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4 **ORDINANCE NO. 18946**
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6 AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr. regarding a
7 Contract Franchise Ordinance granted to Global Crossing
8 Telemanagement, Inc., a telecommunications local exchange
9 service provider providing local exchange service within the City of
10 Topeka, Kansas.
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12 BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOPEKA, KANSAS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

199 Section 6. Indemnity and hold harmless.

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

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

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

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

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

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

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

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

238 Diane Peters
239 Global Crossing Telemanagement, Inc.
240 Director of Regulatory Affairs, N.A.
241 1080 Pittsford-Victor Road
242 Pittsford, New York 14534
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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 September 1, 2007,
283 and after its passage, approval and publication in the official City newspaper.

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PASSED AND APPROVED by the City Council August 14, 2007.

CITY OF TOPEKA, KANSAS

William W. Buntten, Mayor

ATTEST:

Brenda Younger, City Clerk