

1 (Published in the Topeka Metro News June 20, 2007)

2
3 **ORDINANCE NO. 18894**

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5 AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr. regarding a
6 Contract Franchise Ordinance granted to Ionex Communications,
7 Inc., a telecommunications local exchange service provider
8 providing local exchange service within the City of Topeka, Kansas.
9

10 BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOPEKA, KANSAS:

11 Section 1. Pursuant to K.S.A. 12-2001, as amended, a Contract Franchise
12 Ordinance is hereby granted to Ionex Communications, Inc., a telecommunications local
13 exchange service provider providing local exchange service hereinafter referred to as
14 “Local Provider” within the City of Topeka, Kansas (“City”), subject to the provisions
15 contained hereafter. The initial term of this Contract Franchise Ordinance shall be for a
16 period of two (2) years beginning July 1, 2007, and ending June 30, 2009. Thereafter,
17 this Contract Franchise Ordinance will automatically renew for additional one (1) year
18 terms, unless either party notifies the other party of its intent to terminate the Contract
19 Franchise Ordinance at least ninety (90) days before the termination of the then current
20 term. The additional term shall be deemed a continuation of this Contract Franchise
21 Ordinance and not as a new Contract Franchise Ordinance or amendment. Pursuant to
22 K.S.A. 12-2001(b)(2), as amended, under no circumstances shall this Contract
23 Franchise Ordinance exceed twenty (20) years from the effective date of the Contract
24 Franchise Ordinance. Compensation for said Contract Franchise Ordinance shall be
25 established pursuant to Section 3 of this ordinance.

26 Section 2. For the purpose of this Contract Franchise Ordinance, the following
27 words and phrases and their derivations shall have the following meaning:

28 **“Gross receipts”** means only those receipts collected from within the corporate
29 boundaries of the city enacting the franchise and which are derived from the following:
30 (A) Recurring local exchange service for business and residence which includes basic
31 exchange service, touch tone, optional calling features and measured local calls; (B)
32 recurring local exchange access line services for pay phone lines provided by a
33 telecommunications local exchange service provider to all pay phone service providers;
34 (C) local directory assistance revenue; (D) line status verification/busy interrupt
35 revenue; (E) local operator assistance revenue; and (F) nonrecurring local exchange
36 service revenue which shall include customer service for installation of lines,
37 reconnection of service and charge for duplicate bills. All other revenues, including, but
38 not limited to, revenues from extended area service, the sale of lease of unbundled
39 network elements, nonregulated services, carrier and end user access, long distance,
40 wireless telecommunications services, lines providing only data service without voice
41 services processed by a telecommunications local exchange service provider,
42 privateline service arrangements, internet, broadband and all other services not wholly
43 local in nature are excluded from gross receipts. Gross receipts shall be reduced by
44 bad debt expenses. Uncollectible and late charges shall not be included within gross
45 receipts. If a telecommunications local exchange service provider offers additional
46 services of a wholly local nature which if in existence on or before July 1, 2002, would
47 have been included with the definition of gross receipts, such services shall be included
48 from the date of the offering of such services in the city.

49 **“Local exchange service”** means local switched telecommunications service
50 within any local exchange service area approved by the state corporation commission,

51 regardless of the medium by which the local telecommunications service is provided.
52 The term local exchange service shall not include wireless communication services.

53 ***“Telecommunications local exchange service provider”*** means a local
54 exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments
55 thereto, and a telecommunications carrier as defined in subsection (m) of K.S.A. 66-
56 1,187, and amendments thereto, which does, or in good faith intends to, provide local
57 exchange service. The term telecommunications local exchange service provider does
58 not include an interexchange carrier that does not provide local exchange service,
59 competitive access provider that does not provide local exchange service or any
60 wireless telecommunications local exchange service provider.

61 ***“Telecommunications services”*** means providing the means of transmission,
62 between or among points specified by the user, of information of the user’s choosing,
63 without change in the form or content of the information as sent and received.

64 Section 3. Compensation made pursuant to this Contract Franchise Ordinance
65 shall be paid on a quarterly basis without invoice or reminder from the City and paid not
66 later than forty-five (45) days after the end of the remittal period. Compensation shall
67 be payable from services provided by the Local Provider from the effective date of the
68 Franchise Contract and the Contract Franchise Ordinance adopted by the Council of the
69 City of Topeka. For the first year of this Contract Franchise Ordinance, said
70 compensation shall be a sum equal to five percent (5%) of gross receipts. Thereafter,
71 compensation for each calendar year of the remaining term of the Contract Franchise
72 Ordinance shall continue to be based on a sum equal to five percent (5%) of gross
73 receipts; unless the City notifies Local Provider prior to ninety days (90) before the end

74 of the calendar year that it intends to increase or decrease the percentage of gross
75 receipts for the following calendar year. Any increased gross receipt fee shall be in
76 compliance with the public notification procedures set forth in subsections (l) and (m)
77 K.S.A. 12-2001, as amended. Nothing herein shall prohibit the City from changing the
78 method of compensation from gross receipts to an access line fee pursuant to K.S.A.
79 12-2001, as amended, through amendment to the Contract Franchise Ordinance or
80 establishment of a new Contract Franchise Ordinance.

