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3 **ORDINANCE NO. 18911**
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5 AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr. regarding a
6 Contract Franchise Ordinance granted to Navigator
7 Telecommunications, L.L.C., a telecommunications local exchange
8 service provider providing local exchange service within the City of
9 Topeka, Kansas.
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11 BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOPEKA, KANSAS:

12 Section 1. Pursuant to K.S.A. 12-2001, as amended, a Contract Franchise
13 Ordinance is hereby granted to Navigator Telecommunications, L.L.C., a
14 telecommunications local exchange service provider providing local exchange service
15 hereinafter referred to as "Local Provider" within the City of Topeka, Kansas ("City"),
16 subject to the provisions contained hereafter. The initial term of this Contract Franchise
17 Ordinance shall be for a period of two (2) years beginning August 1, 2007, and ending
18 July 31, 2009. Thereafter, this Contract Franchise Ordinance will automatically renew
19 for additional one (1) year terms, unless either party notifies the other party of its intent
20 to terminate the Contract Franchise Ordinance at least ninety (90) days before the
21 termination of the then current term. The additional term shall be deemed a
22 continuation of this Contract Franchise Ordinance and not as a new Contract Franchise
23 Ordinance or amendment. Pursuant to K.S.A. 12-2001(b)(2), as amended, under no
24 circumstances shall this Contract Franchise Ordinance exceed twenty (20) years from
25 the effective date of the Contract Franchise Ordinance. Compensation for said Contract
26 Franchise Ordinance shall be established pursuant to Section 3 of this ordinance.

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

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

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

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

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

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

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

75 notifies Local Provider prior to ninety days (90) before the end of the calendar year that
76 it intends to increase or decrease the percentage of gross receipts for the following
77 calendar year. Any increased gross receipt fee shall be in compliance with the public
78 notification procedures set forth in subsections (l) and (m) K.S.A. 12-2001, as amended.
79 Nothing herein shall prohibit the City from changing the method of compensation from
80 gross receipts to an access line fee pursuant to K.S.A. 12-2001, as amended, through
81 amendment to the Contract Franchise Ordinance or establishment of a new Contract
82 Franchise Ordinance.

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

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

98 manner as is now or may hereafter be provided by law, any such rules, regulation,
99 policy, resolution, or ordinance proposed, adopted, or promulgated by the City. Further,
100 the Local Provider shall comply with the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

197 Section 6. Indemnity and hold harmless.

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

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

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

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

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

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

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

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

236 Michael McAlister, General Counsel
237 Navigator Telecommunications, L.L.C.
238 8525 Riverwood Park Drive
239 P.O. Box 13860
240 North Little Rock, AR 72113-0860
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243 Section 12. The failure of either party to enforce and remedy any
244 noncompliance of the terms and conditions of this Contract Franchise Ordinance shall
245 not constitute a waiver of rights nor a waiver of the other party's obligations as provided
246 herein.

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

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

258 Section 15. In entering into this Contract Franchise Ordinance, neither the
259 City's nor Local Provider's present or future legal rights, positions, claims, assertions or

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

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

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

281 Section 18. This ordinance shall take effect and be in force August 1, 2007, and
282 after its passage, approval and publication in the official City newspaper.

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PASSED AND APPROVED by the City Council June 26, 2007.

CITY OF TOPEKA, KANSAS

William W. Bunten, Mayor

ATTEST:

Brenda Younger, City Clerk