

LEGAL NOTICE**ORDINANCE NO. O-93-24**

AN ORDINANCE GRANTING TO LEVEL 3 COMMUNICATIONS, LLC AND ITS AFFILIATES SUBSIDIARIES, SUCCESSORS, OR ASSIGNS; Level 3 Telecom of Kansas City, LLC AND ITS AFFILIATES SUBSIDIARIES, SUCCESSORS, OR ASSIGNS; and WiTel Communications, LLC AND ITS AFFILIATES SUBSIDIARIES, SUCCESSORS, OR ASSIGNS A CONTRACT FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM WITHIN THE LIMITS OF THE CITY OF KANSAS CITY, KANSAS, PRESCRIBING THE TERMS OF SAID CONTRACT FRANCHISE.

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/ KANSAS CITY, 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. "Access line" - shall mean and be limited to retail billed and collected residential lines; business lines; ISDN lines; PBX trunks and simulated exchange access lines provided by a central office based switching arrangement where all stations served by such simulated exchange access lines are used by a single customer of the provider of such arrangement. Access line may not be construed to include interoffice transport or other transmission media that do not terminate at an end user customer's premises, or to permit duplicate or multiple assessment of access line rates on the provision of a single service or on the multiple communications paths derived from a billed and collected access line. Access line 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.

b. "Access line count" - means the number of access lines serving consumers within the corporate boundaries of the City on the last day of each month.

c. "Access line fee" - means a fee in an amount determined by the City, up to a maximum as set out in K.S.A. 12-2001(j), and amendments thereto, to be used by Grantee in calculating the amount of access line remittance.

d. "Access line remittance" - means the amount to be paid by Grantee to City, the total of which is calculated by multiplying the access line fee, as determined by the City, by the number of access lines served by Grantee within the City for each month in that calendar quarter.

e. "City" - means the Unified Government of Wyandotte County/Kansas City, Kansas, acting as a city within the limits of the former City of Kansas City, Kansas.

f. "Contract Franchise" - means this Ordinance granting the right, privilege and franchise to Grantee

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to provide telecommunications services within the City.

g. "Facilities" - means telephone and telecommunication lines, conduits, manholes, ducts, wires, cables, pipes, poles, towers, vaults, appliances, optic fiber, and all equipment used to provide telecommunication services.

h. "Grantee" - means collectively, Level 3 Communications, LLC, Level 3 Telecom of Kansas City, LLC and WiTel Communications, LLC each a telecommunications local exchange service provider providing local exchange service within the City. References to Grantee shall also include as appropriate any and all its affiliates, subsidiaries, successors, or assigns.

i. "Gross receipts" - shall mean only those receipts collected from within the corporate boundaries of the City enacting the contract franchise and which are derived from the following: (1) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (2) Recurring local exchange access line services for pay phone lines provided by Grantee to all pay phone service providers; (3) Local directory assistance revenue; (4) Line status verification / busy interrupt revenue; (5) Local operator assistance revenue; (6) Nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills. ; and (7) Revenue received by Grantee from resellers or others which use Grantee's facilities. All other revenues, including, but not limited to, revenues from extended area service, the sale or lease of unbundled network elements, nonregulated 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. If Grantee offers additional services of a wholly local nature which if in existence on or before July 1, 2002, would have been included with the definition of gross receipts, such services shall be included from the date of the offering of such services within the City.

j. "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.

k. "Public 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 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

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to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

l. "Telecommunication 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 Grantee this nonexclusive contract franchise to construct, maintain, extend and operate its facilities along, across, upon or under any public right-of-way for the purpose of supplying Telecommunication services to the consumers or recipients of such service 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 outside of the Public right-of-way, specifically including, but not limited to, parkland property, City Hall property or public works facility property; 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.

c. As a condition of this grant, 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). Grantee shall also comply with all applicable laws, statutes and/or City regulations (including, but not limited to those relating to the construction and use of the public right-of-way or other public property).

d. 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, and Grantee shall not knowingly allow the use of its Facilities by any third party in violation of any federal, state or local law. In particular, this Contract Franchise does not provide Grantee the right to provide cable service as a cable operator (as defined by 47 U.S.C. § 522 (5)) within the City. Grantee agrees that this Franchise does not permit it to operate an open video system without payment of fees permitted by 47 U.S.C. § 573(c)

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(2)(B) and without complying with FCC regulations promulgated pursuant to 47 U.S.C. § 573.

