

1 (Published in the Topeka Metro News August 22, 2007)

2
3 **ORDINANCE NO. 18947**

4
5 AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr. regarding a
6 Contract Franchise Ordinance granted to Sage Telecom, Inc., a
7 telecommunications local exchange service provider providing local
8 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 Sage Telecom, 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 August 1, 2007, and ending July 31, 2009.
17 Thereafter, this Contract Franchise Ordinance will automatically renew for additional
18 one (1) year terms, unless either party notifies the other party of its intent to terminate
19 the Contract Franchise Ordinance at least ninety (90) days before the termination of the
20 then current term. The additional term shall be deemed a continuation of this Contract
21 Franchise Ordinance and not as a new Contract Franchise Ordinance or amendment.
22 Pursuant to K.S.A. 12-2001(b)(2), as amended, under no circumstances shall this
23 Contract Franchise Ordinance exceed twenty (20) years from the effective date of the
24 Contract Franchise Ordinance. Compensation for said Contract Franchise Ordinance
25 shall be 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 **“Facilities”** means all telecommunication lines, stations, and works together with
29 all necessary appurtenances thereto which are owned, installed, or controlled by Local
30 Provider but shall specifically exclude facilities owned by another company or owned by
31 another provider in which the local provider only leases line space.

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

51 have been included with the definition of gross receipts, such services shall be included
52 from the date of the offering of such services in the city.

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

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

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

68 Section 3. Compensation made pursuant to this Contract Franchise Ordinance
69 shall be paid on a quarterly basis without invoice or reminder from the City and paid not
70 later than forty-five (45) days after the end of the remittal period. Compensation shall
71 be payable from services provided by the Local Provider from the effective date of the
72 Franchise Contract which is contemplated by the parties to be on or after the effective
73 date of the Contract Franchise Ordinance adopted by the Council of the City of Topeka.

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

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

90 Section 5. The use of the Right-of-Way under this Franchise by the Local
91 Provider shall be subject to all rules, regulations, policies, resolutions, and ordinances
92 now or hereafter adopted or promulgated by the City in the reasonable exercise of its
93 police power relating to use, placement, location, or management of utilities located in
94 the City's Right-of-Way. In addition, the Local Provider shall be subject to all laws, rules,
95 regulations, policies, resolutions, and ordinances now or hereafter adopted or
96 promulgated by the City in the reasonable exercise of its police power relating to

97 permits, fees, sidewalk and pavement cuts, utility location, construction coordination,
98 screening, and other requirements on the use of the Right-of-Way; provided, however,
99 that nothing contained herein shall constitute a waiver of or be construed as waiving the
100 right of the Local Provider to oppose, challenge, or seek judicial review of, in such
101 manner as is now or may hereafter be provided by law, any such rules, regulation,
102 policy, resolution, or ordinance proposed, adopted, or promulgated by the City. Further,
103 the Local Provider shall comply with the following:

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

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

118 c. Except in the event of an emergency, as reasonably determined by the
119 Local Provider, the Local Provider shall comply with all laws, rules, regulations, policies,

120 resolutions, or ordinances now or hereinafter adopted or promulgated by the City
121 relating to any construction, reconstruction, repair, or relocation of Facilities which would
122 require any street closure which reduces traffic flow. Notwithstanding the foregoing
123 exception, all work including emergency work performed in the traveled way or which in
124 any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and
125 otherwise protected.

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

139 e. The Local Provider shall promptly locate, remove, relocate, or adjust any
140 Facilities located in the Right-of-Way if reasonably necessary and requested by the City
141 for a Public Project. Such location removal, relocation, or adjustment for a particular
142 Public Project shall be performed by the Local Provider without expense to the City, its

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

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

166 Public Project for Private Development initiated after the effective date of this
167 Ordinance.

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

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

183 g. All technical standards governing construction, reconstruction, installation,
184 operation, testing, use, maintenance, and dismantling of the Facilities in the Right-of-
185 Way shall be in accordance with applicable present and future federal, state, and City
186 laws and regulations, including but not limited to the most recent standards of the
187 Kansas Corporation Commission and U.S. Department of Transportation, and further, to
188 the extent they are not inconsistent with federal or state laws, the City of Topeka

189 standard technical specifications as may be amended from time to time, or such
190 substantive equivalents as may hereafter be adopted or promulgated. It is understood
191 that the standards established in this paragraph are minimum standards and the
192 requirements established or referenced in this Franchise may be additional to or stricter
193 than such minimum standards.

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

200 Section 6. Indemnity and hold harmless.

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

210 Section 7. As a condition of this Contract Franchise Ordinance, Local Provider
211 is required to obtain and is responsible for any necessary permit, license, certification,

212 grant, registration or any other authorization required by any appropriate governmental
213 entity, including, but not limited to, the City, the Federal Communications Commission
214 (FCC) or the Kansas Corporation Commission (KCC), subject to Local Provider's right
215 to challenge in good faith such requirements as established by the FCC, KCC or other
216 City Ordinance. Local Provider shall also comply with all applicable laws, statutes
217 and/or ordinances, subject to Local Provider's right to challenge in good faith such laws,
218 statutes and/or ordinances.

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

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

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

235 Section 11. Any required or permitted notice under this Contract Franchise
236 Ordinance shall be in writing. Notice upon the City shall be delivered to the City Clerk
237 by first class United States mail or by personal delivery. Notice upon Local Provider
238 shall be delivered by first class United States mail or by personal delivery to:

239 Lori Brosky
240 Manager Contracts, Regulatory Affairs
241 Sage Telecom, Inc.
242 805 Central Expressway South, Suite 100
243 Allen, TX 75013-2789
244

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

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

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

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

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

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

