

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Senator Karin Brownlee at 8:00 a.m. on February 16, 2001 in Room 123-S of the Capitol.

All members were present except: Senator Barone (Excused)  
Senator Wagle (Excused)

Committee staff present: April Holman, Legislative Research Department  
Bob Nugent, Revisor of Statutes  
Lea Gerard, Secretary

Conferees appearing before the committee: April Holman, Legislative Research Department  
Rob Hodges, Kansas Telecommunications Industry Assoc.  
Mike Murray, Director of Government Affairs for Sprint  
Mike Reecht, Government Affairs for AT&T  
Rachel Lipman Reiber, Vice President Regulator & Govt. Affairs, UtiliCorp  
Jim Gartner, Executive Director-External Affairs, SWB  
Mark P. Johnson, Donnenschein, Nath & Rosenthal  
Terry Leatherman, Vice President-Legislative Affairs, KCCI  
Mayor Ed Eilert, Mayor, Overland Park, Kansas  
Don Moler, Executive Director Kansas League of Municipalities  
Doug Brown, Public Works, Overland Park, Kansas  
Mike Santos, Sr. Assistant City Attorney, Overland Park, KS.  
Dennis Kissenger, Salina City Manager  
Eric Arner, Sr. Assistant Attorney, City of Lenexa  
Jeanne Hernandez, City of Wichita  
David Corliss, City of Lawrence  
Dean Katerndahl, Mid-America Regional Council  
Don Seifert, City of Olathe

Others attending: See attached list.

**HB 2035 - Enacting the KAN-ED act.**

Senator Kerr moved, seconded by Senator Brungardt that Senate Substitute for HB 2035 be amended to remove any references of "Senate confirmation of the advisory board" in the bill. The voice vote was in favor of the motion.

Senator Steineger moved, seconded by Senator Emler, that Senate Substitute HB 2035 be recommended favorable for passage as amended. The recorded vote was Yes - 7 No - 0 in favor of the motion.

**SB 306 - Telecommunications, Right-of-Way.**

Letter submitted to the Committee from Duane Goossen, Director of the Budget, that a fiscal note for **SB 306** is being prepared (Attachment 1).

April Holman, Legislative Research Department, briefed the Committee on **SB 306**. Franchise fees have been on the books since KSA 12-2001 which originated in 1945. Cities are authorized to enter into franchise agreements to charge franchise fees or taxes by statutes. Among the activities for which cities may grant the permission and collect franchise fees is the construction and operation of telecommunication lines. By statute all contracts granting an original franchise right or privilege for expanding, renewing, or amending any existing grant right or privilege, the franchise must be approved by a city ordinance. Franchise fees are a significant source of locally generated revenue for many cities. As you look at **SB 306**, this will set-up a new system of access line fees for telecommunications instead of the current system of franchise fees.

Rob Hodges, Kansas Telecommunications Industry Association, presented testimony in support of

**SB 306.** The bill was introduced by the telecommunications industry on January 30, 2001. This bill will separate right-of-way occupancy from the obligation to pay franchise fees and replace the franchise fees with an access line fee. We are intending to keep the cities financially whole in that transition of one fee to another. In fact this will allow many cities that would be at the maximum called for in the bill to actually grow their revenue source. It does provide a procedure for a protest petition similar to the position of 911 taxes which we have had for sometime and will assure compliance with the Telecommunications act of 1996 (Attachment 2).

Mike Murray, Director of Governmental Affairs-Sprint, testified in support of **SB 306**. In Sprint's view the proposed legislation will speed the development of competition; reduce administrative and legal costs for cities and telecommunications providers; give municipalities full authority to manage their public right-of-way in a manner consistent with the Federal Telecommunications act; and keep municipalities financially whole (Attachment 3).

Mike Reece, Government Affairs Consultant, AT&T testified in support of **SB 306**. Mr. Reece testified that **SB 306** would provide a fair and reasonable compensation to the cities, while providing carriers the ability to bring the benefits of the enhanced telecommunications infrastructures to citizens of Kansas rapidly. It eliminates costly and time consuming burden to negotiate with individual cities whose ordinances may contain specific and arbitrary provision (Attachment 4).

Rachel Lipman Reiber, Vice President of Regulatory and Governmental Affairs, Everest Telecommunications testified in support of **SB 306**. The process in several cities is being driven by the Mid America Regional Council (MARC) and its out of state consultants, who are promoting a "model" ordinance. This model ordinance is totally focused on maximizing revenues for the cities. Of particular concern is the fact that the model ordinance embodies principles that fly in the face of the Telecommunications Act of 1996, and which are the absolute antithesis to being neutral (Attachment 5).

Jim Gartner, Executive Director-External Affairs, Southwestern Bell testified in support of **SB 306**. Mid American Regional Council (MARC) has put together a "model" ordinance and there are areas that we disagree with. With the MARC agreement, there is a tax increase for the telecommunications industry and proposed ordinances that will delay delivery of advanced services (Attachment 6).

Mark P. Johnson, Attorney with law firm of Sonnenschein, Nath & Rosenthal testified in support of **SB 306** (Attachment 7).

Terry Leatherman, Vice President-Legislative Affairs KCCI, presented testimony in support of **SB 306** (Attachment 8).

Mayor Ed Eilert, Mayor of Overland Park, testified in opposition to **SB 306** stating this bill would take away the city's ability to effectively manage its right of way and cancel the city's ability to establish appropriate compensation means and rates for telecommunication service providers who enter the right of way (Attachment 9).

Don Brown, City Engineer of the City of Overland Park, testified in opposition to **SB 306** (Attachment 10).

Mike Santos, Senior Assistant City Attorney, Overland Park, testified in opposition to **SB 306** (Attachment 11). The bill is fundamentally unfair, local governments will have no ability to conserve and protect the resources of the public right-of-way or the utility easements. Private telecommunication providers may enter these areas and use as much of the resources as they may choose and only be required to pay an access line fee.

Dennis M. Kissinger, City Manager Salina, testified in opposition to **SB 306** (Attachment 12). The issues raised by SB 306 do not just impact communities in the metropolitan areas. As a city official, we take our stewardship of the public right-of-way very seriously. We recognize that new technology and industry advances have changed the dynamics of the right-of-way use dramatically from 30 years ago. It appears with **SB 306** another industry group desiring to use the public right-of-way for their business doesn't want to work with local government through the franchise process. Their answer is to seek to exempt their industry from Kansas franchise laws allowing them to have a special privilege in using the public right-of-way in communities.

Eric Arner, Senior Assistant City Attorney, Lenexa, Kansas testified in opposition to **SB 306** (Attachment 13). Briefly summarized the City of Lenexa opposes the bill basically on two fronts right-of-way management and access line fees. The bill would seriously impact the ability of local government to effectively and efficiently manage their right-of-way.

Jeanne Hernandez, Franchise Manager Wichita testified in opposition to **SB 306** (Attachment 14). If this bill is adopted, it would undermine the essential concept of municipal control over public right-of-way. SB 306 would take away government rights and duties to manage the right-of-way.

David Corliss, Assistant City Manager & Director of Legal Service testified in opposition to **SB 306** (Attachment 15). This bill would destroy the City of Lawrence's authority to hold private companies responsible for what they do on public right-of-way.

Donald R. Seifert, Policy Development Leader, City of Olathe testified in opposition to **SB 306** (Attachment 16). Summarized the management of local right-of-way as the core function of the business we call local government. All basic local government services: public safety, transportation, and utilities, depend on the public right-of-way for the service delivery.

Dean Katerndahl, Mid-American Regional Council (MARC) testified in opposition to **SB 306** (Attachment 17).

Robert D. Roddy, Senior Manager, Public Works Department, Wyandotte County submitted written testimony in opposition to **SB 306** (Attachment 18).

William L. Kostar, Mayor of Westwood, presented written testimony in opposition to **SB 306** (Attachment 19).

Meeting adjourned at 9:30 a.m.

Next meeting scheduled February 19, 2001 at 8:30 a.m.

SENATE COMMERCE COMMITTEE

GUEST LIST

DATE: FEBRUARY 16, 2001

NAME	REPRESENTING
Rob Hodges	KITA
George Sotny	UBW/CO
Wilson Krueger	Everest
Pat Lehman	City of Lenexa
Mark Johnson	Sonnenstein/NetWorx/entel
JUDITH GANN	SPRINT
Jeanne Calkins	Sprint
Mike Murray	Sprint
Mike Reedt	AT&T
Mike Moffet	SWBT
Les Depperschmidt	SWBT
Irene Fleming	Everest
RACHEL LIPMAN REIBER	UTILICORP COMM. SERVICES/EVEREST
Aaron Smith	MFNS
Kris Becker	MFNS
Glenda Cafar	SWBT
Eric Anner	City of Lenexa
MONTY ZIMMERMAN	CITY OF LENEXA.
ANDY SCHAAF	DISC
Vik Haggood	Sprint
CAROLYN CASTON	SPRINT
Jeanne Hernandez	City of Wichita



STATE OF KANSAS



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Bill Graves  
Governor

Duane A. Goossen  
Director

February 15, 2001

The Honorable Karin Brownlee, Chairperson  
Senate Committee on Commerce  
Statehouse, Room 136-N  
Topeka, Kansas 66612

Dear Senator Brownlee:

Subject: Fiscal Note for SB 306 by Senate Committee on Commerce

This is to notify you that the Division of the Budget is preparing a fiscal note for the bill indicated above. A request to provide fiscal effect information has been sent to one or more agencies or organizations, and we are awaiting a response from them to complete the fiscal note. This notice is to acknowledge that a hearing has been scheduled on the bill and to advise you of the status of the fiscal note in our continuing effort to provide useful and timely information on proposed legislation. As soon as the necessary information is received, the fiscal note will be completed and submitted to you for your deliberations.

If you have questions or more detailed information is desired, please contact us.

Sincerely,

A handwritten signature in cursive script that reads "Duane A. Goossen".

Duane A. Goossen  
Director of the Budget

cc: Rep. Carl Holmes

Senate Commerce Committee  
Feb. 16, 2001  
Attachment 1-1



# Legislative Testimony

Kansas Telecommunications Industry Association 700 SW Jackson St., Suite 704, Topeka, KS 66603-3758 V/TTY 785-234-0307 FAX 785-234-2304

## Before the Senate Committee on Commerce

SB 306

February 16, 2001

Good morning, Chairman Brownlee and members of the committee. I am Rob Hodges, President of the Kansas Telecommunications Industry Association. I appear today on behalf of an industry task force that includes representatives from Southwestern Bell, Sprint, AT&T, and Everest Connections/Utilicorp Communication Services.

SB 306 is the bill that we requested in a presentation before your committee on January 30. At that time, we noted that the bill would:

- Acknowledge and implement the principles of the American Legislative Exchange Council (ALEC) regarding rights-of-way management (attached);
- Separate right-of-way occupancy from the obligation to pay franchise fees and replace those franchise fees with access line fees;
- Keep cities financially whole in the transition from franchise fees to access line fees and in fact, allow most cities to collect more in fees than what they currently receive if they so choose;
- Provide a procedure for protest petition for imposition of, or increases in, the per line fee (similar to that currently in place for imposition of 9-1-1 taxes); and,
- Assure compliance with the federal telecommunications act.

SB 306 does all of that, and we appear today in support of the bill.

I think it is important to start by telling you that, historically, our industry has enjoyed a good relationship with municipalities in Kansas. In fact, it is the continuing good relationship with people in municipal governments that causes the rural telephone companies to adopt a position of neutrality on SB 306. Those companies are not experiencing the problems that telecommunications service providers are encountering in urban areas of Kansas – particularly in Wichita and several cities in Johnson County.

As it is currently enacted, the Kansas Franchise Act allows cities to impose on telephone companies that provide direct, local service, "reasonable" regulations regarding construction and maintenance of facilities. The Act also allows cities to collect adequate compensation in connection with the construction and maintenance

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of those facilities. Over the years, several methods of assessing the "adequate compensation" paid to cities have been used -- flat fee, per access line fee, class of service and gross receipts. In all cases, the fees assessed are passed through to the customers on a dollar-for-dollar basis pursuant to a tariff approved by the KCC. A troubling trend has emerged recently--the desire of The City of Wichita, certain Johnson County municipalities, and others, to impose significant increases in these fees while at the same time imposing burdensome new requirements on companies seeking access to rights-of way. In addition, several jurisdictions are seeking to impose a "right-of-way maintenance fee" in addition to what they call a "franchise fee".

Obviously, this city-by-city approach to these matters is costly and inefficient, and raises barriers to the deployment of advanced services and to competition. These proposals not only burden the providers. They have a real impact on consumers--by raising their costs and hampering, if not eliminating, their ability to receive new advanced services like broadband Internet service.

SB 306 does not seek to create problems or to strain good relationships where they exist between telecommunications providers and municipalities. SB 306 would construct a more modern public policy framework regarding right-of-way and franchise fee issues around which municipalities and telecommunications service providers can structure their relationships in a competitive telecommunications environment.

SB 306 will allow municipalities and telecommunications service providers a level of certainty in matters of rights-of-way and franchise fees. The potential will be reduced for protracted and unproductive negotiation -- a process that will likely end in litigation. If the rules are clearly established by the Legislature, and the maximum fees are set (similar to how the 9-1-1 taxes have been handled for years), municipalities can concentrate on the right-of-way management tasks that comply with federal law and at the same time be confident of the revenue stream available to them from the per access line fee.

According to the provisions of SB 306, municipalities will retain their authority to determine how much their citizens should pay per access line, within the \$1.81 maximum per access line fee suggested in the bill. (The \$1.81 fee is the highest per access line fee presently assessed in Kansas, by the City of Wichita.) Many smaller municipalities are not charging franchise fees today, and they will be able to continue that decision. Those cities that have chosen to collect franchise fees based on some more complicated formula, will have the opportunity to be "kept whole" with the per access line fee.

Telecommunications providers who today are required to comply with a crazy quilt of local regulations, fee schedules and reporting requirements, will be able to



simplify their compliance procedures and focus on the business of providing what their customers want.

SB 306 is printed in eleven pages, but the changes it proposes to make are not as complicated as some might have you believe. In fact, much of what is contained in SB 306 is already in the statute books of other states. Each state has its own way of phrasing the matter, but the thought is uniform: municipalities replace their franchise fees with a simplified, predictable revenue source and right-of-way management is restricted to conform with federal law. I have attached to my testimony several pages of excerpts from the laws of other states.

Kansas can act quickly and confidently based on the experiences of other states. The issues at stake revolve around only a handful of municipalities today, but those municipalities are causing delays in the deployment of broadband services, as you will hear from Southwestern Bell and Everest, as well as creating a barrier to entry for other competitive providers, such as happened with Digital Access in Overland Park. Who knows how many companies and how many cities will be affected if you do not act?

Telecommunications service providers are working diligently to deploy the advanced services and facilities that we all hear about. There will always be challenges to be overcome. We can't always predict how easily a trench can be dug or how long the weather may delay a project. We ask for your help in addressing obstacles of another kind that we are encountering in only a few places today. Without your help, the potential for encountering more obstacles is very great. Please report SB 306 favorably for passage.

## **The American Legislative Exchange Council Municipal Rights-of-Way Principles**

Maintaining a competitive environment in the telecommunications industry is vital to our local, state and national economies. In order to advance competition in telecommunication service it is imperative that certain principles be followed in administering public rights of way. Public policy in this area will have a profound effect on the future of the telecommunications industry in our country.

The members of the American Legislative Exchange Council's Telecommunications and Information Technology Task Force have developed the following principles regarding the administration of public rights of way:

1. Local rights-of-way management must be administered in a predictable, nondiscriminatory and competitively neutral manner.
2. Preserving a competitive telecommunications market requires that no barriers be imposed that would hinder access to public rights of way.
3. Communications industry regulation and general taxes should be set at the state level. Thousands of different local rights-of way policies would drive the cost of compliance up dramatically and would greatly impede any new service providers from entering the market.
4. Rights-of way fees should be limited to the actual cost of rights-of-way administration, and should be recovered in a competitively neutral manner. These fees should not be used as a source to increase local revenue above the cost of right-of-way management.
5. Consumers are entitled to full disclosure of right-of-way fees and/or taxes paid to cities by telecommunications companies.
6. Local governments are responsible for the sensible management of public rights-of-way to ensure public safety. However, any policing powers given to local governments should be clearly defined.
7. Municipalities do not have any regulatory authority over telephone service providers above their policing power which is limited by federal and state law.

Approved by ALEC Board, February 21, 1999



Before the Senate Commerce Committee  
Friday, February 16, 2001  
SB 306  
Mike Murray, Director of Governmental Affairs

Madam Chair and members of the Committee, my name is Mike Murray Director of Government Affairs for Sprint in Kansas. I am here today to offer comments in support of Senate Bill 306.

In Sprint's view, the proposed legislation will:

- Speed the development of competition;
- Reduce administrative and legal costs for cities and telecommunications providers;
- Give municipalities full authority to manage their public rights of way in a manner consistent with the Federal Telecommunications Act; and
- Keep municipalities financially whole.

You have heard this from Sprint many times, but it bears repeating – Sprint is a company made up of diverse business units with diverse customer needs and diverse business strategies for meeting those needs. It is easy to see why Sprint's internal policies must be balanced and why the company advocates public policy that is equally balanced. SB 306 represents a balanced approach to an important public policy issue in several ways.

First, it has the potential to speed the development of competition. Sprint intends to offer advanced telecommunications services in competition with other providers. To be an effective competitor, Sprint must get to the market quickly. Today, market entry is often slowed by having to negotiate separately with each city where Sprint requires use of the public right of way. SB 306 will speed up market entry by establishing more uniform guidelines to be used by cities in managing their public rights of way. The guidelines are consistent with the Federal Telecommunications Act, and will help reduce the possibility of protracted litigation that could also slow the development of competition.

Second, SB 306 ensures that municipalities continue to receive revenue at least equal to that revenue produced by monopoly-era franchise agreements. Sprint has entered into more than 150 such arrangements with Kansas cities where Sprint provides local service.

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City revenue associated with these arrangements can be significant, and Sprint has no intention of putting that revenue stream at risk. SB 306 replaces franchise fees, which are generally calculated as a percentage of local service revenues, with a simple and fair per-access-line fee. SB 306 will put an end to the often-contentious debate about what revenues are to be included in the calculation.

Just as important, SB 306 ends the monopoly-era notion that a telecommunications provider must negotiate a franchise agreement and, in most cases, collect the revenue-based franchise tax for the privilege of providing service within a given municipality. Instead, SB 306 clarifies that authorizing authority rests with the Kansas Corporation Commission and at the same time protects cities' ability to manage the public right of way.

Third, SB 306 offers municipalities the ability to recover the actual costs associated with managing the public right of way in those instances where the city does not recover these costs from access line fees. For example, Sprint's local telephone companies would likely reimburse through access line fees the city's costs of managing the right of way occupied by Sprint local exchange facilities. Sprint's long distance division, which would not have access line customers in a municipality but may occupy the public right of way where it passes through a city, could be subject to other right of way charges. However, the charges would have to reflect a city's actual costs of managing the public rights of way.

In addition, SB 306 does not permit a city to require excess conduit space or in-kind services as a condition for using the public rights of way. In these ways, SB 306 goes a long way in settling arguments about what constitutes a barrier to competitive entry, cost recovery and the potential for discrimination.

Finally, SB 306 should result in stable or lower costs both to telecommunications providers and cities. SB 306 simplifies right-of-way management. The result will be reduced administrative burdens and the potential for litigation.

Thank you, and I'd be happy to respond to questions.

# MIKE REECHT

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Testimony of Mike Reeht  
On Behalf of AT&T  
Before the Senate Commerce Committee  
Regarding SB 306  
February 16, 2001

AT&T supports the position that Kansans deserve the lower prices, the greater choice of providers and new technologies that a competitive telecommunications environment can bring to them. AT&T believes that a competitive environment can be fostered and these benefits can, in turn, be facilitated through the legislation before you today. We believe that a state-granted franchise for local telecommunications services would permit nondiscriminatory access to the public rights of way throughout the state. This would eliminate the need to negotiate with individual cities with diverse franchise requirements. It would ensure consistency in fees and procedures throughout the state, as well as meeting the competitive neutrality provisions of the Federal Telecommunications Act. It would minimize the time it takes to bring innovative services to the market.