81 Section 4. The City shall have the right to examine, upon written notice to the
82 Local Provider, no more than once per calendar year, those records necessary to verify
83 the correctness of the compensation paid pursuant to this Contract Franchise
84 Ordinance.

85 Section 5. The use of the Right-of-Way under this Franchise by the Local
86 Provider shall be subject to all rules, regulations, policies, resolutions, and ordinances
87 now or hereafter adopted or promulgated by the City in the reasonable exercise of its
88 police power relating to use, placement, location, or management of utilities located in
89 the City's Right-of-Way. In addition, the Local Provider shall be subject to all laws, rules,
90 regulations, policies, resolutions, and ordinances now or hereafter adopted or
91 promulgated by the City in the reasonable exercise of its police power relating to
92 permits, fees, sidewalk and pavement cuts, utility location, construction coordination,
93 screening, and other requirements on the use of the Right-of-Way; provided, however,
94 that nothing contained herein shall constitute a waiver of or be construed as waiving the
95 right of the Local Provider to oppose, challenge, or seek judicial review of, in such
96 manner as is now or may hereafter be provided by law, any such rules, regulation,

97 policy, resolution, or ordinance proposed, adopted, or promulgated by the City. Further,
98 the Local Provider shall comply with the following:

99 a. The Local Provider's use of the Right-of-Way shall in all matters be
100 subordinate to the City's use of the Right-of-Way for any public purpose. The Local
101 Provider shall coordinate the installation of its Facilities in the Right-of-Way in a manner
102 which minimizes adverse impact on Public Improvements, as reasonably determined by
103 the City. Where installation is not otherwise regulated, the Facilities shall be placed with
104 adequate clearance from such Public Improvements so as not to conflict with such
105 Public Improvement.

106 b. All earth, materials, sidewalks, paving, crossings, utilities, Public
107 Improvements, or improvements of any kind located within the Right-of-Way damaged
108 or removed by the Local Provider in its activities under this Franchise shall be fully
109 repaired or replaced promptly by the Local Provider without cost to the City, however,
110 when such activity is a joint project of utilities or franchise holders, the expenses thereof
111 shall be prorated among the participants, and to the reasonable satisfaction of the City
112 in accordance with the ordinances and regulations of the City pertaining thereto.

113 c. Except in the event of an emergency, as reasonably determined by the
114 Local Provider, the Local Provider shall comply with all laws, rules, regulations, policies,
115 resolutions, or ordinances now or hereinafter adopted or promulgated by the City
116 relating to any construction, reconstruction, repair, or relocation of Facilities which would
117 require any street closure which reduces traffic flow. Notwithstanding the foregoing
118 exception, all work including emergency work performed in the traveled way or which in

119 any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and
120 otherwise protected.

121 d. The Local Provider shall cooperate promptly and fully with the City and
122 take all reasonable measures necessary to provide accurate and complete information
123 regarding the location of its Facilities located within the Right-of-Way when requested
124 by the City or its authorized agents for a Public Project. Such location and identification
125 shall be promptly communicated in writing to the City without cost to the City, its
126 employees, agents, or authorized contractors. The Local Provider shall designate and
127 maintain an agent, familiar with the Facilities, who is responsible for providing timely
128 information needed by the City for the design and replacement of Facilities in the Right-
129 of-Way during and for the design of Public Improvements. At the request of the Local
130 Provider, the City may include design for Facilities in the design of Public Projects. Also
131 at the request of the Local Provider, the City and/or its contractor(s) or agent(s) shall
132 provide accurate and timely field locations of proposed Public Projects in the event the
133 Local Provider is required to install new and/or relocate its Facilities.

