

1 (Published in the Topeka Metro News September 27, 2010)  
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4 **ORDINANCE NO. 19468**  
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6 AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr. regarding a  
7 Contract Franchise Ordinance granted to Broadband Dynamics, a  
8 telecommunications local exchange service provider providing local  
9 exchange service within the City of Topeka, Kansas.  
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11 BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF TOPEKA,

12 that:

13 Section 1. Pursuant to K.S.A. 12-2001, as amended, a Contract Franchise  
14 Ordinance is hereby granted to Broadband Dynamics, a telecommunications local  
15 exchange service provider providing local exchange service hereinafter referred to as  
16 “Local Provider” within the City of Topeka, Kansas (“City”), subject to the provisions  
17 contained hereafter. The initial term of this Contract Franchise Ordinance shall be for a  
18 period of two (2) years beginning October 1, 2010, and ending September 30, 2012.  
19 Thereafter, this Contract Franchise Ordinance will automatically renew for additional  
20 one (1) year terms, unless either party notifies the other party of its intent to terminate  
21 the Contract Franchise Ordinance at least ninety (90) days before the termination of the  
22 then current term. The additional term shall be deemed a continuation of this Contract  
23 Franchise Ordinance and not as a new Contract Franchise Ordinance or amendment.  
24 Pursuant to K.S.A. 12-2001(b)(2), as amended, under no circumstances shall this  
25 Contract Franchise Ordinance exceed twenty (20) years from the effective date of the  
26 Contract Franchise Ordinance. Compensation for said Contract Franchise Ordinance  
27 shall be established pursuant to Section 3 of this 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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

Section 6. Indemnity and hold harmless.

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

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

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

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

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

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

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

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

Broadband Dynamics, LLC  
Attn: Gary Rodham, Controller  
8757 E Via De Commerico, First Floor  
Scottsdale, AZ 85258

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

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

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

Section 15. In entering into this Contract Franchise Ordinance, neither the City's nor Local Provider's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the Contract Franchise Ordinance, neither the City nor

Local Provider waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Local Provider may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of this Contract Franchise Ordinance or any present or future laws, ordinances, and/or rulings which may be the basis for the City and Local Provider entering into this Contract Franchise Ordinance.

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

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

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

282 PASSED AND APPROVED by the Governing Body September 21, 2010.

283 CITY OF TOPEKA, KANSAS

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William W. Bunten, Mayor

289 ATTEST:

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Brenda Younger, City Clerk