

(Summary First Published in the Times-Sentinel  
on the\_\_day of February 2022.)

THE CITY OF CLEARWATER, KANSAS

ORDINANCE NO. 1080

AN ORDINANCE ESTABLISHING A CONTRACT FRANCHISE AUTHORIZING SOUTHERN KANSAS TELEPHONE COMPANY, INC. TO CONSTRUCT, MAINTAIN AND OPERATE AS A TELECOMMUNICATIONS SERVICES PROVIDER IN THE PUBLIC RIGHT-OF-WAY OF THE CITY OF CLEARWATER, KANSAS IN ACCORDANCE WITH K.S.A. 12-2001 AND 17-1902 AND REPEALING ALL CONFLICTING ORDINANCES OR PARTS THEREOF.

WHEREAS, the Southern Kansas Telephone Company, Inc. (hereinafter "SKT") owns, maintains, operates and/or controls, in accordance with regulations promulgated by the Federal Communications Commission and the Kansas Corporation Commission (hereinafter "KCC"), telecommunications networks as a telecommunications services provider, as defined in accordance with subsections (a)(2) and (a)(3) of K.S.A. 19-1902 and subsection (c)(8) of K.S.A. 12-2001 and amendments thereto, serving SKT's customers through advanced fiber optic facilities located in public rights-of-way throughout the City of Clearwater, Kansas; and

WHEREAS, K.S.A. 17-1902 and K.S.A. 12-2001 provide for the enactment of contract franchise ordinances by Kansas cities with telecommunications services providers; and

WHEREAS, SKT desires to obtain from the City of Clearwater, Kansas (hereinafter "City") and the City is willing to establish a contract franchise authorizing SKT to construct, maintain and operate as a telecommunications services provider, in accordance with K.S.A. 17-1902 and 12-2001, in the public right-of-way of the City.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF CLEARWATER, 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 Clearwater, 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 Southern Kansas Telephone Company, Inc. who currently has a franchise granted by the City of Clearwater, or 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". Access lines shall not include the following: wireless telecommunications services, the sale or lease of unbundled loop facilities, special access services, lines providing only data services without *voice* services processed by a telecommunications local exchange service provider, or private line service arrangements.

K. "Access line fee" means a fee determined by the city, to be used by a telecommunications local exchange service provider in calculating the amount of access line remittance.

Section 2. Non-exclusivity.

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. Franchise.

A. The City hereby grants to Southern Kansas Telephone Company, 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 Telecommunications Services on a nonexclusive basis within the City.

B. The Telephone Company shall continue to operate its telecommunications system and all business incidental to or connected with the conducting of its business and system in the City. The plant, construction and appurtenances used in or incidental to the offering of 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 ordinances and Code provisions of the 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 eligible 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. Fees.

A. The Telephone Company shall pay to the City as compensation for the use of the Right-of-Way pursuant to the Franchise granted under this Ordinance the following Access Line Fee: a fee equal to \$1.00 per month per local exchange access line. No sales, excise, use or other tax levied upon telephone service shall be included in the calculation of fees under this ordinance.

B. The Telephone Company shall calculate, report and pay to the City the amount due under this Ordinance semi-annually. To determine the amount of Access Line Fees to be remitted to the City, the telephone company shall calculate and remit an amount equal to the Access Line Fee established by the City multiplied by the local exchange access line count. The amount shall be pro-rated for each day the access line customer is a customer. The assessment shall occur on the normal billing date of the Telephone Company and shall be assessed on those customers who are customers on that date. The assessment shall be pre-billed, as is local regulated service.

C. The first report and payment to the City shall be based on the monthly local exchange access line counts from the adoption date of this agreement through the June 2022 billing and shall be due on the 31st day of July 2022. Subsequent reports and payments shall be due on January 31 and July 31 of each year based on the prior six month period.

D. No acceptance by the City of any fee remitted hereunder shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any fee payment be construed as a release of any claim of the City.

E. 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.

F. If the City and the telecommunications local exchange service provider cannot agree on the access line count, or are in dispute concerning the amounts due under this section for the payment of Access Line 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.

G. The Access Line 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.

Section 8. Term.

The Franchise shall be effective for a term of five (5) years from the effective date of this Franchise Agreement, unless either party provides the other party one- hundred eighty (180) days' notice in writing of its intent to terminate or renegotiate this Franchise Agreement.

Section 9. Non-Assignability.

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. Severability.

If any provision, clause, sentence or paragraph of this Ordinance or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the other provisions of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 13. Repeal.

All ordinances or parts of ordinances in conflict herewith are repealed. However, any section of an existing ordinance not in conflict herewith is not repealed and remains in full force and effect.

Section 14. Effective Date; Publication Procedure.

This Ordinance shall take effect and be in force from and after publication in the official city newspaper. Publication costs shall be reimbursed by the Telephone Company to the city upon presentation of publication costs' receipts. 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 by the City Council this 8th day of February 2022.

Approved by the Mayor this 8th day of February 2022.

SEAL

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Mayor, Burt Ussery

ATTEST:

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City Clerk, Jaye Poe