A statewide franchise would not preclude a city from managing the public rights-of-way within its borders. To the contrary, we maintain that cities in Kansas should be involved in the management of activities taking place within the public rights-of-way; e.g., the construction, relocation, physical repair or restoration of telecommunications facilities, so long as it is consistent with the Federal Act. We believe that municipal right-of-way regulations that insure citizen safety and minimize traffic disruption are certainly permissible, but regulation of the telecommunication company's business is not.

We further believe that compliance with the Federal Act requires the adherence to the following five principals.

**1. Scope of Local Authority:** Any local ordinance dealing with right-of-way policy should be simple and serve to protect the physical integrity of streets, to insure the safety of its citizens, and to manage construction so that other utilities in the right of way are protected. No local ordinance should impose substantive regulation on

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telecommunications providers that exceeds the scope of the local jurisdiction's authority to manage the right-of-way or that would conflict with the authority granted to the Kansas Corporation Commission.

AT&T agrees that reasonable regulation of the time, place or manner of excavations, coordination of construction schedules, and other local requirements that serve a safety purpose are permissible local management functions. However, municipalities should not impose requirements on telecommunications carriers that are unrelated to the use of the public rights-of-way, like regulating interconnection among carriers, mandating the installation of excess capacity or other requirements that are specified in the model MARC ordinance that is being considered by many cities.

**2. Cost-Based Compensation:** Local governments should be compensated for their costs incurred as a result of carriers physically accessing the public rights-of-way. Appropriate fees and charges should be set to cover such costs. However, it should be a cost-based fee structure supported by economic analysis of the long term cost of such access to the right-of-way. Generating additional revenue beyond the costs caused by being in the right-of-way is inappropriate. It is not fair or reasonable for cities to raise general revenues on the backs of the telecommunications providers, or seek to recover some "perceived value" for the use of the right-of-way.

That having been said, AT&T notes that the legislation currently being considered provides for an access line fee intended to make the legislation "revenue neutral" to the cities, while being fair and non-discriminatory to the providers. While not endorsing this position generally, AT&T can support the reasonable access line fee mechanism being proposed in the context of the overall framework of the bill.

**3. Physical Use:** Any ordinance designed to manage the public rights-of-way must be limited to providers who physically occupy the rights-of-way. No ordinance on right-of-way management should impose a fee or other requirements on providers who lease facilities from providers who already have authority to use the rights-of-way.

**4. Nondiscrimination:** Any ordinance or rule designed to manage the public rights-of-way must be applied in a competitively neutral and nondiscriminatory manner

among all users of the rights-of-way, whether they are gas, water, cable, electric or telephone facilities. No particular firm, industry, or segment of an industry should be favored over others.

AT&T recognizes the authority of any city to insist upon high quality workmanship from a prospective provider. But, for instance, to extract a high arbitrary degradation fee from only telecommunications providers does not recognize the important principal of cost causation. Whether the right-of-way is accessed for the purpose of burying coaxial cable, fiber optic cable, electrical conduit, telephone lines, or water lines, or sewer pipe, the activity is the same: the pavement is cut, a trench is excavated, the object is buried, the trench is refilled, and the pavement is restored. Any fee structure should only reflect those costs of the particular facility being installed.

5. **Timing:** Permit applications for the construction of telecommunications facilities should be acted upon promptly by local authorities. The strength of the any city's economy is becoming increasingly dependent on high speed and universally available voice, video and data networks at competitive rates. The provision of broadband voice, video and data services tomorrow depend upon the construction of new facilities today. Streamlining the administrative process can only help to bring a broad array of new communications services sooner rather than later.

In summary, the legislation before you today provides a fair and reasonable compensation to the cities, while providing carriers the ability to bring the benefits of the advanced telecommunications infrastructures to citizens of Kansas rapidly. It eliminates the costly and time consuming burden to negotiate with individual cities whose ordinances may contain specific and arbitrary provisions.

AT&T joins with other members of the industry in urging your support of SB 306.

Before the Senate Commerce Committee

Testimony of Rachel Lipman Reiber  
Vice President of Regulatory and Governmental Affairs  
UtiliCorp Communications Services

February 16, 2001

Good Morning Chairman Brownlee and Senators,

I am Rachel Reiber. Some of you may know me as Rachel Lipman. I was one of the three members of the Kansas Corporation Commission from 1991-95. I recently accepted a position as Vice President of Regulatory and Governmental Affairs at UtiliCorp Communication Services after five years at Sprint.

UtiliCorp is well known to many of you as a retailer of natural gas and electric services. Last year the company decided to enter the telecommunications arena as a competitive local exchange carrier. In December, UCS became the majority investor in Everest Communications of O'Fallon, Missouri. Everest is a facilities-based provider of broadband services. Instead of leasing parts of the networks of incumbent local exchange carriers, Everest goes into an area and installs fiber to each business or residence. Over this broadband facility, Everest will provide high-speed Internet access, dial tone in competition with the incumbent telephone company and cable service in competition with existing cable providers.

Everest has a formidable challenge before it. As a new entrant, its business plan is based on its ability to attract business from existing providers of telecommunications and cable service. However, to date our biggest challenge has not been marketing clients away from existing providers. It has been securing franchises from several Johnson county cities.

Everest obtained its franchise in Lenexa in September. Our \$20 million network facility is located at 96<sup>th</sup> and Lackman Road. The city of Merriam granted us a franchise in November and Olathe granted us a franchise in December. We are close to finalizing agreements with the cities of Mission and Westwood. We want to be clear. Several of the Johnson county cities--Lenexa, Olathe, Merriam, Mission, and Westwood--have been great to work with because they have allowed us to enter the market under the same terms and conditions and specifically infrastructure requirements, that apply to existing providers. This is the essence of competitive neutrality.

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We have not been as fortunate with several other cities in Johnson County. We have made little or no headway with several cities since our negotiations commenced in May 2000.

Indeed we are particularly discouraged by recent efforts in certain communities to pass a "model" ordinance, which will govern all providers of telecommunications and cable services on a going forward basis. For example in Overland Park, the problem is that one of our biggest competitors, Time-Warner, will continue to operate under its existing franchise agreement, which remains in effect until 2010. So while incumbent providers, such as Time-Warner, have minimal obligations, in terms of infrastructure requirements, cities are requiring that Everest take on obligations that are not being placed on incumbents.

In short, we are not here today because we want to be in front of the Legislature. We are here because of what we feel are extreme and unreasonable positions taken by the cities. UtiliCorp, the parent company of Everest has many years of experience dealing with cities on rights of way issues. We have a track record of being good corporate citizens and working with the cities for many years on rights-of-way issues. It is not the desire of either UCS or Everest to take advantage of the cities or to avoid obligations associated with use of the public rights-of-way. We are here because we feel that the cities are attempting to take advantage of the telecommunications industry generally and Everest in particular.

As a new entrant, we are at an even greater disadvantage than the established incumbents. We feel that the process in several cities is being driven by the Mid America Regional Council and its out of state consultants, who are promoting a "model" ordinance. This model ordinance is totally focused on maximizing revenues for the cities. Of particular concern is the fact that the model ordinance embodies principles that fly in the face of the Telecommunications Act of 1996, and which are the absolute antithesis to being competitively neutral.

Senate Bill 306 assures that cities act in a manner that is consistent with state and federal law. It requires cities to act in a manner that is competitively neutral and nondiscriminatory.

Senate Bill 306 prohibits cities from creating, enacting or erecting any unreasonable condition, requirement or barrier for a providers entry into or use of the public rights-of-way for the conduct of its business as a telecommunications provider.

Senate Bill 306 prohibits cities from requiring that a telecommunications provider provide services, facilities, equipment or goods in-kind for use by the city, political subdivision or any other telecommunications provider.

Senate Bill 306 is consistent with legislation passed in other states, which have chosen to make their rights of way statutes consistent with the intent of the federal Telecommunications Act for 1996.

Senate Bill 306 is needed because without it, cities will continue to be able to demand that companies like Everest install additional conduit, in excess of Everest's own needs, at Everest's expense. It is unreasonable to require a new entrant to build facilities, at its expense, in excess of its own needs, for the convenience of the cities. In one city alone, the cost of these excess facilities is estimated to be in more than \$5 million. There certainly is no guaranteed recovery of this capital expenditure; in addition, the value of these additional facilities would also greatly increase Everest's property tax burden. There is no doubt that this represents a "taking" of property in violation of the United States constitution. While we believe that these issues would ultimately be resolved in the courts in favor of Everest, this could take years. In the meantime the goals of the Telecommunications Act of 1996 -- facilities based competition and consumer choice -- would be thwarted.

We urge you to vote in favor of S.B. 306. Kansas franchise law needs to be updated to be consistent with federal law. Most importantly, Kansas citizens need to be the beneficiaries of customer choice and must be able to be the recipients of new broadband technologies.

Thank you for this opportunity to appear before you today.

Testimony of James Gartner  
Executive Director--External Affairs  
Southwestern Bell Telephone Company  
Before the Senate Commerce Committee  
February 16, 2001

Madam Chair, members of the Committee, I appreciate the opportunity to appear before you this morning to discuss SB 306. Southwestern Bell joins our colleagues in the industry in expressing strong support for this legislation.

I think our company has had long and productive relationships with nearly every municipality in which we serve our customers. We have always been careful to treat with respect both the public rights of way and the private easements necessary to provide service. We have always recognized cities' rights to administer rights-of-way to protect the health, safety and welfare of their citizens. We understand and appreciate that cities have a right to be compensated for the costs incurred as a result of the use of the right of way. Cities also have a legitimate interest in managing the disruptions occasioned by the installation of equipment in the right of way and to set reasonable rules and administrative procedures for use of it. I believe we have operated with due respect to the legitimate interests of the cities in the past, and that has not changed.

We believe that the changes in law that we are supporting will clarify and memorialize the good working relationship that has characterized our interaction with most of the cities of Kansas for over 100 years. Our concern has not been with how things were done in the past, but how some cities propose that they be handled in the future. Our hope is to operate with as little disruption as possible--only that necessary to the efficient and economic delivery of our services to our customers. What we object to, and what this legislation is designed to prevent, is the imposition of new rules and regulations that are designed primarily as surrogate tax collection mechanisms to augment general revenues for certain cities. These proposals would increase consumer costs, stall or eliminate the roll out of advanced services, and inhibit competition.

- **A Tax Increase:** Some cities in Kansas are proposing significant increases in the fees they charge telecommunications companies that provide services to their citizens. Consumers pay these fees and raising them amounts to a significant tax increase. For example, in Wichita, under the new ordinance just passed over our objections, every customer whose phone bill is more than \$36 per month will see an increase. And depending on how it is administered, for customers that subscribe to high-speed internet connections it will *at least* double the current \$1.81 per month per line franchise fee that customers pay. And these are conservative estimates of the tax increase. City staff has told providers that the city intends to tax any charges for any services that "touch the line". This would mean taxes on charges that are completely independent of local phone service. This means new taxes on services such as Internet, long distance, cellular and other affiliated services that have never before been subject to this type of tax. This legislation will maintain the status quo, so that any city can continue to receive revenues it presently receives, and will codify a per access line fee mechanism that will allow the city to receive more revenues in direct relation to growth in their area. But it will stop this attempt to tax new, advanced services that are not part of the traditional local exchange service definition.

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- **Slowing down the Internet**--These proposed ordinances are filled with new mandates for permits, fees and administrative burdens that will inevitably delay the delivery of advanced services--such as high speed Internet-- to the customers who are right now clamoring for them. One example--as a condition of receiving a required permit, one telecom provider would have to lay conduit that it doesn't need for later use by a competitor. Imagine if Hy Vee came to town to build a grocery store and the city required that, as a condition of the required permits, they must build an empty store across the street in case Dillon's wants a new store in the future. This sort of activity will surely inhibit increased competition. The Kansas City Star reported that Digital Access, an advanced services provider, had run up against "an untenable business situation" in which cities were setting "unreasonable requirements" to approve the company's franchise applications, and announced it was pulling out of the market. This legislation will treat all providers the same, and will not impose barriers to entry for new providers.
- **Costly Legal Battles**--These ordinances are replete with provisions that are discriminatory, anti-competitive and unreasonable under state and federal law, and their adoption will lead to protracted and expensive legal battles. We expect, within the near future, to be litigating in Wichita, and possibly in other Kansas cities. This legislation will prevent such litigation.
- **Cities will not lose revenues**--Providers are not proposing changes in law that would result in a reduction in revenues cities are currently receiving under existing state statutes. As I indicated, this legislation preserves the status quo.

Another point, Madame Chair, is that we have come to this point--seeking legislation--reluctantly. In the same spirit that has marked our relationship over the years with most cities in Kansas, we have made every effort to negotiate a resolution to the cities' concerns. We took advantage of every opportunity afforded us in the MARC model ordinance process, making both written and oral comments on the proposal before MARC and numerous city councils. In Wichita, we appeared before the city council, met with several of the council members, including the mayor and again provided detailed commentary on the proposed ordinance to staff both in person and in writing. We have met with both staff and political leaders in other communities that are following the MARC model. Unfortunately, our comments were, for the most part, ignored. Wichita has enacted its version of the MARC ordinance, and other cities are moving down that path. And that is why we are here today.

Madam Chair, let me close by saying once again, that our mission in seeking enactment of this legislation is not to alter the current balance of interests between telecommunications providers and the municipalities where we provide service. Our intent is to clarify the law so that we can continue to bring an ever-expanding array of services to customers as economically and with as little disruption as possible.

TESTIMONY OF MARK P. JOHNSON

KANSAS SENATE COMMERCE COMMITTEE

FEBRUARY 16, 2001

SB 306

Good morning, Madame Chair and members of the Committee. My name is Mark Johnson. I am a partner in the law firm of Sonnenschein, Nath & Rosenthal, in Kansas City. I have specialized in telecommunications law for over 15 years. I have appeared on many occasions before the Kansas Corporation Commission, and have handled telecommunications-related cases before all levels of the Kansas judicial system, including District Courts, the Court of Appeals, the Supreme Court, and federal district court.

I am appearing today to address whether Senate Bill 306 violates the Home Rule provisions of the Kansas Constitution. In my opinion, it does not. If enacted as presently written, the bill would be a lawful act of the Legislature concerning the power of cities to regulate telecommunications providers.

Home Rule for Kansas cities was authorized by the voters in the general election of 1960, when they voted for what became Article 12, Section 5 of the Constitution. Article 12, Section 5 became effective on July 1, 1961. Paragraph (b) of Section 5 empowers Kansas cities to take actions to govern their own affairs. Specifically, paragraph (b) grants to the cities the following powers:

Cities are hereby empowered to determine their local affairs and government, including the levying of taxes, excises, fees, charges and other exactions.

However, this power is not absolute. If the Legislature takes action in a prescribed fashion, Home Rule powers may be limited. This is precisely what SB 306 does, and as written it does so in the proper fashion. Paragraph (b) of Section 5 goes on to state as follows:

...except when and as the levying of any tax, excise, fee, charge, or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class...

The key is whether the legislative action is applicable uniformly to all cities. If it is, then the cities may not challenge the legislation as unlawfully infringing on their Home Rule powers. SB 306 is written to be applicable uniformly to all cities in Kansas, without regard to size or class.

Under paragraph (c) of Section 5, cities may by charter ordinance elect to exempt themselves from the mandates of legislative action. However, that option is available only where the legislative act in question is not uniformly applicable to all cities. SB 306 is by its terms uniformly applicable to all cities, so the charter ordinance exemption option will not be available.

A second question raised by SB 306 with respect to Home Rule powers is the bill's impact on existing municipal ordinances which contain provisions declared unlawful by the bill.

Again, in that SB 306 is uniformly applicable to all cities, its provisions will preempt any municipal ordinance which contains provisions in conflict with the bill. For example, Section 7(c) of the bill specifically prohibits a city from enacting a regulation which mandates that telecommunications providers maintain an office in the city. In my opinion, any existing municipal ordinance which contains such a requirement will be preempted by SB 306.

In summary, under Article 12, Section 5(b) of the Constitution, state legislative actions may limit city powers, as long as the state actions are uniformly applicable to all cities. By its terms, SB 306 is uniformly applicable to all cities. In my opinion SB 306 would withstand scrutiny under the Home Rule provisions of the Kansas Constitution.

# LEGISLATIVE TESTIMONY



*The Unified Voice of Business*

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SB 306

February 16, 2001

## KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee Commerce

by

Terry Leatherman  
Vice President – Legislative Affairs

Madam Chairperson and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for this opportunity to explain why the Kansas Chamber supports passage of SB 306.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

This committee clearly understands telecommunications technology is vital not only to existing individuals and businesses, but also is necessary for our state's economic development. KCCI feels we can best improve our capabilities by promoting telecommunications competition. It is our understanding that SB 306 addresses potential impediments to competition by clarifying and streamlining municipal fees that can be imposed.

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It is our further understanding that cities in our state will be made whole in the conversion from franchise fees to the access line fees called for in the bill. In addition, the bill would steer Kansas from protracted litigation, which appears to be highly likely without legislative action.

Thank you for the opportunity to express KCCI's support for SB 306. I would be happy to answer any questions.





ec

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**To: Chairperson Brownlee and the Senate Commerce Committee**

**From: Mayor of Overland Park Ed Eilert**

**Date: Friday, February 16, 2001**

**Re: Testimony before the Senate Commerce Committee  
Opposition to Senate Bill 306**

**Comments from the City Attorney and City Engineer are attached for your review.**

Good morning, Chairperson Brownlee and members of the Senate Commerce Committee. My name is Ed Eilert, Mayor of the City of Overland Park. I am here today to speak in opposition to Senate Bill 306, which would, in essence, eliminate City telecommunications franchising authority. This bill would take away the City's ability to effectively manage its right of way. It would also negate the cities' ability to establish appropriate compensation methodology and rates for telecommunications service providers.

Locally elected officials are the ones directly responsible to the citizens for proper right of way management. This proposed legislation significantly reduces the City's ability to carry out this responsibility. Telecommunications providers would have no obligation to the public with regard to the right of way. Therefore, while we wish to encourage competition in the

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marketplace, local governments have an obligation to protect its citizens and preserve the public assets.

I hope the Committee understands that there is already a high degree of concern about activity in the right-of-way. People are worried about companies tearing up their neighborhoods and streets in front of their homes and businesses. During my tenure as Mayor of Overland Park, I have never received more calls or comments than from citizens concerned about construction activity in the right-of-way. These complaints come from my constituents who are also your constituents.

Cities have legitimate public safety concerns in regards to the increased activity in the public right-of-way. Last summer, a company installing conduit for fiber-optic cable broke a water main at College Boulevard and Metcalf Avenue, one of the busiest intersections in Johnson County. Over 70,000 vehicles pass through this intersection each day. This water main break caused as many as 50,000 people to be temporarily without water service. In addition, a sixty-foot strip of College Boulevard was seriously damaged and portions of the road were closed for five days. This time, the City was lucky. The high volume of traffic that typically traverses this intersection was at a low period during the late night hours when this incident occurred. Had we not been so fortunate, property damage could have been considerably higher as well as the risk of personal injuries or even fatalities. Further, under the proposed bill, this company would not have been required to pay any compensation to the City for its presence in the right-of-way, nor, would it have even been required to pay a fee for the damage inflicted on this major thoroughfare.

This is just one example, that demonstrates the impact of right-of-way construction on public safety. These types of incidents and the cost to the public will only escalate with the

increased number of right-of-way users. Because local governments are responsible for both managing and maintaining their own rights-of-way, they must have the authority to regulate and obtain fair compensation for its use by private companies. Each City has unique right-of-way issues that require local solutions. For example, Overland Park could have as many as a dozen users in one location such as College Boulevard, yet Senate Bill 306 would prohibit the City from requiring these multiple users to co-locate. This Bill treats all cities and all right-of-way issues the same.

Public right-of-way is land purchased by or deeded to the City to provide the capability to initiate street improvements and other transportation projects. I feel compelled to repeat that the right-of-way is publicly owned property and this bill would effectively give away that property to private companies that may or may not provide service in our City or even in our State. In fact, this bill would allow a private company to entirely consume the finite resource of the right-of-way by installing multiple conduits and then to make enormous private profit by leasing that public space to non-local exchange providers.