134 e. The Local Provider shall promptly locate, remove, relocate, or adjust any
135 Facilities located in the Right-of-Way if reasonably necessary and requested by the City
136 for a Public Project. Such location removal, relocation, or adjustment for a particular
137 Public Project shall be performed by the Local Provider without expense to the City, its
138 employees, agents, or authorized contractors, and shall be specifically subject to rules
139 and regulations of the City pertaining to such. If additional location, removal, relocation,
140 or adjustment is the result of the inaccurate or mistaken information of the Local
141 Provider, the Local Provider shall be responsible for costs associated with such without

142 expense to the City. Likewise, if additional location, removal, relocations or adjustment
143 is the result of inaccurate or mistaken information of the City, the City shall reimburse
144 the Local Provider for any additional expense necessarily incurred by the Local Provider
145 directly due to such inaccurate or mistaken information. The Local Provider shall only be
146 responsible for removal, relocation, or adjustment of Facilities located in the Right-of-
147 Way at the Local Provider's sole cost once each five (5) years for that particular facility.
148 The City shall reimburse the Local Provider for the removal, relocation, or adjustment of
149 the Local Provider's Facilities located in the Right-of-Way if required before the
150 expiration of five (5) years from the date of the last relocation, removal, or adjustment of
151 that particular facility.

152 The Local Provider shall not be responsible for the expenses of relocation to
153 accommodate any new Public Project for Private Development initiated after the
154 effective date of this Ordinance. The expenses attributable to such a project shall be the
155 responsibility of the third (3rd) party upon the request and appropriate documentation of
156 the Local Provider. Before such expenses may be billed to the third (3rd) party, the
157 Local Provider shall be required to coordinate with the third (3rd) party and the City on
158 the design and construction to ensure that the work required is necessary and done in a
159 cost effective manner. The Local Provider may require payment in advance of estimated
160 costs or relocation prior to undertaking any work required to accommodate any new
161 Public Project for Private Development initiated after the effective date of this
162 Ordinance.

163 The City may continue to provide a location in the Right-of-Way for the Local
164 Provider's Facilities as part of a Public Project, provided that the Local Provider has

165 cooperated promptly and fully with the City in the design of its Facilities as part of the
166 Public Project.

167 f. It shall be the responsibility of the Local Provider to take adequate
168 measures to protect and defend its Facilities in the Right-of-Way from harm or damage.
169 If the Local Provider fails to accurately locate Facilities when requested, it shall have no
170 claim for costs or damages against the City. The Local Provider shall be responsible to
171 the City and its agents, representatives, and authorized contractors for all damages
172 including, but not limited to, delay damages, repair costs, down time, construction
173 delays, penalties or other expenses of any kind arising out of the failure of the Local
174 Provider to perform any of its obligations under this Ordinance. The above general
175 provisions notwithstanding, the City and its authorized contractors shall take reasonable
176 precautionary measures including calling for utility locations through Kansas One Call
177 and exercising due caution when working near the Local Provider's Facilities.

178 g. All technical standards governing construction, reconstruction, installation,
179 operation, testing, use, maintenance, and dismantling of the Facilities in the Right-of-
180 Way shall be in accordance with applicable present and future federal, state, and City
181 laws and regulations, including but not limited to the most recent standards of the
182 Kansas Corporation Commission and U.S. Department of Transportation, and further, to
183 the extent they are not inconsistent with federal or state laws, the City of Topeka
184 standard technical specifications as may be amended from time to time, or such
185 substantive equivalents as may hereafter be adopted or promulgated. It is understood
186 that the standards established in this paragraph are minimum standards and the

187 requirements established or referenced in this Franchise may be additional to or stricter
188 than such minimum standards.

189 h. The City encourages the conservation of the Right-of-Way by the sharing
190 of space by all utilities. Notwithstanding provisions of this Franchise prohibiting third
191 (3rd) party use, to the extent required by federal or state law, the Local Provider will
192 permit any other franchised entity by an appropriate grant, or a contract, or agreement
193 negotiated by the parties, to use any and all Facilities constructed or erected by the
194 Local Provider.

195 Section 6. Indemnity and hold harmless.

196 The Local Provider shall indemnify and hold and save the City, its officers,
197 employees, agents, and authorized contractors, harmless from and against all claims,
198 damages, expense, liability, and costs including reasonable attorney fees, to the extent
199 occasioned in any manner by the Local Provider's occupancy of the Right-of-Way. In
200 the event a claim shall be made or an action shall be instituted against the City growing
201 out of such occupancy of the Right-of-Way by Facilities of the Local Provider, then upon
202 notice by the City to the Local Provider, the Local Provider shall assume responsibility
203 for the defense of such actions at the cost of the Local Provider, subject to the option of
204 the City to appear and defend.