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, Grantee 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. Grantee's use of the Public right-of-way 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 public right-of-way; provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Grantee shall be subject to all applicable laws and statutes, and/or rules, regulations, policies, resolutions and ordinances adopted by the City, relating to the construction and use of the Public right-of-way, including, but not limited to the City's ordinance for managing the use and occupancy of the Public right-of-way, and amendments thereto.

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

SECTION 4. COMPENSATION TO THE CITY.

a. In consideration of this contract franchise, Grantee agrees to remit to the City a franchise fee of 5% of Gross receipts. To determine the franchise fee, Grantee shall calculate its gross receipts and multiply such receipts by 5%. Thereafter, subject to subsection (b) hereafter, compensation for each calendar year of the remaining term of this Contract Franchise shall continue to be based on a sum equal to 5% of Gross receipts, unless the City notifies Grantee prior to ninety (90) days before the end of the calendar year that it intends to switch to an Access line franchise fee in the following calendar year, provided that such Access line fee shall not exceed the maximum Access line fee allowed by Kansas statutes. In the event the City elects to change its basis of compensation, nothing herein precludes the City from switching its basis of compensation back, provided the City notifies Grantee prior to ninety (90) days before the end of the calendar year.

b. Every 36 months the City, subject to the public notification procedures set forth in K.S.A. 12-2001 (m), and amendments thereto, may elect to adopt an increased access line fee or gross receipts fee subject to the provisions and maximum fee limitations contained in K.S.A. 12-2001, and amendments thereto, or may choose to decline all or any portion of any increase in the access line fee.

c. Grantee shall pay on a quarterly basis without requirement for invoice or reminder from the City,

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and within forty-five (45) days of the last day of the month for which the payment applies franchise fees due and payable to the City. If any franchise fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.

d. Upon written request by the City, but no more than once per quarter, Grantee shall submit a statement, executed by an authorized officer of Grantee or his or her designee, showing the manner in which the franchise fee was calculated for the period covered by the payment.

e. 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.

f. The City shall have the right to examine, upon written notice to Grantee no more often than once per calendar year, those records necessary to verify the correctness of the franchise fees paid by Grantee.

g. Unless previously paid, within sixty (60) days of the Effective Date of this Contract Franchise, Grantee shall pay to the City a one-time application fee of One Thousand (\$1,000.00). The parties agree that such fee reimburses the City for its reasonable, actual and verifiable costs of reviewing and approving this Contract Franchise.

h. 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 Public right-of-way and shall in no way be deemed a tax of any kind.

i. Grantee shall remit an access line (franchise) fee or gross receipts (franchise) fee to the City on those access lines that have been resold to another telecommunications local exchange service provider after the Effective Date of this Ordinance as defined in Section 14, but in such case the City shall not collect a franchise fee from the reseller service provider and shall not require the reseller service provider to enter a contract franchise ordinance.

j. The City warrants and agrees that, as of the Effective Date of this Ordinance (as defined in Section 14), Grantee does not owe any franchise fee or any other amounts to the City under any prior franchise agreement or ordinance between the City and Grantee or Grantee's predecessors-in-interest.

SECTION 5. INDEMNITY AND HOLD HARMLESS.

It shall be the responsibility of Grantee to take adequate measures to protect and defend its facilities in the Public right-of-way from harm or damage. If Grantee fails to accurately or timely locate facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801

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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 its negligence or intentional conduct. The City and its authorized contractors shall be authorized to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near Grantee's Facilities.

Grantee 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 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 gross negligence of Grantee, any agent, officer, director, representative, employee, affiliate or subcontractor of Grantee, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in the Public right-of-way.

The indemnity provided by this Section 5 does not apply to any liability to the extent such liability results from the negligence of the City, its officers, employees, contractors or subcontractors. If Grantee 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. This Section is solely for the benefit of the City and Grantee and does not create or grant any rights, contractual or otherwise, to any other person or entity.

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

SECTION 6. INSURANCE REQUIREMENT AND PERFORMANCE BOND.

a. During the term of this contract franchise, Grantee 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 Grantee 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. 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, 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 \$2,000,000 combined single limit