If the City of Overland Park is no longer going to have the ability to manage the right-of-way on behalf of the public, then what purpose does it serve to maintain public ownership? If this Committee believes that it is important to remove the City of Overland Park's or any other municipalities' authority to manage the public's property, then the next step is for cities to return the right-of-way back to abutting individual property owners. Telecommunication companies and utilities that want access to that property could then negotiate directly with the thousands upon thousands of private property owners.

I reiterate the City of Overland Park's opposition to Senate Bill 306 and appeal to the Committee to uphold the public's interest in local management of the right-of-way rather than

giving this valuable public asset to private companies, at no cost, to use as they see fit, regardless of any negative impact on the public.

City of Overland Park, Kansas

A handwritten signature in cursive script, appearing to read "Ed Eilert".

Ed Eilert  
Mayor

Testimony  
The Impact of SB 306 on Local Rights-of-Way Management  
February 17, 2001

Good Morning, Chairperson Brownlee and members of the Senate Commerce Committee. My name is Doug Brown. I am the City Engineer of the City of Overland Park. I am here this morning to speak in opposition to SB 306. I will address its potentially damaging impact on Overland Park's ability to manage its public right-of-way for the optimum benefit of its citizens and those authorized users of the public right-of-way.

My testimony will address two aspects of right-of-way management: (1) how SB 306 would adversely affect the general purpose and intent of right-of-way management, and (2) the specific provisions of SB 306 that would compromise a municipality's ability to protect and preserve this invaluable asset and the numerous existing utilities located therein.

General Purpose and Intent of ROW Management

There is a fundamental issue that is raised by SB 306 – that of preemption of local authority. Last year, the National League of Cities identified preemption as the most serious intergovernmental concern that cities were facing – in very much the same way that 6-8 years ago cities [and state governments] were dealing with unfunded federal mandates. This is a well-known issue for at least one member of this committee, Senator Wagle, who testified in Congress in 1995 as to the impacts of unfunded federal mandates on the State of Kansas and its municipalities. Preemption represents an erosion of local authority and weakens those governments that provide essential public services to the citizens of this state.

This proposed legislation is diametrically opposed to the spirit of cooperation and mutual support which is embodied in the ROW ordinance, passed by Overland Park and two sister cities in October 1999, which was fairly and openly negotiated with all existing utility companies. As recently as last month, a senior official of one of those utilities publicly expressed his appreciation to the three cities because of the significantly improved management of public rights-of-way that was saving his company money by reducing the damages caused by utility work in the right-of-way.

One of the tenets of the City's right-of-way management ordinance is non-discriminatory treatment of all ROW-users. The philosophy espoused in the ordinance recognizes the right of authorized entities to utilize the ROW and ensures fair treatment of all. SB 306 would result in discriminatory treatment as telecommunications providers would follow one set of rules and all other utilities' use of the ROW would follow a different set of rules. Over time, this separate and unequal treatment would be exacerbated by the increase in the number of telecommunications providers using the ROW – and the resultant diminished capability of municipalities to effectively manage public ROW.

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The final general concern relates to the principle on which the cost recovery provisions of the ROW ordinance are based. The fees assigned in the current ordinance are based on the service provided to the using utilities – this is “fee for service “ or “user fee” foundation. But for the location in the ROW and use of the ROW by authorized utilities, this service would not be required – and would thus not have to be provided by the municipalities.

#### Specific Concerns Raised by this Proposed Legislation

SB 306 prohibits recovery of costs incurred by municipalities in managing the right-of-way for the benefit of authorized utilities. Paragraph 4 (a) prohibits cost recovery for services provided – forcing municipalities to either eliminate this service or increase taxes in order to raise the revenue to fund right-of-way management. Paragraph 4(a) would potentially have another adverse impact – since telecommunication providers would not incur any costs in open cutting city streets, thus damaging the pavement and disrupting traffic, they would have no incentive to minimize any damage or disruption.

This same provision of SB 306 further eliminates the ability of our municipality to assess delay damages to those utilities that fail to timely relocate their facilities when required for a public improvement project. Thus, any delay damages incurred by the city or its agent would be borne the taxpayers rather than the utility which caused the delay.

This circumstance is carried to an even further extreme in Paragraph 4(f) of SB 306 which mandates that “pass-through” utilities which do not sell services in the municipality, could install their facilities and use the public right-of-way at no cost whatsoever. The city would be required to provide ROW management services totally free of cost to the utility which would be using valuable right-of-way as a free good.

There is also some confusion caused by the provisions of Paragraph 7. Paragraph 7(b) indicates the a city may require the telecommunications company to apply for a construction permit, seemingly inferring that no permit is required for maintenance activities in the right-of-way. However, Paragraph 7(d) indicates that permits may be required for maintenance activities. Further, in Paragraph 7(c) the prohibitions listed could be construed by telecommunications companies to mean that they are not required to provide mapping of their system or “as built” plans from their construction activities to the city. Paragraph 7(c) also indicates that cities can act only to protect health, safety and welfare of the public. This excludes one of the most valuable services that cities provide – protection of existing utilities from damage or loss due to installation of new facilities, and it appears to suggest that a city may not protect and preserve this unique public asset.

On my own behalf and that of the many other public servants across the State of Kansas who are engaged in the serious business of properly managing the public right-of-way, I ask that you oppose this well-meaning but ill-advised legislation.

Doug Brown

City Engineer  
City of Overland Park

**CITY OF OVERLAND PARK  
LAW DEPARTMENT**

February 15, 2001

**TO: Chairperson Brownlee and Members of the Senate Commerce Committee**

**FROM: Michael Santos, Senior Assistant City Attorney**

**RE: Testimony In Opposition to Senate Bill 306**

Thank you for the opportunity to present comments concerning Senate Bill 306. I am here today to speak in opposition to this legislation. My comments will primarily focus on the legal authority for Kansas municipalities to receive adequate compensation for the private use of the public right-of-way. I will also address why an "Access Line Fee" is not related to the fair value of the right-of-way and why this fee concept as set forth in Senate Bill 306 improperly discriminate against providers.

**Legal Authority to Receive Adequate Compensation for Use of the Right-of-Way.**

Contrary to the assertions of some telecommunications providers, neither state nor federal law limit the compensation that Kansas communities may receive for the use of their right-of-way by local telecommunications service providers to the "cost" of such use. Kansas Statute 12-2001 specifically authorizes, indeed requires, Kansas cities to receive compensation for the use of right-of-way stating that no franchise may be granted "unless it provides for adequate compensation" and that regardless of any required "additional compensation," a city may charge a fixed charge that "may consist of a percentage of the gross receipts." K.S.A §12-2001(b)(5).

Federal law does not disturb this authority. Instead, the federal Telecommunications Act of 1996 explicitly preserves the authority of local governments, such as Overland Park to receive fair and reasonable compensation for the use of its right-of-way providing:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. 253(c).

In interpreting this provision several federal and state courts have specifically affirmed the ability of local governments to assess a gross receipts fee on the use or right-of-way as a type of rent. Last Spring, in *TCG v City of Dearborn*, the U.S. Court of Appeals for the Sixth Circuit

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upheld a municipality's right to assess a four-percent gross revenue franchise fee. Significantly, to date this is the only federal appellate decision in the country that has actually ruled on the meaning of "compensation" as used in Section 253. In the underlying opinion, the District Court noted that "the fact that Congress used the word 'compensation' in lieu of the word 'costs' in the Telecommunications Act is strong evidence against construing the term to limit charges by municipalities to strictly their costs related to telecommunications providers use of their rights-of-ways." The District Court in *Dearborn* went on to hold that "there is nothing inappropriate with the city charging compensation, or 'rent,' for the City owned property that the Plaintiff seeks to appropriate for its private use." In reaching this conclusion the District Court cited the Supreme Court opinion in *City of St Louis v. Western Union*, 148 U.S. 92-99 (1893), which recognized the general right of a city to seek compensation "in the nature of rental" from a telephone company's use of a city's right-of-way. Most recently, in *TCG New York, Inc., TC Systems, Inc. v. City of White Plains, New York*, No. 99CIV4419 (S.D.N.Y. Dec. 20, 2000) a federal district Court in New York relying on *Dearborn* upheld a 5% gross revenues franchise fee, a minimum charge of \$5000-10,000, and the installation of 1000 feet of conduit as "fair and reasonable" compensation under the federal Telecommunications Act. See also *Omnipoint Communications, v. The Port Authority of New York and New Jersey*, 1999 WL 494120 (S.D.N.Y.) ("[i]t is doubtful that Congress, by use of the words 'fair and reasonable compensation, limited local governments to recovering their reasonable costs).

### **The Practical and Legal Problems with "Access Line Fees."**

While Senate Bill 306 purports to establish an "administratively simple" access line charge, in reality it creates an arbitrary, discriminatory and complicated structure that is neither related to the fair value of the use or the costs imposed on the public. This is so because it sets an arbitrary fee for some specified users (local exchange providers), while prohibiting any fee on the vast number of other uses and users.

The primary drawback to a per line fee methodology is the difficulty in establishing the proper amount to be assessed per line. As an alternative to the long standing use of gross receipt fees in Kansas, the City presumably would want to set the per line fee at an amount that would approximate the amount that the City would obtain from the carrier if it were subject to a three percent gross receipts fee. In addition to the difficulty in attempting to anticipate the number of access lines that may exist, this methodology is inherently flawed because it must necessarily assume that all lines are of equal value. This is clearly not the case, as certain types of lines generate far greater revenues than others. For example, a commercial voice line is typically sold for much more than a residential voice telephone line. A per line charge wholly ignores the amount or the value of the use, so that a provider that uses 100 miles of rights-of-way potentially pays the no more than one that uses only 10 miles of rights-of-way; and the subscriber to an \$80 per month service pays the same as the \$15 per month subscriber. This is fair neither to the provider nor to the customer that will be assessed the charge. For example, the \$1.81 per line charge established by Senate Bill 306 would be nearly 10% of a resident's bill for a \$20 per month service, but only 2% for a \$100 per month high speed, high quality commercial line. The City's existing 3% gross receipt fee, however, charges the same percentage to each customer.

Another problem with a per access line fee is that it does not necessarily anticipate or accommodate changes in technology or services that may alter the underlying assumptions on which the per line rate was set. For example, Senate Bill 306 limits compensation to use of local

exchange access lines, yet this service may not even exist in the near future given the capabilities of the internet and wireless telephone to wholly replace that antiquated term. In addition, some carriers are moving towards the provision of multiple services over a single line, and a per line formula may not capture all of these discrete services. The pending state legislation resolves this in a draconian way- it simply prohibits any compensation of any kind from access lines that are not for "local exchange" telephone service. This, of course, discriminates against local exchange carriers and in favor of conduit, internet, and dark fiber companies who would use the ROW without payment. Moreover, because local phone connections may be completely eliminated by wireless and internet telephone service, this formula is a recipe for potentially eliminating all compensation to cities in the near future. Finally, use of an access charge will result in a direct discrimination against companies that have access lines and in favor of those that do not. Such a discrimination will distort the use of the rights-of-way by encouraging businesses that do not have direct customers and result in no compensation whatsoever for significant use of the rights-of-way. This type of unfair playing field is exactly what the 1996 Telecommunications Act and the cities proposed Code is intended to prevent.

### **The Benefit of Gross Receipts Fees**

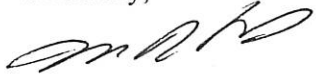
Under a gross receipts fee methodology the provider is required to pay the City a percentage of their overall telecommunications revenue in the City based on any usage of the rights of way. In many respects this fee methodology is the most administratively straightforward since the City need only determine the carrier's gross revenues to establish the fee. As a consequence, the gross receipts fee methodology does not suffer from the inherent problems of the access line fee with respect to anticipating changes in technology or the value of services. Nor does it discriminate, as Senate Bill 306 does, based on the content, nature or type of telecommunications service or signal. The statutorily authorized gross receipt compensation formula has worked well for years in Kansas. In addition, the gross receipt compensation scheme is specifically authorized in the federal Cable Act for cable providers. Given the entrance of new "broadband" overbuilders who seek to provide both cable and telephone services, it is appropriate to have right-of-way compensation fees that treat similarly situated providers in a similar manner.

### **Senate Bill 306 Prohibits Local Regulation of Utility Easements In Which A City Has An Interest.**

The definition of "Public Right-Of-Way" in Senate Bill 306 is so broad that it even includes utility easements in which a City has an interest. If Senate Bill 306 is passed, local governments will have no ability to conserve and protect the finite resources of the public right-of-way or the utility easements. Private telecommunication providers may enter these areas and use as much of these resources as they may choose in any manner they choose, subject only to the requirement to pay an access line fee if they are a local exchange telephone service.

For the above reasons I strongly urge the Committee to vote in opposition to this ill-advised legislation that benefits private telecommunications companies to the detriment of local communities and their citizens.

Sincerely,



Michael R. Santos  
Senior Assistant City Attorney



City Manager's Office

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## Testimony Notes

By: Dennis M. Kissinger, City Manager  
Representing: The City of Salina, Kansas  
Before: Kansas Senate Commerce Committee  
Re: Opposition to Senate Bill No. 306  
Date: February 16, 2001

I am here today partially because we believe it is important for the Committee to know the issues raised by S306 do not just impact communities in the metropolitan areas.

Salina City officials take our stewardship of the public right of way very seriously. We recognize that new technology and industry advances have changed the dynamics of right of way use dramatically from the days 30 years ago when we dealt very simply with "Ma Bell" and one utility provider. These changes present great opportunities, along with some challenges. We have an excellent record in Salina of responsibly handling these right of way issues by working with businesses in negotiating fair and reasonable franchise agreements under existing state and federal laws.

During the 1990s, Salina City government negotiated an excellent franchise agreement with a cable television provider. That agreement has benefited our community tremendously, including enabling our local school district to have modern technology capabilities through fiber optic connections, at a savings of millions of dollars in the education budget. Under this franchise, the community continues to be well served, new technology services are made available to our residents, the company is profitable, and the relationship between the City and the franchise holder is good. As Senator Brungardt, who was a member of the Salina City Commission at that time, can tell you, those franchise discussions were complex, and sometimes challenging. However, the local elected officials in Salina were very capable of seeing that a fair and high quality agreement was reached, and the public interest served.

By Senate Bill 306, it appears that another industry group desiring to use the public right of way for their business doesn't want to work with local government through the franchise process. Their answer is to seek to exempt their industry from Kansas franchise laws, allowing them to have a special privilege in using the public right of way in our communities. They wish to substitute a one-size-fits-all approach. The interests of Salina may not be identical to Overland Park or Olathe, or a Pittsburg or Phillipsburg. At a minimum, this bill declares Salina a failure at being able to work with the telecommunication industry fairly and appropriately, before we have even had a first meeting with existing or new telecom providers. Just because the industry fears that working out agreements with local communities is too challenging for them is no

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reason to give a special exemption from franchise laws which allow local officials to represent the individual community needs and interests.

Salina is a member of the MARC Telecom Consortium. Joining with 40 other cities is a very cost-effective way for our City to research, learn and share information. But we have never intended our consortium participation to lead to an identical agreement in each City. We understand that one size doesn't fit all.

Even if someone accepts the basic premise behind this bill (which we don't), we believe it is fatally flawed as written. For example, it would apparently allow any company holding a local exchange certificate but not actually providing that service in a community to have full use of the public right of way to set poles, bury lines and conduct their entire business without any franchise or license agreement, and without paying any compensation. It also appears that under this bill, the existing cable television provider in Salina could decide to acquire a K.C.C. certificate to offer local exchange service in Kansas, and then promptly give the City of Salina notice they are terminating their existing cable TV franchise under New Section 6 in this bill. They may attempt to use one of the large loopholes this bill creates and be able to avoid virtually all their agreed upon franchise obligations to the community, its schools and local government by re-characterizing themselves as a "telecommunications provider".

My best description of Senate Bill 306 is an "iceberg" bill. Only about 10% of the impact is visible on its surface. In reality, the hidden 90% will cause serious problems both immediately and into the future for local communities, large and small. The bill is both unnecessary and undesirable. We respectfully request your opposition.

Thank you for your consideration. I will be happy to discuss this at any time.

**TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE  
PRESENTED BY ERIC R. ARNER  
SENIOR ASSISTANT CITY ATTORNEY, LENEXA, KANSAS  
FEBRUARY 16, 2001**

**SENATE BILL No. 306  
By Committee on Commerce**

Senator Brownlee, members of the Senate Commerce Committee, my name is Eric Arner and I am a Senior Assistant City Attorney for the City of Lenexa, Kansas. Among my duties, I am assigned to handle legal matters relating to telecommunications, right of way and franchising. I am here this morning on behalf of the City of Lenexa to offer testimony in opposition to Senate Bill 306.

The City of Lenexa is enjoying a period of unprecedented growth in telecommunications. This growth in telecom is a product of not only a favorable economy and friendly financial market but more importantly a Federal policy of promoting competition and enhanced technology in telecommunications. Congress passed the Telecommunications Act of 1996,

“[T]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”  
(Public Law 104-104 amending 47 USC 151 et seq.)

As Congress promised with the passage of the Telecommunications Act of 1996, we are now seeing competition in telecommunications services. Likewise, as promised in the 1996 Telecommunications Act, we are seeing the deployment of new, high quality telecommunications technologies. The City of Lenexa has seen the benefits of the 1996 Telecom Act first hand. In the past few years, the City of Lenexa has granted over 12 telecommunications franchises to companies offering a variety of competitively priced services to our business and residential citizens. The City believes that access to these types of telecom services is vital to the continued success of our community.

Fundamental to the 1996 Telecom Act is the careful balance of enabling and regulatory authority between Federal, State and local authorities. Congress specifically recognized the traditional regulatory role of local government when in the Act, the control of the public right of way was left to local government. Specifically, 47 USC 253 reserves to the local authority the ability to manage the public rights of way and expect fair and reasonable compensation from the telecommunications providers for the use of those public ways. Congress though did not provide unfettered local control of the right of way, but instead conditioned the local control on fair, reasonable, nondiscriminatory and competitively neutral rules and regulations. 47 USC 253 (a)(b)(c)(d). Senate Bill 306 seeks to reverse the regulatory balancing approach Congress developed in the 1996 Act and significantly reduce if not eliminate the role of local government in regulating their public rights of way.

The City of Lenexa strongly opposes Senate Bill 306 and believes the negative consequences of this piece of legislation, if passed, would be far-reaching and detrimental to the City and the citizens we serve. For purposes of my testimony today and to efficiently use the time this Committee has graciously permitted me, I will focus the remainder of my comments on the impact of Senate Bill 306 to right of way management and related fees.

### Right of Way Management

Over the past few years, cities all over the country have been struggling with managing their public right of way. The traditional regulatory model of one gas, electric, telephone, water and cable provider no longer works in the post-1996 Telecom Act era. Cities have been forced to deal with the increased demand for finite right of way space, all the while exercising their role as trustees of that public right of way. Congress recognized the change in the traditional right of way model when it specifically reserved the management of the right of way to local government but prohibited any unreasonable or unnecessary regulatory barriers. It is clear that local government has a fiduciary obligation to protect the public investment in the right of way. It is equally clear that local government must exercise this obligation, as it relates to telecommunications, in a competitively neutral and nondiscriminatory manner. This balanced Federal, State and local approach provides the appropriate vehicle necessary to deploy new telecom technologies without eliminating or reducing the ability of local government to effectively manage the right of way and protect the public investment in streets, sidewalks, landscaping and the like.

Senate Bill 306, as written, would severely restrict the ability of local government to protect the public investment in the right of way. In section 10 of SB 306 (amending K.S.A. 17-1901(a)(2)(b)), local government would be prevented from exercising basic and fundamental right of way management decisions. Decisions with respect to excess conduit, collocation, facilities engineering, design approval and the like should be left to local government. These right of way decisions cannot be made in a vacuum or in any universally applicable manner. Local governments must have the flexibility to make right of way management decisions that best meet the needs of their particular community.

Next, Senate Bill 306 substantially limits the ability of local government to effectively deal with right of way problems. By limiting or restricting the scope of regulatory authority of local government, Senate Bill 306 creates accountability without authority. Local government currently receives the right of way complaints, whether those complaints originate from work done in the public right of way or private easements. The citizen expects that their complaint will be handled in an appropriate, timely manner and holds the city accountable for that process. Through franchising and reasonable right of way ordinances, cities currently have the authority to resolve these right of way problems. This authority is subject to current Federal and State laws and regulations, which serve as the legal framework for local government to exercise their regulatory authority. Senate Bill 306 significantly alters that legal framework and would

effectively restrict or eliminate the authority of cities to resolve right of way problems at the local level.