205 Section 7. As a condition of this Contract Franchise Ordinance, Local Provider
206 is required to obtain and is responsible for any necessary permit, license, certification,
207 grant, registration or any other authorization required by any appropriate governmental
208 entity, including, but not limited to, the City, the Federal Communications Commission
209 (FCC) or the Kansas Corporation Commission (KCC), subject to Local Provider's right

210 to challenge in good faith such requirements as established by the FCC, KCC or other
211 City Ordinance. Local Provider shall also comply with all applicable laws, statutes
212 and/or ordinances, subject to Local Provider's right to challenge in good faith such laws,
213 statutes and/or ordinances.

214 Section 8. Nothing herein contained shall be construed as giving Local
215 Provider any exclusive privileges, nor shall it affect any prior or existing rights of Local
216 Provider to maintain a telecommunications system within the City.

217 Section 9. The City agrees to provide Local Provider with notification in the
218 event that it annexes property into the corporate boundaries of the City that would
219 require Local Provider to collect and pay a franchise fee on access lines or gross
220 receipts which prior to the annexation of the property Local Provider was not required to
221 pay a franchise fee. The City agrees to provide Local Provider with notification in the
222 event the City renumbers or renames any streets that would require Local Provider to
223 collect and pay a franchise fee on access lines or gross receipts which prior to the
224 renumbering or renaming of the streets Local Provider would not have been required to
225 pay a franchise fee.

226 Section 10. The City agrees that under K.S.A 12-2001, as amended, and other
227 state and federal laws, this Contract Franchise Ordinance must be competitively neutral
228 and may not be unreasonable or discriminatory to any telecommunications local
229 exchange service provider operating in the City.

230 Section 11. Any required or permitted notice under this Contract Franchise
231 Ordinance shall be in writing. Notice upon the City shall be delivered to the City Clerk

232 by first class United States mail or by personal delivery. Notice upon Local Provider
233 shall be delivered by first class United States mail or by personal delivery to:

234 Chris Bunce
235 Vice President, Legal and General Counsel
236 Ionex Communications, Inc.
237 2300 Main Street, Suite 600
238 Kansas City, MO 64108
239
240

241

242 Section 12. The failure of either party to enforce and remedy any
243 noncompliance of the terms and conditions of this Contract Franchise Ordinance shall
244 not constitute a waiver of rights nor a waiver of the other party's obligations as provided
245 herein.

246 Section 13. Each and every provision hereof shall be subject to acts of God,
247 fires, strikes, riots, floods, war and other disasters beyond Local Provider's or the City's
248 control.

249 Section 14. Local Provider has entered into this Contract Franchise Ordinance
250 as required by the City and K.S.A. 12-2001, as amended. If any clause, sentence,
251 section, or provision of K.S.A. 12-2001, as amended, shall be held to be invalid by a
252 court of competent jurisdiction, either the City or Local Provider may elect to terminate
253 the entire Contract Franchise Ordinance. In the event a court of competent jurisdiction
254 invalidates K.S.A. 12-2001, as amended, if Local Provider is required by law to enter
255 into a Contract Franchise Ordinance with the City, the parties agree to act in good faith
256 in promptly negotiating a new Contract Franchise Ordinance.

257 Section 15. In entering into this Contract Franchise Ordinance, neither the
258 City's nor Local Provider's present or future legal rights, positions, claims, assertions or
259 arguments before any administrative agency or court of law are in any way prejudiced
260 or waived. By entering into the Contract Franchise Ordinance, neither the City nor
261 Local Provider waive any rights, but instead expressly reserve any and all rights,
262 remedies, and arguments the City or Local Provider may have at law or equity, without
263 limitation, to argue, assert, and/or take any position as to the legality or appropriateness
264 of this Contract Franchise Ordinance or any present or future laws, ordinances, and/or
265 rulings which may be the basis for the City and Local Provider entering into this
266 Contract Franchise Ordinance.

267 Section 16. The parties agree that in the event of a breach of this Contract
268 Franchise Ordinance by either party, the non breaching party has the right to terminate
269 the Contract Franchise Ordinance as set forth herein. Prior to terminating the Contract
270 Franchise Ordinance, the non breaching party shall first serve a written notice upon the
271 breaching party, setting forth in detail the nature of the breach, and the breaching party
272 shall have thirty (30) days thereafter in which to cure the breach. If at the end of such
273 thirty (30) day period the non breaching party deems that the breach has not been
274 cured, the non breaching party may take action to terminate this Contract Franchise
275 Ordinance.

276 Section 17. This Contract Franchise Ordinance is made under and in
277 conformity with the laws of the State of Kansas. No such Contract Franchise Ordinance
278 shall be effective until the ordinance granting the same has been adopted as provided
279 by law.

