing local exchange service to businesses and residences located within the corporate limits of the City is greater than or less than the Franchise Fee specified in Section 7.A above, the Franchise Fee imposed on the Franchisee hereunder shall be adjusted to conform to the Franchise Fee imposed on such incumbent local exchange carrier within thirty (30) days following the adjustment date thereof.

SECTION 8. Term. The Franchise shall remain in effect for 5 years from the anniversary of its adoption or until such time that any court of competent jurisdiction shall rule that a franchise agreement relating to digital telephone service whereby the voice communications is converted to Internet Protocol (“IP”) and carried in part, over high speed access, also known as Broadband Internet Service (generically referred to as Voice-Over IP) is ruled to be duplicative and not necessary to protect the rights-of-way and therefore not applicable.

SECTION 9. Non-assignable. No Franchisee shall sell, transfer, lease, assign, sublet, or dispose of in whole or in part, either by forced or involuntary sale, or by ordinary sale, consolidation, or otherwise, a Franchise granted hereunder or any of the rights and privileges granted by such Franchise.

SECTION 10. Enforcement; Attorney Fees. The City shall be entitled to enforce this Ordinance, and, any Franchise granted pursuant to it, through all remedies lawfully available, and Telephone Company shall pay City reasonable attorneys' fees in the event that the Telephone Company is determined judicially to have violated the terms of this Ordinance or Franchise.

SECTION 11. Indemnification.

A. The Company shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kinds 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 the provider, any agent, officer, director, representative, employee, affiliate or subcontractor of the provider, or their respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in a public right-of-way. The indemnity provided by this

subsection does not apply to any liability resulting from the negligence of the City, its officers, employees, contractors or subcontractors.

B. If a provider and the City are found 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.

SECTION 12. Effective date; procedures.

A. This ordinance shall become effective upon publication.

B. Publication costs shall be reimbursed by the Telephone Company to the city upon presentation of publication costs' receipts.

C. Publication must be preceded by: (1) Notice of the fee provided at a regular meeting of the City Council; (2) Publication of the fee in the official City paper once a week for two consecutive weeks; (3) sixty (60) days from the date of the regular meeting at which the fee was proposed.

PASSED AND APPROVED THIS 18TH DAY OF MAY, 2017.

Mayor Richard Penn

ATTEST:

Linda Stinnett, CLERK