Lastly, with respect to right of way management, Senate Bill 306 effectively carves out telecommunications providers from all other utilities using the public way. By carving out telecom providers, local government would be forced to adopt two separate right of way management standards instead as currently exists, one comprehensive ordinance dealing with all right of way users, regardless of the type of use. This type of dual system would be administratively cumbersome and prone to inefficiencies as well as create confusion among those using the dual systems. Likewise, dual regulatory systems would greatly inhibit the ability of local government to efficiently manage the finite, but desirable public right of way.

### Fees

Cities rely on fees generated by franchises granted pursuant to K.S.A. 12-2001. Likewise, cities traditionally rely on other fees associated with the use of the public right of way by private enterprises. These fees typically relate to the various aspects of right of way management such as administration, inspection and degradation. Senate Bill 306 would greatly impact the ability of cities to collect franchise fees as well as other fees associated with the use of the public right of way. Senate Bill 306 not only introduces a new type of franchise fee calculation, but it also eliminates those cost recovery fees associated with the use of the public right of way. Additionally, as currently drafted, Senate Bill 306 provides no fiscal incentive on the part of a telecommunications provider to be a responsible right of way user.

In new section 1, the text refers to the policy of the State that municipalities receive fair and reasonable compensation for the right of telecom providers to use the public ways to operate their telephone systems. A careful reading of the entire bill though reveals that SB 306 does not provide for fair and reasonable compensation, but in fact will be a new cost to the municipalities by eliminating every relevant cost recovery mechanism. It is likely that telecommunications providers will argue, as they often do, that the franchise fee sufficiently reimburses the cities for the use of the public way. Clearly, SB 306 follows this vein of logic in that every fee but an access line fee is prohibited. New section 8 clearly makes the access line fee a pass through to the end user, not unlike the current pass through of applicable franchise fees. In other words, the only fee permitted by SB 306 to be assessed against private companies using public property for economic gain is a fee paid by the end user. The telecommunications provider will pay no fee for their use of the public right of way. The telecommunications provider will pay no fee for their degradation of public assets such as streets or landscaping in the right of way. The entire financial burden of a private telecom company using public right of way will ultimately and unfairly fall on the end user in the form of an access line fee.

In lieu of franchise fees, new section 4(a) creates an access line fee of not more than \$1.81 per month. Customarily, franchise fees are calculated on a percentage of the



revenue generated from the use of the telephone lines. Currently, the City of Lenexa uses a percentage of 3.5% multiplied by the gross revenues to calculate the applicable franchise fee. The City of Lenexa has not had sufficient time to study the fiscal impact of abandoning a gross receipts method of calculation in favor of the proposed access line fee. In the past, the City has been approached by one telecommunications provider with respect to using the access line method of calculation. In that instance, after considerable study and debate, the City rejected the access line method of calculation in favor of the gross receipts method. The City of Lenexa is very concerned that the access line fee would drastically impact revenues generated from telecommunications services in a negative manner.

Next, new section 4 eliminates the ability of local government to collect any fee for degradation, permitting or inspecting the use of the public way by telecom providers. With respect to degradation, studies as well as common sense show that the useful life of a street is reduced every time that street is cut. Degradation fees can be extremely useful in not only protecting the public investment in the street, but in many cases forcing the right of way user to use alternates to cutting a public street. By eliminating the degradation fee, it is most likely that telecommunications providers would have no incentive to minimize, coordinate or otherwise be concerned with the impact of their street cuts on local government. Likewise, without a degradation fee, it is likely that in many cases, public streets will be in need of substantial repair or replacement much sooner than anticipated or budgeted. Without a degradation fee, telecom providers will not make the public whole for the damage to public assets caused directly by their use of the public right of way.

Also, new section 4 prohibits local government from assessing a permit or inspection fee. Without the ability to collect any processing fees from telecom providers, local government will be forced to subsidize those users with fees or revenues from other sources. It is good public policy to require a high level of professionalism in the design and construction of any work done in the public right of way. In order to ensure that work done in the right of way is acceptable, local government must have the ability to not only require information through the permitting process but also recover some of the cost associated with processing that information. In addition, local government must be able to recover some of the costs associated with inspecting the work done in the right of way or be forced to again subsidize those costs with revenue from other sources. It is illogical to suggest that telecommunications providers should not bear at least some of the costs associated with their use of the public right of way.

In conclusion, the City of Lenexa opposes Senate Bill 306 and would ask the Senate Commerce Committee as it receives testimony from opponents and proponents alike, to carefully consider the impact on the ability of local government to efficiently and effectively manage the public rights of way. Thank you for allowing me the opportunity to present testimony on behalf of the City of Lenexa. Should you desire further information or clarification of any of my comments, please feel free to contact me at 913-477-7623 or [earner@ci.lenexa.ks.us](mailto:earner@ci.lenexa.ks.us).



**Date:** February 16, 2001

**To:** Senate Commerce Committee, State of Kansas

**From:** Jeanne Hernandez, Franchise Manager  
City of Wichita, Kansas

**Subject:** *Request opposition of Senate Bill 306. An Act concerning telecommunications; relating to the provision of local exchange telephone service.*

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Thank you for the opportunity to allow the City of Wichita to provide information, experiences and feedback regarding Senate Bill 306. This bill, if adopted, would undermine the essential concept of municipal control over public rights-of-way and would scrap years of work by Wichita and other communities to develop telecommunications ordinances that are a balance between the competing needs of the public and the industry.

This bill has two basic premises for the Telecommunication industry's use of the right of way: 1) To remove from cities the right to manage rights-of-way, and 2) to require all cities to be compensated in the same way based upon the number of access lines. Experience has shown that both concepts have serious consequences when implemented, and the City of Wichita has recently taken carefully considered steps to solve those problems. The proposed bill would impose those problems on every city in Kansas. Changes in technology, industry practices and regulations in the telecommunication industry have prompted Wichita and other cities to update the way local governments manage, negotiate franchises and regulate rights-of-way with new and current telecommunication providers. The proposed bill would sweep away those progressive improvements for the advantage and profit of a few providers within the proliferating communications industry.

Competition in the telecommunications industry is good for the community. It reduces prices, increases the quality and types of services and has a tremendous impact on a local community's economic development capability. The current efforts to establish a comprehensive approach to dealing with telecommunications companies arose when Wichita received three separate requests for telecommunication franchises within a short period of time. Although the City was pleased with the requests, we did not have a framework in place to treat all telecommunication companies equitably. In January 2001, the City Council adopted a Master Telecommunications Ordinance to facilitate the individual franchises granted to telecommunication providers. The development process was lengthy and included input from the industry, the community, the International City and County Manager's Association (ICMA), independent telecommunication legal experts and Public Technology Institute (PTI, a technology resource for local government).

The Master Telecommunication Ordinance adopted allows Wichita to treat communication providers equitably and meet the needs of the community, which are outlined in a brief and simple format below:

- 1) **Ensures efficient use of a public resource.** In certain areas of the City, rights-of-way space is extremely limited. However, most new entrants will request facilities to be placed in our downtown area. To facilitate the placement, the City is requiring companies to share information and plan in advance of construction to determine co-location opportunities. The co-location requirements are applied in concept similar to cellular siting and other utilities attached to poles.

- 2) **Minimize disruption to the streets and public.** Wichita has also invested millions of dollars in streetscape and beautification projects and has an interest in protecting this investment where practical. Multiple disruptions and constructions reduce the life of our assets as well as increase the risks to public safety; such as, line breaks, accidents, etc. Co-location requirements reduce these risks; however, if co-location opportunities are not available excess capacity may be required as determined by our City Engineer to facilitate future co-locations. *This was so important to the City that the City will finance the incremental cost of the excess capacity, at the option of the communication provider.*
- 3) **Ensures the City receives adequate compensation for the utilization of the rights of way.** A gross receipts compensation method was adopted. Wichita has learned from experience that the access line payment methodology does not keep up with change in technology, regulations and industry practices. This method may be administratively easy for the Incumbent Local Exchange Carrier (ILEC); however, the Competitive Local Exchange Carrier (CLECs), resellers and municipals have a difficult time ensuring accurate payments have been remitted and all have been treated equitably. A more detailed response is outlined further in this letter.

The bill before you eliminates local governments ability to manage the rights-of-way based on the communities needs and individual issues and mandates the payment provisions that are blindly uniform. From the language proposed, cellular towers could show up in cities' rights-of-way. Another example is, the City of Wichita has a pavement-cut fee applicable to all utilities. It requires a surcharge if a utility digs up brand new pavement, which provides an incentive for utilities to coordinate with each other and the City. The proposed bill would eliminate the ability of the City to impose such fees.

The current Franchise Act treats all utilities in an equitable and consistent manner. This is important as we are seeing convergence of technologies and the deployment of communication services over electric utility and cable systems' infrastructure as well as telecommunication companies providing video services over the phone lines. Even the gas companies are investing in fiber optics for the deployment of communication systems. To separate the telecommunication companies (local exchange service) out in the proposed bill provides them an unfair and competitive advantage over other companies who may provide communication services.

A city granting a franchise is required to receive compensation under K.S.A. 12-2001. Wichita believes the intent of the state legislature was to allow local governments to receive adequate compensation for the use of a limited public resource for private profit. A franchise fee is viewed as a rental fee for placement of utility company's facilities in rights of way. For many reasons not outlined in this memo today, local government has always been portrayed by the utilities as being greedy when it assesses the fees. Asking for reasonable compensation from a profit making utility company deriving a special benefit from public easements is not greedy, it is only fair. The rights-of-way are a very valuable public asset; there should be charges for its use. Franchise fees are also an important element of funding general fund services in every community and are extremely important for providing governmental services from recreation to public safety. Wichita is implementing the intent of the Franchise Act and revenue is important. Cities could rely on revenues from the general population to pay for the benefits afforded to a utility. However, a reasonable fee for the use of the rights-of-way charged to the utility companies seems more appropriate than subsidizing the operating expenses of these companies at the expense of taxpayers generally.

**Franchise Fee Methodology.** For many years, the City of Wichita, like many other cities, used the gross receipts calculation as the basis for franchise fees (consistent with all other franchised utilities). In April 1996, Wichita adopted a \$1.81 per access line payment methodology. At the time, Wichita felt that Southwestern Bell was redefining accounts and not paying the appropriate amount under the gross receipts calculation. After two years of negotiations with Southwestern Bell on many franchise issues, the City made a decision to switch to an access line payment methodology that the franchisee said would generally reflect 5% of gross receipts making Wichita "whole" on a going forward basis.

In hindsight, the expedience of switching the method of calculation was not a good decision. There are many problems with the access line definition, which were confirmed by an independent legal review, ICMA and PTI. All of these organizations recommended we switch back to a gross receipts payment methodology. The reasons are outlined as follows:

- 1) The definition of access line does not keep up with the change in technology. As the services offered by the telecommunication industry change, the technical access line definition becomes quickly outdated, adversely impacting the compensation received by local governments. In 2000, Wichita received \$4,533,147 in franchise fees from SWB. This was 8% less than expectations and 5% less than the previous year.
- 2) With the convergence of technology, the cable and telecommunications industries are becoming competitors with similar infrastructure and services. The Federal Cable Act allows cities to receive 5% of gross receipts for utilization of public assets. A gross receipts methodology for telecommunication service providers allows local government to treat the cable and telecommunication companies equitably. For example, in Wichita, the cable company pays 5% of gross receipts on high-speed Internet access. SWB does not pay any franchise fee on high-speed Internet services. Wichita's Master Telecommunication Ordinance remedies these inequities.
- 3) As new CLECs enter the market, the use of unbundled loop facilities will increase. The proposed bill excludes these unbundled loop facilities from the payment provision entirely; although, the use of the right-of-way has not changed (only who owns a particular portion of the facilities). Excluding unbundled network facilities also prevents local unit of governments from treating all telecommunication carriers equitably. Why? Because a CLEC who owns its facilities will have to pay a franchise fee to a local unit of government while a CLEC who leases a portion of its facilities from the incumbent local exchange carrier (ILEC) will not.
- 4) Resellers are exempt from the provisions of the proposed bill. Equity issues between service providers (reseller versus a facilities based provider) are difficult to resolve with the proposed language. The franchisee in Wichita has also used "Affiliate" companies to resell services and used this business structure to exclude payment of access line fees to the City of Wichita that are attributable to the same lines as existed before the "Affiliate" took over.
- 5) Access line does not consider "bundled" services and how such services would be accounted for.

It is also important to highlight that the Federal Telecommunications Act gives cities the right to control rights-of-way and to charge fees. SB 306 places the control at the State level, not allowing local communities to manage and react to issues, which may arise, particular to an individual city. Southwestern Bell has threatened to take Wichita to court as well as other communities who adopt the recent "Wichita Ordinance". However, Wichita believes the Ordinance is within the framework provided by State and Federal regulations. Strategically, SWB is better positioned to lobby a change in the law than challenge it.

It is also important to point out that the current ordinance in Wichita has some interim rights-of-way management provisions pending the adoption of a master rights-of-way ordinance. The Master Telecommunications ordinance is a guideline for future franchises. It does not replace existing franchises. Southwestern Bell continues to operate in the City under the grant in its current franchise which has not expired.

Wichita does not support a voter referendum for determining the rates to be set for utilization of the rights-of-way, as suggested by the bill. Wichita manages over ten franchises and each franchise includes payment provisions. Should all ten franchises be sent for voter referendum? To vote on the value of that fee may not result in the best outcome, will be administratively difficult to implement and a very expensive way of doing business.

Senate Bill 306 does not allow local government to review the financial and operational ability of a company prior to the company providing services. Bonding requirements are absent from the bill. The market capitalization for the telecommunications industry has taken a dramatic plunge resulting in companies scaling back, reducing and/or abandoning services. Who provides the assurance cities aren't left in a mess and how are abandoned facilities addressed?

Some of the provisions of the bill challenge constitutional rights. Cities and the franchisee negotiated in good faith to reach enforceable franchise agreements (contracts) enacted by their governing bodies. The bill provision that a telecommunications provider may terminate a franchise agreement, at its sole discretion, as of the effective date of this act, violates the sanctity of a contract that is constitutionally protected.

The senate bill preempts local units of governments' ability to apply an Occupation Tax, which is one of the tools Wichita uses to ensure all telecommunication providers, including Affiliates of a franchisee, are treated equitably.

In summarizing the comments presented, it is important for local communities to be able to manage rights-of-way in a manner that matches the local communities needs. Local communities must be able to treat all users of the rights-of-way and providers of communication services equitably. The bill before you is an impediment to maximizing the efficient and safe use of rights-of-way and prohibits cities from treating equitably all communication providers, including cable and other non-traditional providers.

The Senate Bill appears to be a reaction by the industry from similar policies adopted by both major metropolitan areas in Kansas (MARC and Wichita). Wichita and other cities have invested in telecommunication technical and legal experts to ensure the policies adopted are practical and legal. We do not believe that the industry has a legal or technical basis to challenge the ordinance. It is unfortunate that threats of litigation appear to be used to discourage some cities from proceeding with the update of their franchises and ordinances.

*We strongly request that this one-sided bill not be approved.* I would be glad to discuss the contents of this letter with members of the committee or provide more information about the City of Wichita's current franchise or new Telecommunications Ordinance. Your consideration of this testimony is greatly appreciated.



# City of Lawrence KANSAS

CITY COMMISSION

MAYOR  
JAMES R. HENRY

COMMISSIONERS  
MIKE RUNDLE  
ERVIN E. HODGES  
MARTIN A. KENNEDY  
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MIKE WILDGEN, CITY MANAGER

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To: Senator Brownlee, Chair, and Members of the Senate Committee on  
Commerce  
From: David Corliss, Assistant City Manager & Director of Legal Services  
Date: February 16, 2001  
Re: Senate Bill 306 - Removal of Telephone Companies from City  
Franchise Authority and Accountability

The City of Lawrence and the telecommunications industry has enjoyed a very healthy and satisfactory relationship over the years working jointly to ensure appropriate planning, infrastructure coordination, and service issues in our growing community. This relationship has always been based on our franchise contract pursuant to K.S.A. 12-2001, which clearly establishes the rights and responsibilities of both the City and the telephone company in the use of City right-of-way. The franchise has provided our citizens the assurance that the private entities which use our public right-of-way will be held accountable for their activities. We have never heard from Southwestern Bell that the requirements of our franchise were anything but helpful and appropriate. Senate Bill 306 destroys this relationship and greatly harms the authority of the City of Lawrence and all cities to hold private companies responsible for what they do on public right-of-way:

### **The Franchise/Contract Relationship is Destroyed by SB 306**

Lawrence has always worked with our telephone company (Southwestern Bell) to obtain necessary easements and rights-of-way that mutually benefit the utility and the development. In fact, a SWB representative attends our staff meetings to review pending plats and site plans to ensure coordination and request necessary easements. Senate Bill 306 tosses that relationship overboard. Under the bill, telephone companies can do whatever they want in the right-of-way without pain of penalty or repercussions. The City will not obtain easements for a utility that does not have a franchise with the City. The utility will be on their own. Future plats will not contain the necessary easements that non-franchised utilities might request. In fact, future plats and site plans may exclude easements based on SB 306 leaving the telephone company left to go door-to-door to obtain easements.

### **SB 306 Severely Damages Valuable City Ordinances Protecting Neighborhoods, Private Property and Public Property**

It is clear from a reading of SB 306 that this bill aims to get telephone companies out from under any city laws regulating the use of public right-of-way. Without a franchise contract there is no tangible ability to hold a utility accountable for city laws in the use of the right-of-way. SB 306 will eliminate the ability of Lawrence to enforce many laws and policies, including:

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- \* Underground Wiring Ordinance -- requiring utilities to put wiring underground in many neighborhoods;
- \* Street Tree Ordinance -- requiring utilities to follow appropriate practices in the trimming of trees in public right-of-way;
- \* Laws requiring the safety signage when utilities make cuts or place equipment in public streets, alleys, right-of-way, etc.;
- \* Laws requiring sidewalks to be repaired after damage;
- \* Coordination of improvements to streets with future utility cuts. Few things make citizens madder at government than to see a road repaired and overlaid, and then a few weeks or months later that same road torn up again for a different project. ***We have over 270 miles of streets, countless miles of easements: City Hall coordination -- which is meaningful and powerful -- is a public safety necessity.***

**Who you goin' call?** Today, city halls are the appropriate place to call when a citizen has a question about someone digging in their front yard right-of-way or back yard easement. Cities coordinate and regulate this activity. Utilities with franchise agreements know and follow the rules regulating this activity. When a utility leaves a mess in someone's backyard, tears down a fence, or plows through Mrs. Jones' flower bed -- someone at city hall will find out what happened and how it can be fixed. When utilities fail to respond, cities serve as liaisons to get this matters resolved.

**SB 306 Kills the contract relationship between the City and the Utility: the Utility is off the hook, and the City has no meaningful way to make the utility respond.**

**Who is the citizen going to call? Are there any Legislator volunteers?**

#### **Technical and Constitutional Problems with Senate Bill 306**

There are a number of technical problems with Senate Bill 306. The bill fails to recognize the roles cities have in the coordination of State right-of-way located within city boundaries. Apparently, proponents of SB 306 only plan to abscond and damage City right-of-way and stay away from State right-of-way. SB 306 assumes that cities only use home rule power for regulating utility use of right-of-way, but cities also use statutory powers, for example KSA 12-1801 et seq. concerning sidewalk repair. The notice and election procedures do not appear to work appropriately. SB 306 also violates Kansas common law: "...before a city may authorize the use of the public right-of-way for private purposes there must be a clear showing that the primary use of the right-of-way will benefit the public and any private use must be incidental to the public purposes." *Stauber v. City of Elwood*, 3 Kan. App. 2d, 341 (1979). SB 306 clearly allows unaccountable use of public property for private gain -- a violation of the Kansas public purpose doctrine.

To use a term from an industry, this bill **slams** the public interest in public property. The City of Lawrence calls on the legislature to continue to protect the public interest and reject Senate Bill 306.

