

1 (Published in the Topeka Metro News August 15, 2007)
2

3 **ORDINANCE NO. 18939**
4

5 AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr. regarding a
6 Contract Franchise Ordinance granted to McLeodUSA
7 Telecommunications Services, Inc., a telecommunications local
8 exchange service provider providing local exchange service within
9 the City of Topeka, Kansas.
10

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 McLeodUSA Telecommunications Services, Inc., 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 September 1, 2007, and
18 ending August 31, 2009. Thereafter, this Contract Franchise Ordinance will
19 automatically renew for additional one (1) year terms, unless either party notifies the
20 other party of its intent to terminate the Contract Franchise Ordinance at least ninety
21 (90) days before the termination of the then current term. The additional term shall be
22 deemed a continuation of this Contract Franchise Ordinance and not as a new Contract
23 Franchise Ordinance or amendment. Pursuant to K.S.A. 12-2001(b)(2), as amended,
24 under no circumstances shall this Contract Franchise Ordinance exceed twenty (20)
25 years from the effective date of the Contract Franchise Ordinance. Compensation for
26 said Contract Franchise Ordinance shall be established pursuant to Section 3 of this
27 ordinance.

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

30 **“Gross receipts”** means only those receipts collected from within the corporate
31 boundaries of the city enacting the franchise and which are derived from the following:

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

51 **“Local exchange service”** means local switched telecommunications service
52 within any local exchange service area approved by the state corporation commission,
53 regardless of the medium by which the local telecommunications service is provided.
54 The term local exchange service shall not include wireless communication services.

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

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

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

74 calendar year of the remaining term of the Contract Franchise Ordinance shall continue
75 to be based on a sum equal to five percent (5%) of gross receipts; unless the City
76 notifies Local Provider prior to ninety days (90) before the end of the calendar year that
77 it intends to increase or decrease the percentage of gross receipts for the following
78 calendar year. Any increased gross receipt fee shall be in compliance with the public
79 notification procedures set forth in subsections (l) and (m) K.S.A. 12-2001, as amended.
80 Nothing herein shall prohibit the City from changing the method of compensation from
81 gross receipts to an access line fee pursuant to K.S.A. 12-2001, as amended, through
82 amendment to the Contract Franchise Ordinance or establishment of a new Contract
83 Franchise Ordinance.

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

88 Section 5. The use of the Right-of-Way under this Franchise by the Local
89 Provider shall be subject to all rules, regulations, policies, resolutions, and ordinances
90 now or hereafter adopted or promulgated by the City in the reasonable exercise of its
91 police power relating to use, placement, location, or management of utilities located in
92 the City's Right-of-Way. In addition, the Local Provider shall be subject to all laws, rules,
93 regulations, policies, resolutions, and ordinances now or hereafter adopted or
94 promulgated by the City in the reasonable exercise of its police power relating to
95 permits, fees, sidewalk and pavement cuts, utility location, construction coordination,
96 screening, and other requirements on the use of the Right-of-Way; provided, however,

97 that nothing contained herein shall constitute a waiver of or be construed as waiving the
98 right of the Local Provider to oppose, challenge, or seek judicial review of, in such
99 manner as is now or may hereafter be provided by law, any such rules, regulation,
100 policy, resolution, or ordinance proposed, adopted, or promulgated by the City. Further,
101 the Local Provider shall comply with the following:

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

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

116 c. Except in the event of an emergency, as reasonably determined by the
117 Local Provider, the Local Provider shall comply with all laws, rules, regulations, policies,
118 resolutions, or ordinances now or hereinafter adopted or promulgated by the City
119 relating to any construction, reconstruction, repair, or relocation of Facilities which would

120 require any street closure which reduces traffic flow. Notwithstanding the foregoing
121 exception, all work including emergency work performed in the traveled way or which in
122 any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and
123 otherwise protected.

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

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

143 or adjustment is the result of the inaccurate or mistaken information of the Local
144 Provider, the Local Provider shall be responsible for costs associated with such without
145 expense to the City. Likewise, if additional location, removal, relocations or adjustment
146 is the result of inaccurate or mistaken information of the City, the City shall reimburse
147 the Local Provider for any additional expense necessarily incurred by the Local Provider
148 directly due to such inaccurate or mistaken information. The Local Provider shall only be
149 responsible for removal, relocation, or adjustment of Facilities located in the Right-of-
150 Way at the Local Provider's sole cost once each five (5) years for that particular facility.
151 The City shall reimburse the Local Provider for the removal, relocation, or adjustment of
152 the Local Provider's Facilities located in the Right-of-Way if required before the
153 expiration of five (5) years from the date of the last relocation, removal, or adjustment of
154 that particular facility.

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

166 The City may continue to provide a location in the Right-of-Way for the Local
167 Provider's Facilities as part of a Public Project, provided that the Local Provider has
168 cooperated promptly and fully with the City in the design of its Facilities as part of the
169 Public Project.

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

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

189 that the standards established in this paragraph are minimum standards and the
190 requirements established or referenced in this Franchise may be additional to or stricter
191 than such minimum standards.

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

198 Section 6. Indemnity and hold harmless.

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

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

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

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

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

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

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

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

237 Michelle McLaughlin
238 Right of Way Representative
239 McLeodUSA Telecommunications Services, Inc.
240 One Martha's Way
241 Hiawatha, IA 52233
242

243

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

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

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

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

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

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

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

282 Section 18. This ordinance shall take effect and be in force from September 1,
283 2007, and after its passage, approval and publication in the official City newspaper.

284
285
286
287
288
289
290
291
292
293
294
295
296
297

PASSED AND APPROVED by the City Council August 7, 2007.

CITY OF TOPEKA, KANSAS

William W. Bunten, Mayor

ATTEST:

Brenda Younger, City Clerk