NW Corner of Kasold and Trail - 2/12/01





NW Corner of Boulder and Trail - 2/12/01



15.4



City of Olathe

MEMORANDUM

**TO:** Members of the Senate Commerce Committee

**FROM:** Donald R. Seifert, Policy Development Leader *DRS*

**SUBJECT:** **Senate Bill 306**; Telecommunications Companies; Right of Way

**DATE:** February 16, 2001

On behalf of the city of Olathe, thank you for the opportunity to appear today in opposition to SB 306. This bill would remove telecommunications providers from the Kansas franchise act at K.S.A. 12-2001, replacing the local franchise law that has served Kansas well since 1945 with a statutory "franchise" from state government. Contrary to the federal Telecommunications Act, the bill would also deprive local government the ability to receive fair compensation for use of the public right of way.

Management of local right of way is a core function of the business we call local government. All basic local government services: public safety, transportation, and utilities, depend on the public right of way for service delivery. Much of our daily business and a significant portion of our weekly meeting agendas deal with financing, constructing, maintaining, and operating public improvements in the right of way. As stewards of public property, city officials view right of way management very seriously.

Within general parameters, through the franchise law and prior acts Kansas cities have long had authority to delegate use of public right of way for private use under locally negotiated franchise terms and conditions. The delivery of private telecommunications and utility services would be impossible without the availability of public right of way. Federal law requires localities to manage right of way in a nondiscriminatory and competitively neutral manner. Amidst a veritable telecommunications revolution, Olathe has taken great care in its approach to both cable and telephone franchising to balance the reasonable needs of consumers while ensuring that franchise requirements are not unduly burdensome on the providers. Our philosophy is that competition is good for our citizens as long as the right of way infrastructure is not compromised. Olathe was one of the first cities in the metropolitan area to enter into agreements with new companies providing broadband service and wireless Internet access. Both providers and consumers have praised our efforts.

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It is difficult to understand what is so "broken" with the current system at this point in time that the legislature must step in and preempt local control of one of cities' most important assets. Communities throughout Kansas and the nation are in the midst of a telecommunications construction boom. Providers tell us it is difficult to obtain financing, materials or hire enough construction crews to build much faster. We have seen no evidence that there is a need to change the whole regulatory environment for this one type of right of way user.

Beyond the basic need for this legislation, some specific concerns with SB 306 include:

1. Local control. The bill removes local right of way management through the franchise process. Franchises are negotiated in good faith between the parties. The issues covered in franchise ordinances concerning excavations, location of lines, restoration standards, damage to public improvements, traffic control, etc. cannot possibly be handled in Topeka. These are real world, day to day issues that citizens expect to be handled at city hall. Outside of the franchise, SB 306 would severely weaken a city's ability to hold a provider accountable for compliance with local laws.
2. Quality of service. The bill does not address inadequacy of service issues, such as where construction is abandoned or not completed in a timely manner - thus squandering precious right-of-way to the detriment of other providers, the city and, ultimately the public.
3. Mandates one method of compensation. The bill allows only the access line method of compensation, rather than the more common method based on gross revenues. Olathe is considering the access line method, but it should not be mandated.
4. Narrow definition of access lines. Valuing all lines the same, irrespective of the number of derived channels of service they are capable of carrying, creates a huge compensation gap for cities. Technology is headed toward networks of fewer, large capacity lines and toward large lines carrying integrated packet switched network communications that will be combining voice and data (including video data). The proposed legislation freezes local compensation with the old technology for "plain old telephone service." How would the bill handle bundled services?
5. One-sided legislation. The bill is entirely written from one point of view. Provisions in the bill that statutorily narrow the scope of local home rule or allow a company to unilaterally terminate a contract seem unprecedented outside of a national emergency.

Thank you for the opportunity to appear today. The city urges the committee to reject this bill and preserve telecommunications franchising authority at the local level.

**Testimony before the Senate Commerce Committee  
Regarding Opposition to Senate Bill 306  
Presented by Dean Katerndahl  
Representing the Mid-America Regional Council and  
the Kansas City Regional Telecommunications Consortium  
February 16, 2001**

I want to thank the Committee for the opportunity to speak to you in regards to Senate Bill 306. I am Dean Katerndahl of the Mid-America Regional Council and staff coordinator for the Kansas City Regional Telecommunications Consortium.

The Kansas City Regional Telecommunications Consortium, a coalition of 40 local governments, has undertaken a process based on the premise that informed and knowledgeable cities working together to responsibly manage the public right-of-way is the best approach to developing sound public policy. Some representatives of the telecommunications industry have criticized this process and used it as a rationale for promoting Senate Bill 306. However, we strongly believe that cities should be commended, not criticized, for adopting a considered, rational approach, which actively seeks input from the telecommunications industry, to develop right-of-way policy that serves their communities.

The Consortium was formed in April of last year because many of its members were being inundated with requests from telecommunication companies to use the right-of-way and in some cases provide new services. These new services raised new issues such as how to handle bundled services, how to insure a level playing field for all providers, and how to manage multiple competitors entering the right-of-way at the same time.

The Consortium set out to do three things. First, the members wanted to get up-to-speed on the very complex and rapidly changing telecommunications field and its potential impact on their communities. Second, the members wanted a vehicle to share telecommunications related information, issues and practices. Finally, the members wanted to pool their resources to develop model agreements and procedures that they could use to expedite right-of-way approvals and make sure the interests of their communities were fairly represented.

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Cass County, MO

Secretary  
Executive Director

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This process consisted of the development and revision of draft agreements and policies and the solicitation and review of comments by members and telecommunications providers. The Consortium conducted a very open process, sharing drafts with the industry at each step, although not all telecommunication companies chose to participate and provide comments. The many comments received by the Consortium were reviewed and often incorporated into the next draft. We also met several times with representatives of the industry. Although the Consortium members and industry do not always agree on each and every point, the process has been open, key issues have been thoroughly discussed, and the Consortium members look forward to continuing the dialog.

I want to emphasize two points here. First, even as our Consortium process proceeded, individual members moved ahead at their own pace, engaging in negotiations and issuing permits. Second, the agreements and policies developed by the Consortium were models to be used by each city as a starting point, not an end point. Each city then modifies the models to meet their community's particular needs and the needs of the individual providers.

What do the cities want out of this process?

- First, of all, they want the new infrastructure and new services for their residents and businesses
- But,
  - they want them in a manner that is sensitive to the right-of-way and the current users of the right-of-way, including all utilities, not just telecommunication companies
  - and they want to be fairly and reasonably compensated for use of the right-of-way, exactly as is stated in the Telecommunications Act of 1996

The bottom line is that the Consortium and its members have acted in a totally responsible manner by becoming knowledgeable participants, by actively seeking industry input, and by forthrightly advocating for their communities.

Telecommunications companies and cities already operate under a wide array of federal and state legislation and regulation. Cities adhere to and embrace these requirements. Deployment of advanced telecommunication infrastructure and services is already proceeding at an unprecedented rate. No company is being denied access to the right-of-way, being treated in unfair manner, or being prevented from deploying facilities. Senate Bill 306 is not needed, would be harmful to communities, and I would urge your opposition.

I want to thank the committee for this opportunity to speak to you and would be happy to answer any questions.

## **Background Information**

### **Kansas City Regional Telecommunications Consortium**

The Kansas City Regional Telecommunications Consortium was formed in April of 2000. It currently consists of 39 cities and one county. The Consortium has undertaken activities to further three objectives:

- Minimize intrusions into the right-of-way and damage to facilities located in the right-of-way and maximize the capacity of the right-of-way to accommodate new and existing uses.
- Assure that cities are equitably compensated for use of the right-of-way and that such compensation is equitably applied to all users of the right-of-way.
- Encourage the development of state-of-the-art telecommunications infrastructure and assure that all parties have access to it.

The policies and procedures put in place to achieve these objectives must be applied in a nondiscriminatory way to all communication companies that use the public rights-of-way. Developing such policies and procedures is just one of the challenges faced by cities since communications companies provide a wide array of differing, but often overlapping services, and are governed by different state and federal regulatory requirements, or in some cases not governed at all.

The Consortium, over the last seven months, has had an extraordinarily open process as it moved forward to develop model agreements and ordinances. The industry (55 representatives of over 20 companies and industry associations) was sent every copy and version of the draft model agreements, their written comments were solicited each time, and the Consortium met several times with the industry, including meetings with the Kansas Telecommunications Industry Association (KTIA) and the Missouri Telecommunications Industry Association (MTIA), as well as with individual industry representatives. In addition, individual members of the Consortium discussed the Consortium issues with industry representatives and brought those conversations and comments back.

Besides having an extensive open process of review, discussion, and redrafting (schedule attached) the Consortium has made every attempt to accommodate the interests of the telecommunication and cable industries. Of course, the industry is not monolithic and does not always speak with one voice on many matters. For example, while incumbents advocated a slow, drawn-out process, new providers advocated a swifter one. The Consortium and its members made a diligent effort to accommodate all parties.

As the Consortium proceeded with its drafting of model agreements and ordinances the Consortium and its members made every possible effort to accommodate individual and collective comments on the drafts. Many changes were made and every comment was discussed and considered. In the end the Consortium's goal was to develop model agreements that would help move the negotiating process forward in each community and identify the key issues of the industry and local governments. The Consortium was successful in doing that. However, not every issue could be resolved to everyone's satisfaction.

Although over the last few months the Consortium discussed many different issues, two principal ones occupied most of the discussions. The first is the adoption of right-of-way management practices that minimize disruption to the right-of-way and damage to facilities already in the ground and maximize the capacity of the right-of-way to accommodate new infrastructure. The Consortium has discussed a number of options with its members and providers that would encourage joint construction of new facilities and require, in certain high use corridors, excess conduit so that the next company laying fiber will not have to dig up the right-of-way. Such practices will benefit all users of the right-of-way.

The other principal issue is compensation for use of the right-of-way. The objective of Consortium members is to make sure that all users of the right-of-way are paying a fair and reasonable amount, exactly as stated in the Telecommunications Act of 1996, for the use of this scarce commodity. Fair compensation assures that the right-of-way will be used wisely and that citizens are not subsidizing for-profit services that may not even be available to them.

The Consortium and its members understand that the communications industry is in continuing flux with new technologies, changing industry structure, and ever evolving regulatory schemes. The Consortium is committed not only to its three main goals; minimizing disruptions to the right-of-way, assuring that local governments receive just compensation for use of the right-of-way, and encouraging the development of a state-of-the-art communications infrastructure; but also to pursuing these goals in partnership with the communications industry. The Consortium feels strongly that these are matters of local control and can be addressed in such a manner as to meet the individual needs of each local government and the companies wishing to use the right-of-way.

### **Chronology of Model Agreement Development**

- Draft cable and communication agreements sent to cities and providers (July 2000)
- Written comments solicited from all parties (July—August 2000)
- Separate meetings with communication and cable companies (August 2000)
- Second draft of agreements (September 2000)
- Additional written comments solicited from all parties (September—October 2000)
- Meeting with the Missouri Telecommunications Industry Association (MTIA) (September 2000)
- Meeting with Kansas Telecommunications Industry Association (KTIA) (September 2000)
- Cities meet individually with providers, solicited comments on the drafts, and shared the comments with the Consortium (July 2000 to present)
- Cities meet to discuss key issues (November 2000)
- Revised agreements developed into consolidated ordinance (November 2000)
- Final recommended versions of model ordinance and agreements (December 2000)

# Kansas City Regional Telecommunications Consortium

## Membership February 2001

Belton, Mo  
Bonner Springs  
Blue Springs, Mo  
Cass County, Mo  
DeSoto, Ks  
Fairway, Ks  
Gardner, Ks  
Gladstone, Mo  
Grain Valley, Mo  
Grandview, Mo  
Harrisonville, Mo  
Independence, Mo  
Kansas City, Mo  
Kearny, Mo  
Leavenworth, Ks  
Leawood, Ks  
Lee's Summit, Mo  
Lenexa, Ks  
Liberty, Mo  
Manhattan, Ks  
Merriam, Ks  
Mission, Ks  
Mission Hills, Ks  
Mission Woods, Ks  
North Kansas City, Mo  
Oak Grove, Mo  
Olathe, Ks  
Ottawa, Ks  
Overland Park, Ks  
Parkville, Mo  
Platte City, Mo  
Prairie Village, Ks  
Raymore, Mo  
Raytown, Mo  
Richmond, Mo  
Riverside, Mo  
Roeland Park, Ks  
Salina, Ks  
Shawnee, Ks  
Unified Govt. of Wyandotte County/KCK





**UNIFIED GOVERNMENT OF WYANDOTTE COUNTY  
& KANSAS CITY, KANSAS  
PUBLIC WORKS DEPARTMENT**

ONE McDOWELL PLAZA

701 NORTH 7<sup>TH</sup> STREET, 66101

(913) 573-5700  
FAX (913) 573-5727

February 15, 2001

Senator Karin Brownlee  
State Capital Building  
Topeka, Kansas 66612

Dear Senator Karin Brownlee and Members of the Commerce Committee:

This letter is written to you on behalf of the Unified Government as a member of the MARC Consortium. We are opposed to the adoption of Senate Bill 306 for the following major reasons:

1. The State should protect and uphold the local authority to:
  - Manage its public rights-of-way.
  - Receive fair and reasonable compensation for management and use of public rights-of-way.
  - Protect the rights of all rights-of-way users.
  - Hold accountable those responsible for the restoration of rights-of-way.
  - Keep and maintain permit, location, inspection and pavement restoration management tools.
  
2. Limiting the Cities' authority to franchise will:
  - Significantly reduce revenue
  - Give away a limited public resource to private beneficiaries.
  - Create additional tax burden to all citizens for maintenance, particularly road surfaces.
  - Discriminates against compensation arrangements from other right-of-way users in the City ie, Water, Gas, Sanitary, Electric.
  
3. Additional telecommunication facilities in the public right-of-way will have major cost impact.
  - The amount of right-of-way used is affected by the number of projected companies.
  - Repeated trenching and construction in the right-of-way accelerates road surface deterioration.
  - Telecommunications facilities create additional safety hazards.
  - Telecommunications facilities affect rights-of-way aesthetics and impose additional make ready costs on the other right-of-way utility occupants.

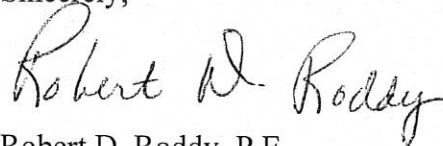
Senate Commerce Committee  
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- Creates disruptions to businesses and loss of revenue.
  - a. Key to our concern would be the inability to effectively manage our public rights-of-way for essential services, storm, sanitary, electric and water.
    - i. Telecommunication pass throughs will be end-running local authority at an unprecedented pace.
    - ii. Already congested rights-of-way with additional conduit banks further alienate underground space.
    - iii. Due to separation requirements of facilities, the presence of one utility sterilizes the space on either side.
    - iv. Sterilized space or congestion means less space for entrants or forces them to go deeper which may be cost prohibitive.
      - a. Future users would be at a competitive disadvantage due to unavailability of right-of-way space without proper management.

On behalf of the Unified Government, we implore you to reject SB306 in toto, for we believe that the industry is experiencing a case of buyer's remorse.

Thank you for your consideration of our concerns and your time.

Sincerely,



Robert D. Roddy, P.E.  
Senior Manager, Public Works Dept.

RDR:hj

cc: Frederick Backus  
John Mendez  
Sharon Meyers  
George Sooter



February 14, 2001

Senator Karin Brownlee  
State Capitol, Room 136N  
Topeka, KS 66612

Dear Senator Brownlee:

I very much appreciated the opportunity to discuss municipal issues with you on Tuesday and to express my concern with Senate Bill 306 dealing with telecommunications. It was not surprising to me that telecommunications companies are seeking legislative relief from some of the provisions in the Mid-America Regional Council franchise/right-of-way prototype, given the length of time taken in the production of the document, its 75-page length, and, in my view, many of the excessive restraints and costs imposed on the applicants. Westwood was never a part of the MARC process, choosing instead to deal directly with the companies.

Our approach recognized the accomplishment of three major objectives:

- We needed to ensure that damage to public and private property associated with telecommunications projects was repaired appropriately and safe construction practices were followed at all times.
- Given the mergers and acquisitions in the industry, we needed to know current ownership of the companies.
- If a provider added new services during the franchise period, negotiations would automatically re-open so our residents could be offered the latest in service and technology.

I might note that Westwood does not place much emphasis on franchises as a revenue source, our rate being 0.12%.

With those objectives in mind, our first negotiations were with Southwestern Bell and Time Warner Cable, resulting in a franchise document for multi-service

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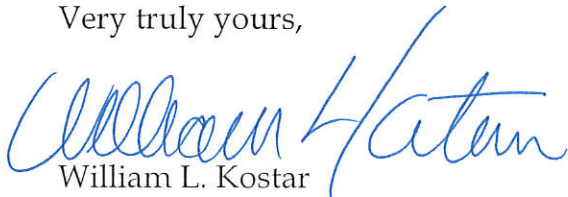
providers and a separate one for companies limited to cable television. Those documents, which I've enclosed, have subsequently been adopted by Sprint, Axon, and Everest (with minor modifications made at the applicants' request), the last using both.

I believe our approach has been shown to be an expeditious, cost effective, and even-handed process which still, very importantly, preserves the home rule rights and authority necessary for us to address local concerns of public safety, control, and use of rights-of-way. I know of no municipality in the Kansas City Metro which has adopted the MARC approach in its entirety. In fact, many, like Westwood, don't use any of it.

In its attempt to create a Kansas City metro-wide level and fair playing field for telecommunications providers, I'm afraid an unnecessarily complex, burdensome, and ultimately unfair approach resulted. However, legislative relief at the state level is an inappropriate approach. Rather, I would suggest the Kansas League of Municipalities in Kansas City, the Johnson/Wyandotte Council of Mayors, or perhaps even the courts. Finally, I also believe the free market will encourage the proliferation of both providers and services throughout the state.

If I can be a resource for you on this or other municipal issues, please feel free to call on me.

Very truly yours,

  
William L. Kostar  
Mayor

WLK:km  
enc

**DRAFT**

ORDINANCE NO. \_\_\_\_

AN ORDINANCE granting to Everest Midwest Licensee LLC a telecommunications franchise, prescribing the terms thereof and relating thereto, and repealing all ordinances or parts of ordinances inconsistent with or in conflict with the terms thereof.

**FRANCHISE BETWEEN THE CITY OF WESTWOOD  
AND EVEREST MIDWEST LICENSEE LLC**

**SECTION 1. Grant.** Franchisee is granted permission pursuant to K.S.A. 12-2001, *et seq.*, as amended, to erect, install, construct, repair, replace, and maintain equipment, systems, supporting structures, appurtenances, and other property in connection with the operation of the franchise in, on, over, under, upon, along and across the rights-of-way of the City, for the purposes of constructing, operating, and maintaining franchise properties for the origination, reception, transmission, amplification, and/or distribution of the franchise services.

**SECTION 2. Use of Franchisee's Facilities by Other Providers.** Subject to Section 18 herein, nothing in this franchise agreement shall be construed to require or permit or prohibit the use, licensing, contracting or leasing of franchisee's facilities, system or capacity to another provider of services without any and all parties involved obtaining permission and a franchise from the City. Franchisee shall cooperate with the City by informing city staff at least annually of the identity of any and all such operators, including contact persons. It is understood, however, that Franchisee is not, by providing such information, verifying that such operators are specifically providing services within the City, but only providing the identity of such operators who have the regulatory authority and an agreement with Franchisee which would allow such service. This provision shall apply to, but not be limited to, leasing or other use of franchisee's facilities, systems or property to or by a third party for re-sale of telecommunications or other cable services. However, franchisee shall not be required to disclose information about private lines, but shall disclose information about persons or entities leasing unbundled network elements or persons or entities using franchisee's lines for re-sale of services. Nothing herein is intended to limit or prohibit any use of Franchisee's system by another party as required by federal law.

**SECTION 3. Nondiscrimination Clause.** The use or occupation of the public rights-of-way shall be available in a competitively neutral and nondiscriminatory fashion.

**SECTION 4. Nonexclusive Clause.** The privilege to construct, erect, operate and maintain franchisee's system and to use or to occupy the public right-of-way is nonexclusive. The

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**FRANCHISE**

City expressly reserves the right to grant other nonexclusive franchises to other persons. However, nothing herein shall affect the City's rights to limit the number of franchises granted based upon all relevant considerations, including, but not limited to, physical space available within the rights-of-way.

**SECTION 5. Severability.** If any section, provision, paragraph, sentence, clause or phrase of this franchise agreement is held to be invalid or unconstitutional for any reason, the language in question shall be considered to be a separate, distinct and independent part of this franchise agreement, and such holding shall not affect the validity and enforceability of any other language of this franchise agreement.

**SECTION 6. Federal, State and City Jurisdiction.** This franchise agreement shall be construed in a manner consistent with all applicable federal, state and local laws. Franchisee's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Nothing herein shall affect franchisee's duty to comply with all applicable general laws and ordinances enacted by the City pursuant to that power.

**SECTION 7. Force Majeure.** Each and every provision hereof shall be subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond franchisee's or the City's control.

**SECTION 8. Definitions.** For the purpose of this franchise agreement, the following words and phrases and their derivations shall have the following meaning:

**"City"** -- shall mean the City of Westwood, Kansas, a municipal corporation, or its successors, and shall include when appropriate to the use of the term in context, the territorial boundaries of the City as now constituted or as shall hereafter exist.

**"Facilities"** -- shall mean franchisee's lines, conduits, wires, cables, pipes, poles, towers, vaults, and appliances, either under or above ground.

**"Franchise"** -- shall mean the agreement between the City and franchisee, or the right of franchisee to operate within the City's rights-of-way.

**"Franchisee"** -- shall mean Everest Midwest Licensee LLC, or its successors, transferees, or assigns.

**"Franchise Fee"** -- shall mean twelve one-hundredths of one per cent (.12%) of gross annual revenues as set forth herein imposed by the City. It shall not include: (1) any tax, fee, or assessment of general applicability (including any of which is imposed on franchisees or their services as long as such is not unreasonably discriminatory against franchisees or their subscribers); (2) requirements or charges incidental to the awarding or enforcing the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or (3) any other fee or charge imposed by state, federal, or local authority not specifically relating to franchise activities.

**"Franchise ordinance" or "Franchise agreement"** -- shall mean the ordinance passed to grant the franchise to franchisee. The ordinance shall be subject to the laws of the State of Kansas and the ordinances of the City of Westwood, Kansas.

**"Governing Body"** -- shall mean the present legislative body of the City of Westwood, Kansas; or any successor to the legislative powers of the present Governing Body;

**"Gross annual revenues"**-- shall mean those revenues, whether wholesale or retail, less uncollectibles, derived from the following:

1. Recurring local exchange service revenues for businesses and residences which include basic exchange service; Touch Tone, optional calling features and measured local calls;
2. Recurring local exchange access line service revenues for pay phone lines provided by franchisee to all pay phone service providers;
3. Local directory assistance revenue;
4. Line status verification/busy interrupt revenue;
5. Local operator assistance revenue;
6. Nonrecurring local exchange service revenue which shall include customer service for installation of lines; reconnection of service and charge for duplicate telephone bills.

Franchisee and City agree that all other revenues, including but not limited to, revenues from extended area service, unbundled network elements, nonregulated services, carrier and end user access, long distance and all other services not wholly local in nature are excluded from gross revenues.

Franchisee and City agree that gross revenues shall be reduced by bad debt expenses and uncollectibles and further agree that franchise fees collected and late charges shall not be included within gross revenues. If during the term of the ordinance Franchisee offers additional services of a wholly local nature which if in existence at the effective date of this ordinance would have been included within the definition of gross revenues, such services shall be included within gross revenues from the date of the offering of such services in City for the remaining term of the ordinance.

**" Normal Operating Conditions"** -- shall mean those service conditions that are within the control of franchisee. Those conditions that are not within the control of franchisee include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions, and significant legislative or regulatory requirements. Those conditions which are ordinarily within the control of franchisee include, but are not limited to, special promotions, regular peak or

seasonal demand periods, and maintenance or upgrade of the system.

" **Person**" -- shall mean any individual or association of individuals, or any entity, firm, partnership, corporation, limited liability company, trust or other business or government organizations.

" **Public improvement**" -- shall mean any existing or contemplated public facility, building or capital improvement project, including without limitation streets, alleys, sidewalks, sewer, water, drainage, right-of-way improvements, and public projects, including any project undertaken by the City or the Westwood Foundation, but not activities or projects undertaken by private developers or entities.

" **Public project**" -- shall mean any activity or project planned or undertaken by the City or any governmental entity, including but not limited to the Westwood Foundation, for construction, reconstruction, maintenance, or repair of public facilities or public improvements, or any other purpose of public nature, but not projects or activities undertaken by private developers or entities.

" **Right-of-way**" -- shall mean present and future streets, roadways, sidewalks, highways, alleys, public rights-of-ways, and public easements, including easements dedicated in plats, of the City of Westwood.

" **Street**" -- shall mean any public street, roadway, highway, alley, or other public right-of-way now or hereafter subject to the jurisdiction and regulation of the City as provided by the laws of the State of Kansas and as subsequently amended thereof.

" **System**" -- shall mean a system of antennas, cables, wires, lines, towers, waveguides, conductors, converters, equipment or facilities located within the City and designed and constructed for the purposes of conducting the franchise operations and providing service to subscribers.

" **Subscriber**" -- shall mean any person in the City who receives services from franchisee.

**SECTION 9. Franchisee is Without Remedy Against the City.**

The parties acknowledge that each has the right and authority to execute this instrument, and the execution of this instrument shall not be the basis for a cause of action. Franchisee agrees it is not damaged by, and will not seek any recourse against the City for the execution of this instrument. Franchisee expressly acknowledges that it accepted the franchise granted in reliance upon its independent and personal investigation and understanding of the power and authority of the City to grant the franchise



conferred upon franchisee. Franchisee acknowledges by its acceptance of the franchise that it has not been induced to enter into the franchise upon any understanding, or promise, whether given verbally or in writing by or on behalf of the City, or by any other person concerning any term or condition of this franchise not expressed in this franchise agreement.

Finally, franchisee acknowledges by the acceptance of the franchise that it has carefully read the provisions, terms, and conditions of this franchise agreement and is willing to, and does accept, all of the risk attendant to the provisions, terms, and conditions. However, neither party waives its rights to seek a judicial interpretation of this instrument or the rights or duties hereunder in the event a dispute should arise between the parties.

**SECTION 10.** Duty to Indemnify the City. Franchisee shall fully indemnify, release, defend and hold harmless the City, the members of the Governing Body, the mayor, and all other officials, employees and agents of the City when acting in their capacity as municipal officials, employees and agents, from and against any and all claims, demands, suits, proceedings, and actions, liability and judgment by other persons for damages, losses, costs, and expenses, including attorney fees or otherwise arising out of the actions of the franchisee or its agents, assigns, subcontractors, or other acting by or on behalf of franchisee to the extent that those activities relate to franchisee's activities in the rights-of-way of the City. Nothing herein shall be deemed to prevent the City, the members of the Governing Body, the mayor, and all other officials, employees and agents when acting in their capacity as municipal officials, employees and agents from participating in the defense of any litigation by their own counsel at their own expense. Such participation shall not under any circumstances relieve franchisee from its duty to defend against liability or its duty to pay any judgment entered against the City, the members of the Governing Body, the mayor, and all other officials, employees and agents. The City agrees to give written notice of any claim or demand within a reasonable time.

**SECTION 11.** Liability Insurance Requirement. Franchisee is self-insured. Upon written request, Franchisee shall provide certification of self-insurance, and applicable limits of self-insurance. Franchisee shall have the equivalent minimum coverage of one million dollars (\$1,000,000.00).

**SECTION 12.** Performance Bond Requirement. Franchisee shall at all times during the term of the franchise maintain in full

force and effect a corporate surety bond in a form approved by the City Attorney, in an amount of \$50,000, or as set forth in this franchise agreement by the City, renewable annually, conditioned upon franchisee's faithful performance of the provisions, terms and conditions of the franchise granted and conferred by ordinance. In the event the City shall exercise its right to revoke the franchise as granted herein, then the City shall be entitled to recover under the terms of said bond the full amount of any loss occasioned thereby. This provision shall be in addition to and supplemental to any other bonds or other requirements as the City may, from time to time, establish pursuant to its police powers and/or other lawful authority. However, any failure of franchisee to obtain any other bond unrelated to franchisee's activities in the right-of-way shall not form a basis for an allegation of violation of the franchise such as would be a basis for the termination thereof.

**SECTION 13.** City's Right to Audit and Access to Records. The City shall have access to and the right to examine, at all reasonable times, all books, receipts, files, records and documents of franchisee necessary to verify the correctness of any statement of gross revenues and to correct the same, if found to be erroneous. If such statement of gross revenues is incorrect, then such payment shall be made upon such corrected statement. Franchisee shall annually file in the office of the City Clerk a statement prepared by a person satisfactory to the City and franchisee showing gross annual revenues of franchisee as defined herein. Further, the City's acceptance of any payment determined as hereinbefore provided to be deficient shall not be construed as a release of liability from the City or an accord or satisfaction of any claim that the City may have for additional sums owed by franchisee as provided for in this franchise.

**SECTION 14.** System Mapping Requirement. Within sixty (60) days of completion of initial or any additional construction, each franchisee shall provide the City Clerk a complete set of plans with accurate and complete information in a format as requested by the City showing and describing the exact locations, both horizontal and vertical, of all facilities constructed and existing within the public rights-of-way and private easements as of the time of construction. Such mapping and identification shall be at the sole expense of franchisee.

**SECTION 15.** Description of Use Requirement. Franchisee shall be required to provide the City with a current description of the use and services using property within the City right-of-

way. In the event franchisee changes or adds to the use of such property or services beyond what is described as a component of ❖ gross revenues❖ as defined herein, franchisee is required to notify the City of such change or addition.

SECTION 16. Exclusive Benefit of Franchise Right by Franchisee. The rights granted to franchisee by this franchise to use the public rights-of-way shall be for the sole use of franchisee. Franchise use is limited to the use that franchisee has filed with the City in accordance with Section 15 of this franchise. These rights are for the exclusive benefit of franchisee, except where use by the City is allowed under the terms of this agreement. No other party may use franchisee's right, unless otherwise authorized by the City. Nothing herein, however, shall be construed to require franchisee to undertake any action that would constitute a violation of federal law.

SECTION 17. Assignment of Franchise. Pursuant to the written permission of the City, which shall not be unreasonably withheld, franchisee shall have the right to assign this franchise, and the rights and privileges herein granted, to any person, firm, corporation or entity, and any such assignee, by accepting such assignment, shall be bound by the terms and provisions hereof. If Franchisee should seek approval to assign this franchise, Franchisee shall notify the City in writing. All such assignments shall be in writing and authenticated copies thereof shall be filed with the City Clerk. This franchise shall be assignable only in accordance with the laws of the State of Kansas, as the same may exist at the time when any assignment is made. Franchisee shall at all times keep the City apprised of its correct name and notify the City of any change of name.

SECTION 18. Duty to Comply with Law. Franchisee agrees to comply with all law and regulations concerning the provision of local telecommunication services. All technical standards governing construction, reconstruction, installation, operation, testing, use maintenance, and dismantling of the facilities in the rights-of-way shall be in accordance with applicable present and future federal, state and City laws and regulations, including, but not limited to, the most recent editions of the National Electrical Code, the National Electrical Safety Code, and the Fiber Optic Cable Installation Standard of the Telecommunications Industry Committee or such 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 ordinance may be additional to or stricter than such minimum standards.

**SECTION 19. Subscriber Rates.** Franchisee charges to subscribers will comply with all applicable regulations. When so provided by law, the City may at any time during the existence of this franchise agreement fix a reasonable schedule of maximum rates to be charged to the City and its residents.

**SECTION 20. Rights of Individuals.**

(a) Franchisee shall not deny service or otherwise discriminate against subscribers or general citizens on the basis of race, color, age, religion, national origin, disability or sex. Franchisee shall comply at all times with all other applicable federal, state, and local laws and regulations, and all executive and administrative orders relating to nondiscrimination which are hereby incorporated and made part of this ordinance by reference. However, a failure to comply with this section shall not be a basis upon which the City may terminate this franchise unless such violation relates to franchisee's franchise activities hereunder.

(b) No cable, line, wire, or other piece of equipment owned by franchisee shall be installed by franchisee in the subscriber's premises, other than in appropriate easements, without first securing any required consent. If a subscriber requests service, permission to install upon subscriber's property shall be presumed. Where a property owner or his predecessor has granted an easement including a public utility easement or a servitude to another and the servitude by its terms contemplates a use such as franchisee's intended use, franchisee shall not be required to obtain the written permission of the owner for the installation of the service.

**SECTION 21. Franchisee Information.** Franchisee shall designate a person familiar with the system, who is responsible for timely satisfying the information needs of the City and other users of the right-of-way.

**SECTION 22. Rights Reserved to the City.** In addition to any rights specifically reserved to the City by this franchise, the City reserves to itself every right and power available to it under the constitutions of the United States and the State of Kansas, and any other right or power, including, but not limited to all police powers and authority to regulate and legislate to protect and promote the public health, safety, welfare, and morals. Nothing in this franchise shall limit or govern the right of the City to exercise its municipal authority to the fullest extent allowed by law. Franchisee further agrees to conduct its activities in accordance with all municipal ordinances, as amended from time to time, including, but not limited to, Westwood Municipal Code Secs. 13-101 et seq. However, violations of law which are unrelated to franchise activities shall not be a basis for terminating the franchise hereunder.

**SECTION 23. Use of Public Right of Way.** In the use of right-of-way under this franchise, franchisee 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 and is subject to all applicable laws, orders, rules and regulations adopted by governmental bodies now or hereafter having jurisdiction. In addition, franchisee shall be subject to all technical specifications, design criteria, policies, resolutions, and ordinances now or hereafter adopted or promulgated by the City relating to permits and fees, sidewalks, and pavement cuts, utility location, construction coordination, surface restoration, and other requirements on the use of the right-of-way.

**SECTION 24. Preference of Franchise System Placement.**

- (a) **Placement Standards.** All facilities constructed, replaced, or relocated in the rights-of-way after the date hereof shall be placed underground unless otherwise agreed to by the City. Where there are obstructions in the rights-of way such as trees, shrubs, other utilities, commercial signs, man-made structures, or other like obstruction which makes the cost of such underground burial unreasonable, Franchisee may request a waiver of this requirement, in which event the City will not unreasonably withhold consent to such waiver. Underground placement of facilities shall comply with all existing City

standards as well as the following standards, unless waived in writing by the City in its sole discretion:

(1) Cables shall be buried a minimum of 24 inches below finished grade along improved streets, or 24 inches below proposed finished grade adjacent to unimproved streets.

(2) Cables shall be buried no closer than 3 feet from the existing back of the curb and gutter preferably as far from the curb and gutter as possible.

(3) Facilities shall be placed in a manner which minimizes adverse impact on public improvements, as reasonably determined by the City. Where placement is not otherwise regulated, the facilities shall be placed with adequate clearance from such public improvements so as not to impact or be impacted by such public improvement as defined in the City's technical specifications and design criteria.

(4) Franchisee shall not erect any poles within the City unless approval is obtained in advance from the City. Above ground placement of facilities shall comply with the standards provided by the City.

(b) Above-Ground Placement on Another Franchisee's Distribution Facilities. In those areas of the City where franchisee's cables are located or to be located on the above-ground transmission or distribution facilities of another franchise operator (for example telephone poles), in the event that the facilities of such other franchise operator are placed underground, then franchisee likewise shall construct, operate and maintain its transmission and distribution facilities underground, at franchisee's expense. However, franchisee shall have a reasonable period of time (not to exceed ten (10) years) in which to place its facilities underground after the date on which the facilities of such other franchise operator are placed underground.

SECTION 25. System Construction Standards. The construction, reconstruction, installation, operation, testing, use, dismantling and maintenance of the properties and facilities of franchisee's system shall be in accordance with engineering practices utilizing due care and shall be in compliance with then-existing laws, ordinances and regulation. All transmissions and distribution structures, lines and equipment erected by franchisee within the City shall be so located as to cause minimum interference with the proper use

of streets, easements and swales, sidewalks, alleys, and other public ways and places, and to cause minimum interference with the rights and reasonable convenience of property owners who join any of the said streets, easements and swales, sidewalks, alleys or other public ways and places. Franchisee shall not construct or reconstruct any of its franchise system located upon, over, under or within the public streets or public ways of the City without first having submitted in writing a description of its planned improvement to the Director of Public Works of the City and having received a permit for such improvement from said Director. All poles and above ground facilities need to be in compliance with current City standards.

**SECTION 26. Franchise System Construction / Repair / Maintenance.**

- (a) Permits Requirement. Prior to any work being done within existing public right-of-way, franchisee or its agent shall first obtain approval from the City for overhead facilities, and any necessary permits from the City.
- (b) Notice of Work. Franchisee shall notify the City not less than three (3) working days in advance of any construction, reconstruction, repair, location or relocation of facilities which would require any street closure which reduces traffic flow to less than two lanes of moving traffic. Except in the event of an emergency as reasonably determined by franchisee, no such closure shall take place without notice and prior authorization from the City. The City shall follow its policies in the granting or denial of such authority, which shall not be unreasonably delayed. In addition, all work performed in the traveled way or which in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected. Such signing shall be in conformance with the latest edition of the Federal Highway Administration's Manual on Uniform Traffic Control Devices, unless otherwise agreed to by the City.
- (c) Safety. Franchisee shall at all times exercise due care attendant to and appropriate to the risks involved and shall construct, operate and maintain commonly accepted methods and devices for preventing

failure and accidents which are likely to cause damage, injury and nuisance to the public. Additionally, all facilities shall be kept in a suitable condition and in good order and repair so as not to endanger or interfere with pedestrian or vehicular traffic on City streets.

(d) Disturbances and Damages. Any disturbance or damage to a street or public property caused by franchisee during the course of constructing, operating or maintaining its system facilities shall be replaced or restored to as good or better condition as before the disturbance or damage in accord with the City's established standards at the sole expense of franchisee as soon as possible. The City Public Works Director or other designee of the City shall have the full and exclusive authority in the exercise of his or her reasonable discretion to determine if the quality of such replacement or restoration is adequate and satisfactory. In the event such street or property is not adequately and satisfactorily replaced or restored, the Public Works Director or his agent shall have the authority to require franchisee to do any necessary work to place the street or property in such condition, or the City can do or contract for such work to be done at franchisee's sole expense. However, franchisee shall have fourteen (14) calendar days after receipt of written notice to cure and rectify any deficiencies before the City undertakes to rectify any such deficiencies.

(e) City Inspection of Activities and System. At the completion of any work done within the existing public rights-of-way, franchisee must notify the City. Inspections of completed work may be performed and franchisee shall be responsible for the costs to perform such inspection. Failure to notify the City of the completion of work or failure to comply with the inspection process or other inspection requirements of the City shall be a violation of this franchise agreement and the City shall have the right to revoke a franchise as provided herein should such a violation occur. Upon forty-eight (48) hours' written notice, and during normal business hours, franchisee shall permit examination by any duly authorized representative of the City of all franchise property and facilities situated within the City, and all records relating to the franchise, provided they



are necessary to enable the City to carry out its regulatory responsibilities under local, state and federal law, and this franchise. Franchisee shall have the right to be present for any such examination.

If any such records are proprietary or must be kept confidential by state, federal or local law, upon proper request by franchisee, such information obtained during such an inspection shall be treated as confidential, making it available only to those persons, who must have access to perform their duties on behalf of the City. To the extent any federal requirement for privacy applies to the information to be submitted, said law shall control.

- (f) Office Buildings and Residences. In the event franchisee decides to offer services to businesses or residents in the City, franchisee shall bury their cables and wires where other franchise operators have buried their cables and wires between the pole and the building or residence, and that franchisee will not place the wire over the parking lot or yard.

SECTION 27. Requirement to Coordinate Construction / Repair / Maintenance Activities. Prior to the end of each calendar year, the City, if possible, will provide franchisee with a copy of the City's annual capital improvements program. Within 30 days, franchisee shall provide the City with information regarding any then-planned construction activities within the City, including advance notice of all known new construction and all relocation of facilities located in the City public right-of-way or in private easement with the City proposed for the following year. Construction shall be coordinated and scheduled to minimize public inconvenience, disruption and damage to the public rights-of-way. Nothing herein shall preclude franchisee from undertaking reasonable modifications to its plans, and franchisee will undertake to give notice promptly of such modifications to City.

SECTION 28. Use of Poles and Other Facilities by Other Parties. Nothing in this franchise agreement shall be construed to require or permit any cable, telephone, electric light, or power wire attachments by either the City or franchisee on the poles or other facilities of the other. If such attachments are desired by the City or franchisee, then a separate noncontingent agreement shall be a prerequisite to such attachments.

SECTION 29. Requirement to Temporarily Move Wires. On the request of any applicant who is compliance with City procedures and ordinances, franchisee shall remove or raise or lower its wires temporarily to permit the moving of houses or other structures. The expense of such temporary removal, raising or lowering of wires shall be paid by the party or parties requesting the same, and franchisee may require such payment in advance. Franchisee shall be given not less than fifteen (15) days' written notice from the applicant detailing the time and location of the moving operations, and not less than 24 hours' advance notice from the applicant advising of the actual operation.

SECTION 30. Removal of Franchise System. Franchisee shall promptly remove from the public streets and other public ways where its properties are located, all or any part of its facilities or properties located above ground including, but not limited to overhead wires or cables or pedestals, when franchisee ceases to use any part, or all of its franchise system for a continuous period of twelve months, or when the franchise is terminated, forfeited, revoked or declared void pursuant to notice as provided elsewhere in this franchise agreement, unless otherwise authorized and permitted by the City or unless used by franchisee to provide intra-state and/or interstate telecommunications services. Franchisee shall be entitled to receive notice in writing from the City setting forth the properties to be removed. Franchisee shall have one hundred eighty (180) days from the date upon which said notice is received to remove all properties located above ground as required. Such removal shall be performed by franchisee at the sole expense of franchisee. Any disturbance or damage to a street or public property caused by franchisee during the course of removal of its system facilities shall be replaced or restored to as good or better condition as before the disturbance or damage at the sole expense of franchisee.

The City Public Works Director or his or her agent shall have the full and exclusive authority in the exercise of his or her reasonable discretion to determine if the quality of such replacement or restoration is adequate and satisfactory. In the event such street or property is not adequately and satisfactorily replaced or restored, the Public Works Director or his agent shall have the authority to require franchisee to do any necessary work to place the street or property in such condition, or the City can do or contract for such work to be done at franchisee's sole expense. The insurance, indemnity and bond provisions of this franchise agreement shall remain in full force and effect during the entire term of removal.

(a) Failure to Remove System. If franchisee fails to commence removal of its above-ground system within one hundred eighty (180) days subsequent to receipt of notice to remove the system or if removal is not completed within one (1) year subsequent to receipt of notice to remove the system, the City shall have the right to:

(1) Claim Ownership. The City may declare the system abandoned and all right, title and interest to the system to be in the City with all rights of ownership including, but not limited to, the right to operate the system or transfer the system to another for operation. Franchisee shall receive no compensation; or

(2) Remove at Franchisee's Expense. The City may declare the system abandoned and cause the system to be removed at no cost to the City. The cost of the removal shall be recoverable pursuant to the insurance, indemnity and bond provisions of this franchise agreement or from franchisee directly.

(b) Abandoned Property. Any property abandoned by franchisee that the City claims as hereinabove allowed shall become the property of the City and franchisee agrees to execute and deliver an instrument in writing, transferring its ownership interest in any such property to the City. Additionally, any notice given by the City as provided hereinabove, shall be deemed notice to any other persons claiming interest in said property of franchisee, and said persons shall be subject to all the provisions hereinbefore provided.

**SECTION 31. No Liability for City Damage to Franchise System.**

The City shall not be liable for any damage to or loss of any of franchisee's facilities within the public right-of-way or private easement as a result of or in connection with any construction, excavation, grading, filling or work of any kind, including any public works or public improvement work by or on behalf of the City, except to the extent such damage or loss is caused by a negligent, willful, intentional or malicious act or omission of the City or, to the extent applicable, as provided in K.S.A. 66-1801 et seq. as amended.

**SECTION 32. City's Right Preeminent.** The privilege to use or occupy the public right-of-way granted to franchisee under this franchise agreement shall in all matters be subordinate to the City's right to use or occupy the public right-of-way.

Without limitation upon the rights which the City might otherwise have, the City does hereby expressly reserve the right to exercise its governmental powers, now or hereafter vested in or granted to the City.

- (a) Relocation for Public Improvements. Within ninety (90) days of written request from the City, franchisee shall forthwith remove, relocate, reinstall or adjust its facilities or any such property within the public right-of-way or private easements when removal, relocation, reinstallation or adjustment is necessary for any public improvement or public project. Such removal, relocation, reinstallation or adjustment shall be performed by franchisee at the sole expense of franchisee, but franchisee shall only be required to do so at its expense one time for each project.
- (b) Emergency. The City retains its rights as provided by law in the event of an emergency.

**SECTION 33. Consideration.** Because franchisee is initially not using the public right-of-way for service to subscribers within the City of Westwood, franchisee shall pay One Dollar (\$1.00) per linear foot of cable, line, conduit, wire or pipe located within the rights-of-way of the City per year. The first payment shall be due on the effective date of the ordinance. Such annual payments shall be made on the anniversary date of this franchise each year. However, in the event franchisee begins providing service to subscribers in the City of Westwood, such services shall not commence without notification to the City, and the fee hereunder shall be twelve hundredths of one per cent (.12%) of the franchisee's gross annual revenues as defined herein for services within the City. Said sums shall be paid monthly withing forty-five days of the last day of the applicable month for which a fee payment is due and owing. Franchisee shall pay interest at an annual rate of ten percent (10%) for each month or fraction thereof of any late payment that exceeds sixty (60) days from the last day of the applicable month for which a fee payment is due and owing in this franchise. Payment shall be made by any method approved by the City and Franchisee.

**SECTION 34. Other Payments and Charges.** The payments herein provided shall be in addition to, not in lieu of, all other taxes, charges, assessments, fees and impositions that are or may be imposed by the City, with the exception of an annual occupation license. No other fee or charge shall be assessed pursuant to the authority of the City to assess a fee or

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charge for the use of the rights-of-way in the provision of local telecommunications services.

**SECTION 35.** **Term.** This franchise shall be effective for a term of one (1) year from the effective date of this ordinance. This agreement shall renew annually unless either party gives notice of its intent to terminate the agreement four (4) months prior to the end of the then current term. Nothing herein, however, shall operate to void or vitiate either party's rights to terminate or renegotiate the franchise as set forth herein.

**SECTION 36.** **Effectiveness and Acceptance of Ordinance.** The franchise shall take effect as provided by statute.

**SECTION 37.** **Notification Procedure.** Whenever either party hereto shall be required or permitted to give notice to the other, such notice shall be in writing. If notice is to be served upon the City, it shall be delivered either by first class United States mail addressed to the office of the City Clerk or by personal delivery of the same to said person, or a duly authorized agent for receiving the same. If said notice is to be served upon franchisee, the same shall be delivered by either first class United States mail addressed to Everest Midwest Licensee LLC, d/b/a Everest Midwest, or by personally delivering the same to such people as hereinbefore provided, or such other person as franchisee shall from time to time direct.

**SECTION 38.** **Change of Use or Addition to Current Use.** Franchisee shall cooperate with the City by informing City staff of any change or addition to the current use of the franchise system. Additionally, franchisee shall inform the City of any new developments, including new technologies, new services or material improvements to existing technology that would constitute new, modified or additional services by franchisee, as well as any sale or transfer of franchisee's system. Transfers include leasing of system capacity, but not the use of private lines.

**SECTION 39.** **Sale, Lease, or Transfer of Franchise to Third Party.** Franchisee shall notify the City of any contract with a third party to sell, use, lease, borrow or transfer franchisee's physical facilities in the City or any part thereof. This provision shall not apply to franchisee's provision of telecommunications services to its customers, re-sale of telecommunications services or the lease of unbundled network elements, which transactions are governed elsewhere herein.

**SECTION 40.** **Annual Reports.** Upon written request by the City, franchisee shall provide the following information unless such information is publicly available, in which case franchisee shall have no obligation to provide the information, and City may obtain said information from other sources:

- (a) A summary of the previous year's activities in development of the franchise system, including but not limited to, services begun or discontinued during the year;

- (b) A list of franchisee's officers, members of its board of directors, and other principals of franchisee;
- (c) A list of stockholders or other equity investors holding five percent (5%) or more of the voting interest in franchisee; and
- (d) Information as to the number of subscribers in the City.

**SECTION 41. Violation.** Failure on the part of franchisee to comply with one or more of the terms, conditions or provisions of this franchise agreement shall constitute a violation of this franchise agreement. The City shall provide written notice to franchisee of any such violation. Franchisee shall have fourteen (14) days subsequent to receipt of notice to inform the City in writing of the action franchisee will take to correct the violation. Such corrective action shall be completed within thirty (30) days subsequent to receipt of notice unless otherwise agreed to by the City.

**SECTION 42. Revocation of Franchise.** In addition to all other rights and powers herein or otherwise enjoyed by the City, the City shall have the additional and separate right to revoke a franchise and all rights and privileges of the franchisee as a result of and in response to any of the following events or reasons:

- (a) Franchisee fails to remedy violation of a term, condition, or any provision of this franchise agreement or federal or state law whether the same be committed by act or omissions, within thirty (30) days following the date upon which franchisee receives written notice of such violation; or
- (b) Any provision of this franchise agreement is adjudged by a court of competent jurisdiction to be invalid or unenforceable and said judicial act and declaration is deemed by the Governing Body to constitute such a material consideration for the granting of the franchise as to cause the same to become null and void; or
- (c) Franchisee is adjudged bankrupt, becomes insolvent, suffers a transfer of its properties pursuant to an action of its creditors upon an instrument or judicial declaration securing said creditors' interest in said properties, and thereafter the same be not redeemed by franchisee within thirty (30) days from the date of said transfer, or franchisee is otherwise unable or unwilling to pay its debts and obligations as the same accrue; or
- (d) Franchisee commits an act of fraud or deceit against the City in obtaining the grant of the franchise herein conferred, or upon being granted franchisee commits such an act against the City.

To revoke this franchise under this paragraph or any other provision of this franchise, the following procedure shall apply. The City shall enact an ordinance setting out the grounds upon which said franchise is to be canceled and terminated. Prior to the enactment of such ordinance, franchisee shall be provided with written notice by certified mail not less than thirty (30) days prior to the meeting of the Governing Body at which the ordinance of revocation is to be considered, and franchisee shall be allowed to address the Governing Body before final consideration and enactment of any such ordinance. Nothing herein shall preclude either party from exercising its rights at law or in equity to seek an adjudication of the actions of the other party hereto.

**SECTION 43. Extended Operation and Continuity of Services.** Upon either expiration or revocation of the franchise, the City shall have discretion to permit and/or to require franchisee to continue to operate the franchise for an extended period of time not to exceed six (6) months from the date of such expiration or revocation. Franchisee shall continue to operate the system under the terms and conditions of the franchisee ordinance and to provide the regular subscriber service and any of the services that may be provided at that time.

**SECTION 44. Failure to Enforce.** Neither party's failure to enforce and remedy any noncompliance by any party of the terms and conditions of this franchise shall constitute a waiver of either party's rights or obligations as herein provided.

**SECTION 45. Franchisee Promise to Not Interfere with Other City Agreements.** Franchisee agrees to not interfere with other agreements between the City and other franchise operators. Specifically, if the City requires or negotiates to have another franchise operator with which franchisee has contracted to use that franchise operator's poles (such as KCPL) bury their cables, franchisee will not interfere with the agreement and/or not allow the other franchise operator to bury their lines. Additionally, franchisee agrees that in the event the other franchise operator decides to bury their cables for any reason, that franchisee shall not try to prevent the other franchise operator from this action. Franchisee also agrees that it will not at this or any other time place any new poles or repair current poles in the right-of-way without City authorization.

**SECTION 46. Effective Date.** This ordinance shall take effect and be in force as provided by statute.

PASSED by the Governing Body the \_\_\_\_ day of \_\_\_\_\_, 2001.

APPROVED by the Mayor the \_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
WILLIAM L. KOSTAR, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Pamela I. Jackson

\_\_\_\_\_  
James R. Orr

City Clerk

City Attorney



DRAFT

CITY OF WESTWOOD, KANSAS

ORDINANCE NO. \_\_\_\_\_

PART 1

GENERAL

Section 1. Intent.

Everest Midwest Licensee LLC ("Everest Midwest") applied for a cable communications franchise, and agreed to comply with all applicable ordinances, statutes, regulations, rules, and other laws for the construction, maintenance, and operation of a cable communications system. It is the intent of this Franchise Agreement to provide for and specify the means by which the City shall grant to Everest Midwest, and by which Everest Midwest will exercise, authority to continue providing cable communications service to the residents of the City of Westwood, Kansas. Absent a provision in this Franchise Agreement, or other waiver, neither the City of Westwood nor Everest Midwest shall be required to forego any rights it may possess under the First Amendment or any other provision of the United States or Kansas Constitutions, or any statute, regulation, rule or decision of any federal, state or local agency or court having jurisdiction.

Section 2. Definitions.

For the purpose of this Franchise Agreement, the following terms, phrases, words or their derivations shall have the following meanings. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given the meaning as defined in the Act. Words not defined in the Act shall be given their common and ordinary meaning. When used in this Franchise Agreement, defined terms shall be capitalized.

2.01 "Act" means the Cable Communications Policy of 1984, Public Law Number 98-549, as amended by the Cable Television Consumer Protection and Competition Act of 1992, Public Law Number 102-385, and as further amended by the Telecommunications Act of 1996, Public Law 104-104. The term "Act" shall include future amendments to the Communications Act of 1934.

2.02 "Affiliate" means, when used in relation to Everest Midwest, another Person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or common control with Everest Midwest, or any of Everest Midwest's principal partners; and when used in relation to the City, any agency, board, authority, or political subdivision affiliated with the City or other person in which the City has a legal or financial interest.

2.03 "Everest Midwest" means Everest Midwest Licensee LLC, a Delaware limited liability company authorized to do business in the State of Kansas, and its successors, assigns, and permitted transferees.

2.04 "Basic Service" means any service tier, which includes the retransmission of local television broadcast signals, or such other definition as may be adopted by federal law.

2.05 "Cable Communications System" means a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service which is provided to multiple Subscribers within the City, but the term Cable Communications System does not include (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves subscribers without using any public Right-of-Way; (3) a facility or common carrier which is subject, in whole or

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in part, to the provisions of 47 U.S.C. §§ 201-226, except that such facility shall be considered a Cable Communications System (other than for purposes of 47 U.S.C. § 541) to the extent such facility is used in the transmission of video programming or other programming services directly to Subscribers; or (4) any facilities of any electric utility used solely for operating its electric utility system.

**2.06 “Cable Service”** means the transmission via closed transmission paths to Subscribers of video programming or other programming services, and Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

**2.07 “Channel”** means a frequency band, which is capable of carrying a traditional television signal, a number of audio, digital and other non-video signals, or some combination of such signals.

**2.08 “City”** means the City of Westwood, Kansas and all of the territory within its present and future boundaries.

**2.09 “City Council”** means the elected governing body of the City.

**2.10 “Days”** means calendar days, unless otherwise specified.

**2.11 “Drop”** means the cable that connects the demarcation point of a Subscriber’s home wiring to the nearest feeder cable of the System.

**2.12 “Franchise”** means the rights and obligations extended by the City to a Person to own, construct, maintain and operate a Cable Communications System within the boundaries of the City.

**2.13 “Franchise Agreement”** means this agreement between the City and Everest Midwest under which the City grants a Franchise to Everest Midwest.

**2.14 “Gross Receipts”** means all amounts actually received by Everest Midwest directly from the operation of the System to provide Cable Service, including but not limited to, Subscriber Basic Service fees, Tier Service and Premium Service fees, and advertising revenues as described below.

Gross Receipts shall not include: amounts received from any other business endeavor; studio rental; production equipment rental; penalties charged for late payment; sales taxes or the amount of money collected by Everest Midwest attributable to the payment of Franchise fees; the revenue of any Person, including, without limitation, a supplier of programming to Everest Midwest to the extent the revenue is also included in the Gross Receipts of Everest Midwest; or revenue for any goods or services which are not provided over the System even if such goods and services are advertised or ordered using the System. In the event Everest Midwest receives any revenue from disseminating advertisements or carrying programming or other services on the System within and without the City, Gross Receipts shall, with respect to those advertisements, programming or other services, include an amount derived by multiplying those receipts by a fraction, the numerator of which is the number of Subscribers in the City reached by that advertisement, programming or other service and the denominator of which is the total number of Subscribers reached by such advertisement, programming or other service.

**2.15 “Person”** means any individual, corporation, partnership, proprietorship, organization, group or other entity.

**2.16 “Premium Service”** means any Cable Service delivered on a per-Channel or per-program basis.

**2.17 “Resident”** means any Person residing in the City.

2.18 **“Residential Dwelling Unit”** means each home, house, building, or other structure that normally accommodates the living quarters of one family, and each apartment, condominium, or cooperative unit that normally accommodates the living quarters of one family in any multiple-unit building or complex of multiple-unit buildings; provided, however, that if Everest Midwest has not obtained the permission or authority of the owner or association of owners to extend its facilities to individual apartments, condominiums, and cooperative units within the interior of a multiple-unit building or complex of multiple-unit buildings, then that multiple-unit building or complex of multiple-unit buildings shall be considered a single Residential Dwelling Unit.

2.19 **“Right-of-Way”** is any real property, easement, right-of-way, or other interest in real estate, including a Street, owned or controlled by the City or any other governmental unit.

2.20 **“Street”** means the surface of, and the space above and below, any public street, road, highway, freeway, lane, path, public way, alley, court, sidewalk, boulevard, parkway, drive, avenue, or bridge now or hereafter located in the City.

2.21 **“Subscriber”** means any Person who subscribes to a Cable Service provided by Everest Midwest, by means of or in connection with the System, and pays a fee, unless the fee is lawfully waived.

2.22 **“System”** means the Cable Communications System operated by Time Warner in the City.

2.23 **“Tier-Service”** means any Cable Service tier other than Basic Service or Premium Service.

### Section 3. Competition.

3.01 **Franchise Non-Exclusive.** Everest Midwest’s right to use and occupy the Streets and other Rights-of-Way shall not be exclusive. The City reserves the right to grant similar Franchises to the operators of other Cable Communications Systems.

#### 3.02 **Less Restrictive Terms.**

**A. Notice to the City.** If the City permits another provider of multi-channel video service, including Cable Service, to use the Streets or other Rights-of-Way to provide such service upon terms and conditions which are less burdensome or more favorable to the other operator than the terms and conditions of this Franchise Agreement, or if any Person (including the City or an affiliate of the City) is using the Streets or Rights-of-Way to provide multi-channel video service, including Cable Service, without a Franchise, Everest Midwest shall so notify the City.

**B. Procedure.** Upon notice from Everest Midwest as set forth in subsection A above, the City shall have the opportunity to modify the Franchise or other agreement with the other provider to cure any disparity between the two Franchises (if the other provider has a Franchise) or to require a Franchise which cures any disparity (if the other provider has no Franchise). If the City does not commence action and proceed with due diligence to do so within sixty (60) Days after receipt of a notice from Everest Midwest to cure a disparity, then Everest Midwest may propose to the City modification of the requirements in this Franchise Agreement in order to cure any disparity. The City, acting through the City Council, shall accept or reject any such proposed modification as soon as practicable after receipt of such notice. The City shall not unreasonably reject any proposed modification which cures a disparity. If the City does not cure a disparity by amendment of the Franchise with the other provider or by entering into a Franchise which cures a disparity within sixty (60) days after receipt of a notice from Everest Midwest, then Everest Midwest shall not be required to comply with any terms contained herein that create a disparity. For purposes of this section,

a disparity is a term or condition of this Franchise or another Franchise or right to use the Streets and Rights-of-Way which permits another Person to use the Streets and Rights-of-Way upon terms and conditions that are less burdensome or more favorable than those contained in this Franchise.

## PART 2

### CONTINUATION OF AUTHORITY TO EVEREST MIDWEST

#### Section 4. Franchise Term.

4.01 Term. This Franchise Agreement shall be effective from the effective date of this Franchise Agreement until the expiration of fifteen (15) years from the effective date of this Franchise Agreement. This Franchise Agreement shall expire on \_\_\_\_\_, 2016.

4.02 Franchise Renewal. The City and Everest Midwest may reasonably expect to renew this Franchise Agreement under terms and conditions which may be lawfully ordained by the City Council and agreed to by Everest Midwest. Such renewal shall be consistent with the provisions of the Act or any other prevailing federal or state laws, rules or regulations governing Franchise renewal.

#### Section 5. Acceptance.

5.01 Everest Midwest's Acceptance. Acceptance of this Franchise Agreement shall be reflected by the execution of this Franchise Agreement by Everest Midwest and the Franchise Agreement shall be effective upon the later of (1) sixty (60) Days after the passage of the City's Ordinance Number \_\_, which Ordinance authorizes the granting of the Franchise to Everest Midwest; or (2) the date of execution of this Franchise Agreement on behalf of Everest Midwest and the City.

5.02 Everest Midwest's Warranty. Everest Midwest represents, warrants and guarantees that neither it, nor any of its representatives or agents, has committed any illegal act or engaged in any wrongful conduct contrary to, or in violation of, any federal, state or local law or regulation in connection with the passage of the ordinance which includes this Franchise Agreement. Everest Midwest further warrants and represents as follows:

A. Lawful Acts of Everest Midwest. That it is a corporation authorized to do business in the State of Kansas, and has full right and authority to enter into and fully perform the Franchise Agreement; that all partnership action required to authorize the acceptance of the Franchise Agreement and execution and delivery of all other documents to be executed or delivered by Everest Midwest pursuant to the Franchise Agreement, and to authorize the performance by Everest Midwest of all of its obligations under the Franchise Agreement, and all other documents to be executed or delivered by Everest Midwest, have been validly and duly acted on and are in force and effect; and that the Franchise Agreement and all other documents executed or delivered by Everest Midwest have been duly accepted and executed and the terms of each thereof are fully binding upon and enforceable against Everest Midwest.

B. Ability to Perform. Everest Midwest has the financial and technical capability to commence, complete, operate and maintain a Cable Communications System pursuant to the terms of this Franchise Agreement.

C. Covenant Against Contingent Fees. Everest Midwest has neither employed nor retained any Person to solicit or secure the continuation of its Franchise upon an agreement or understanding for a commission, percentage, brokerage or contingent fee.

D. No Gratuities. Everest Midwest has not offered, given or agreed to give to any employee or official or former employee of the City, and has not solicited, demanded, accepted or agreed to accept from any other Person or business, a gratuity, offer of employment or anything of pecuniary value in connection with any decision, approval, disapproval, recommendation, or preparation of any part of this Franchise Agreement.

**E. Contemporaneous Employment.** Everest Midwest warrants and agrees that no employee or official of the City who is participating directly or indirectly in the development of this Franchise Agreement is or will become, as a result of this contract, an employee of Everest Midwest.

**5.03 Recourse by Everest Midwest.** It is recognized that challenges by Everest Midwest (which are not excluded or disallowed by the terms of this Franchise Agreement) to actions of the City are subject to applicable law.

**5.04 Everest Midwest Acknowledgments.** The City shall not be liable to Everest Midwest for any loss, cost, expense or damage arising from any of the provisions or requirements of this Franchise Agreement, or because of the enforcement of them by the City, or for the failure of the City to have the authority to grant all, or any part, of the Franchise, but nothing shall limit Everest Midwest's right to obtain injunctive relief or declaratory relief for those matters. Everest Midwest expressly acknowledges that upon accepting this Franchise Agreement, it did so relying upon its independent and personal investigation and understanding of the power and authority of the City to grant and to continue the Franchise. By accepting this Franchise, Everest Midwest acknowledges that it has not been induced to enter into this Franchise by any understanding or promise or other statement, whether verbal or written, by or on behalf of the City or by any other third Person concerning any term or condition of this Franchise Agreement not expressed in this Franchise Agreement. Finally, Everest Midwest acknowledges by the acceptance of the Franchise that it has carefully read the provisions, terms and conditions of this Franchise Agreement and is willing to, and does accept, all of the risk attendant to the provisions, terms and conditions.

**Section 6. Sale or Transfer of Franchise.**

**6.01 Restriction.** The Franchise granted to Everest Midwest shall not be sold, assigned or transferred, either in whole or in part, or leased or sublet in any manner without full compliance with the procedures set forth in this section.

**6.02 Exceptions.** The restrictions established by this section shall not apply to the sale, assignment, transfer, lease or sublease of the Franchise to any Affiliate of Everest Midwest so long as such sale, assignment, transfer, lease or sublease does not result in a change in control of Everest Midwest's operations within the City.

**6.03 Procedure.** The following procedure shall be observed:

**A. Request in Writing.** The parties to the proposed sale or transfer of this Franchise shall make a written request of the City for its approval.

**B. Decision in Writing.** The City shall reply in writing within forty-five (45) Days of the request indicating whether it grants or denies its approval; such approval shall not be unreasonably withheld.

**C. Verification.** Everest Midwest, upon sale or transfer, shall within sixty (60) Days from the sale or transfer submit to the City a copy of the deed, agreement, mortgage, lease or other written instruction evidencing such sale, transfer of ownership, control or lease, certified and sworn to as correct by Everest Midwest.

**6.04 Inquiry into Qualifications.** In reviewing a request for sale or transfer, the City may inquire into the qualifications of the prospective transferee in accordance with applicable law, and Everest Midwest shall assist the City in any inquiry.

**6.05 Acceptance of Franchise Terms Required.** In no event shall any transfer or assignment of ownership or control be approved or effective without the transferee executing a document accepting the terms and conditions of this Franchise Agreement.

## PART 3

### USE OF RIGHTS-OF-WAY FOR CABLE COMMUNICATIONS SYSTEM

#### Section 7. Grant of Authority and Use of Streets.

7.01 Authority. Everest Midwest is authorized to engage in the following activities:

- A. **Develop Cable Communications System.** To establish, acquire, own, construct, operate and maintain a Cable Communications System within the City;
- B. **Provide Cable Services.** To furnish, render and sell Cable Service in the City; and
- C. **Use of Public Streets and Rights-of-Way.** To use and occupy the Streets and other Rights-of-Way for its System.

7.02 Use of Public Rights-of-Way. In the use of the Rights-of-Way under this Franchise, Everest Midwest 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 and is subject to all applicable laws, orders, rules and regulations adopted by governmental bodies now or hereafter having jurisdiction. In addition, Everest Midwest shall be subject to all technical specifications, design criteria, policies, resolutions and ordinances now or hereafter adopted or promulgated by the City relating to permits and fees, sidewalk and pavement cuts, utility location, construction coordination, surface restoration, and other requirements on the use of the Rights-of-Way. Nothing herein, however, shall limit the right of Everest Midwest to challenge the applicability to Everest Midwest of any subsequent laws, orders, rules and regulations adopted by the City to the extent they are inconsistent with or otherwise seek to amend or alter the terms of this Franchise.

7.03 Description of Use Requirement. Everest Midwest shall be required to provide the City with a current description of the use and services using property within the City Rights-of-Way. In the event Everest Midwest changes or adds to the use of such property or service, Everest Midwest is required to notify the City of such change or addition.

7.04 Duty to Comply with Law. Everest Midwest agrees to comply with all laws and regulations concerning the provision of Cable Service in the City. All Right-of-Way standards governing construction, reconstruction, installation, maintenance and dismantling of the facilities in the Rights-of-Way shall be in accordance with applicable present and future federal, state and City laws and regulations, including, but not limited to, the most recent editions of the National Electrical Code and the National Electrical Safety Code. It is understood that the standards established in this section are minimum standards.

7.05 Compliance with Zoning and Construction Codes. Everest Midwest shall comply with the terms of applicable zoning ordinance, building code, and other ordinances, regulations and laws controlling the location or construction of towers, poles, cables, amplifiers, conduits and other facilities owned, leased and otherwise used by Everest Midwest for its System. This includes requirements to obtain applicable permits and to pay applicable plan review, permit or inspection fees.

7.06 Placement of Facilities. This Franchise Agreement does not alter in any fashion the City's police power to establish regulations or general applicability on the erection, construction or installation of any facilities which may be construed, maintained or operated by a Person authorized to use and occupy the Streets and other Rights-of-Way, including a Cable Communications System operator. Everest Midwest shall comply with those requirements, including obtaining permits prior to excavation and providing maps showing where construction or excavation is planned, and upon



completion, maps showing actual construction if any changes are authorized. The City retains the right to designate where Everest Midwest may place such facilities within the Streets and other Rights-of-Way.

**7.07 City's Right Preeminent.** The privilege to use or occupy the public Rights-of-Way granted to Everest Midwest under this Franchise Agreement shall in all matters be subordinate to the City's right to use or occupy the public Rights-of-Way. Without limitation upon the rights which the City might otherwise have, the City does hereby expressly reserve the right to exercise its governmental powers, now or hereafter vested in or granted to the City.

**A. Relocation for Public Improvements.**

**(1) Request of the City.**

**(a) Governmental Powers.** Whenever because of public necessity or the welfare of the public generally, during the term of this Franchise Agreement or any extensions or renewals thereof, the City shall determine to change or alter the grade of any Street, or to sell or vacate any Street to construct or reconstruct any water line, sanitary and storm sewers, water courses, drainage ditches, conduits, playgrounds, recreation facilities, parks, traffic control systems or other public improvements, Everest Midwest shall, within thirty (30) Days notice by written request from the City, remove, relay and relocate its poles, wires, cables, conduits and other fixtures. If the City reimburses any utility, cable operator or other entity for relocating its facilities within the Streets or other Rights-of-Way, then the City shall be obligated to pay all of Everest Midwest's reasonable costs for labor and materials to effect such work, which costs (or Everest Midwest's reasonable estimation thereof) shall be paid by the City to Everest Midwest prior to the date such work is to be commenced. If the City does not reimburse any utility, cable operator or other entity for relocating its facilities within the Streets or other Rights-of-Way, then such relocation shall be at Everest Midwest's own expense.

**(2) Actions as a Competitor.** Notwithstanding the foregoing, if Everest Midwest shall be required to move, relay or relocate any of its facilities in connection with the construction or preparation for construction of a Cable Communications System by the City or any Affiliate of the City (regardless of whether removal or relocation is required under the terms of this Franchise Agreement or under any applicable pole attachment agreement to which Everest Midwest is a party), then the City shall be obligated to pay all of Everest Midwest's reasonable costs for labor and materials to effect such work, which costs (or Everest Midwest's reasonable estimation thereof) shall be paid by the City to Everest Midwest prior to the date such work is to be commenced. Should the estimated costs be more than actual costs, Everest Midwest shall refund to the City the difference.

**B. Emergency Access.** The City retains the right to cut or move any facilities located within the public Rights-of-Way as may be determined necessary, appropriate or useful in response to any public health or safety emergency.

**7.08 Relocation at Request of Private Parties.** Whenever Everest Midwest is requested by a private party, including any utility not affiliated with the City, to remove, relay and relocate its poles, wires, cables, conduits and other fixtures, the requesting party shall provide thirty (30) Days advance written notice. If such removal, relaying or relocation is required within a subdivision of the City where all utility facilities and those of other services, including those of Everest Midwest, are present, the entities requesting those changes may decide among themselves who is to bear the cost of removing and relocating Everest Midwest's facilities, provided that the City shall not be liable to

Everest Midwest for those costs. Everest Midwest may require the payment of a reasonable predetermined cost for the requested removal and relocation prior to commencing work.

**Section 8. Conditions of Street Occupancy.**

**8.01 General Construction Practices.** All construction practices shall be in accordance with all applicable federal, state and local laws, rules and regulations. All installation of electronic equipment shall be of a permanent nature, durable and installed in accordance with the provisions of the applicable codes.

**8.02 General Operational Practices.** The construction, operation and maintenance of Everest Midwest's System shall be performed by experienced maintenance and construction personnel. Everest Midwest's System shall be kept in a safe and suitable condition and in good order and repair, so as not to endanger or interfere with improvements the City may deem necessary, or to interfere in any manner with the rights of any property owner, or to unnecessarily hinder or obstruct pedestrian or vehicular traffic on Streets or other Rights-of-Way.

**8.03 Safety.** Everest Midwest shall at all times employ the standard of care attendant to the risks involved and shall install and maintain in use commonly accepted methods and devices for preventing failure and accidents which are likely to cause damage, injury or nuisance to the public, including public employees.

**8.04 Rf Leakage.** Everest Midwest shall perform Rf leakage monitoring and testing in accordance with FCC rules and regulations. Everest Midwest shall have the right to discontinue its service to any Subscriber's premises where uncontrolled Rf radiation is originating from inside the premises.

**8.05 Undergrounding.** In all areas of the City where the cables, wires and other like facilities of public utilities exist underground, Everest Midwest shall also place its cables, wires or other facilities underground. If the City reimburses or compensates in any manner a utility, cable operator or other entity for relocating its facilities within the Streets or other Rights-of-Way and requests or requires Everest Midwest to also relocate its facilities, then the City shall be obligated to reimburse or compensate Everest Midwest in a like manner prior to the date such work is to be commenced.

**8.06 Pole Attachments.** Everest Midwest shall use the existing poles and other properties of the City or public utility companies operating within the City when available upon reasonable terms and conditions, and Everest Midwest shall not construct, erect, or maintain any support poles or other properties within the Streets or other Rights-of-Way for operation of its System except upon the express consent of the City, which consent shall not be unreasonably withheld if existing poles are not reasonably available. In all areas of the City where the cables, wires and other like facilities of Everest Midwest are attached to any City-owned utility poles, Everest Midwest shall maintain those attachments without charge by the City.

**8.07 Disturbances.** In the case of any disturbance of a Street or other Right-of-Way caused by Everest Midwest during the course of constructing or maintaining its System, Everest Midwest shall, at its own expense, replace and restore all paving, sidewalk, driveway, landscaping, or surface of any Street or other Right-of-Way disturbed in as good condition as before the disturbance as is possible to the reasonable satisfaction of the City.

**8.08 Authority to Trim Trees.** Everest Midwest shall have the authority to trim trees which are located upon and overhang the Streets and Rights-of-Way so as to prevent the branches of trees from coming into contact with Everest Midwest's properties. Except in cases of emergencies, Everest Midwest shall provide notice to the City before trimming trees.

**Section 9. Design and Construction Provisions.**

**9.01 Performance Guidelines.** The following performance guidelines shall serve as the initial minimum guidelines for the design, installation and operation of the System:

**A. FCC Technical Standards.** Everest Midwest shall operate its System in compliance with the technical standards of the FCC;

**B. Continuous Operation.** The System shall be capable of continuous 24 hour daily operation without severe material degradation of signal except during extremely inclement weather, and immediately following extraordinary storms which adversely affect utility services or which damage major System components;

**C. Lack of Interference.** The System shall be operated in such a manner as to avoid causing interference with the reception of off-the-air signals of a Subscriber.

**9.02 Equipment for Hearing-Impaired Persons.** Everest Midwest shall make available for reasonable charges the installation and rental of equipment which facilitates the reception of Cable Service by hearing impaired individuals, where such properly encoded programming exists.

**9.03 Performance Standards.**

**A. Compliance with Technical Standards.** The System shall be designed and installed so as to be capable of operating according to the technical standards and all applicable rules and regulations of the FCC or any future amendments or standards required by the FCC, or any other lawful authority.

**B. Report of Compliance.** Upon written request, Everest Midwest shall provide proof to the City that its System meets or exceeds current technical standards imposed by the FCC or by any other lawful authority.

**9.04 System Improvement.** Upon the third anniversary of the execution of this Agreement and every three (3) years thereafter, Everest Midwest shall make such improvements to the System as are necessary to maintain the System at the modern level of technical performance which has been implemented in a majority of cable television systems, provided such improvements can be instituted through technology which has been demonstrated to be feasible for its intended purpose, in an operationally workable manner, and in a manner which is profitable with respect to each such improvement.

**9.05 Test Procedures.** Everest Midwest's methods and schedules for testing the System on an ongoing basis shall be at least as stringent as those in other high-quality, reliable, modern Cable Communications Systems of similar design. A summary of all ongoing tests shall be provided by Everest Midwest for the City's review, upon the City's request. When a Subscriber has complained to Everest Midwest directly, or through the City, about the technical quality of the service received by the Subscriber, and that complaint remains unresolved for thirty (30) Days, the City may request the performance by Everest Midwest, at Everest Midwest's cost, of reasonable tests in addition to those tests performed by Everest Midwest as part of its ongoing testing program, to measure the technical quality of the System in the area of the complaint. Should any test requested by the City reveal that Everest Midwest's System is in compliance with the FCC's technical standards, the City shall reimburse Everest Midwest for the costs of such test. Tests performed by Everest Midwest in an effort to resolve the Subscriber complaint need not be duplicated by Everest Midwest.

**9.06 Provision of Cable Service in General.** Everest Midwest shall extend and make Cable Service available to each Residential Dwelling Unit located within 200 feet of the existing portion of the System. Everest Midwest shall extend its System to make Cable Service available to any

Residential Dwelling Unit located more than 200 feet from the System if the owner agrees to pay for the extension on a time and materials basis.

**9.07 Interconnection.** Provided there is no decrease in the technical quality of service provided to Subscribers, the System may be interconnected with other Cable Communications Systems.

**9.08 Maps.** Within sixty (60) Days of completion of initial or any additional construction, Everest Midwest shall provide the City Clerk a complete set of plans with accurate and complete information in a format as agreed to by the City and Everest Midwest showing and describing the exact locations, both horizontal and vertical, of all facilities constructed and existing within the public Rights-of-Way as of the time of construction. Such mapping and identification shall be at the sole expense of Everest Midwest.

**9.09 Proprietary Information/Confidentiality.** The City shall maintain confidentiality of information provided by Everest Midwest when Everest Midwest has designated such information as proprietary. The City shall provide Everest Midwest with notice of any request by a third party for such information.

## **Section 10. Operation and Maintenance Provisions.**

**10.01 Customer Service Standards.** Everest Midwest shall furnish, render and sell Cable Service to its Subscribers in a manner which conforms to the FCC Customer Service Standards, as amended from time to time and so long as those standards exist.

**10.02 Policies and Practices.** Everest Midwest shall have authority to promulgate, consistent with the terms of this Franchise Agreement, the Act, and any other applicable federal, state or local laws, rules, policies, prices and Subscriber practices as are reasonably necessary for its business including installation and disconnection policies, delinquent accounts collection procedures and late penalty charges.

**10.03 Refunds to Subscribers.** If any Subscriber to Cable Service terminates, for any reason, any monthly service prior to the end of the prepaid period, a prorated portion of any prepaid Subscriber service fee, using the number of Days within the billing period as a basis, shall be credited to the Subscriber's account by Everest Midwest.

**10.04 Company Office.** Everest Midwest shall maintain an office in the Kansas City metropolitan area that is open during normal business hours. The portion of the office open to the public shall comply with the terms of the federal Americans with Disabilities Act.

**10.05 Telephone Access.** Everest Midwest shall establish and maintain at least one publicly listed telephone number whereby Subscribers may register service complaints, request service and conduct other business. Any telephone used to receive Subscriber complaints and request for repairs shall be operated 24 hours a day, seven (7) days a week. Telephone equipment shall be available to permit Persons with hearing impairments to communicate with the operator.

### **10.06 Maintenance and Complaints.**

**A. Duty to Provide Efficient Service.** Everest Midwest shall render efficient service, make repairs promptly and interrupt Cable Service only for good cause and for the shortest time possible.

**B. Regular Office Hours.** Everest Midwest's office staff will maintain regular office hours Monday through Friday. Complaints concerning billing, employee courtesy, programming, safety, Everest Midwest's operational policies, or any other matter raised by

a Resident, shall be handled during those hours.

**C. Repair Force.** Everest Midwest shall maintain a sufficient repair force of technicians that shall respond to Subscriber complaints, loss of service, or requests for repair.

**D. Resolution of Complaints.** Everest Midwest shall use its best efforts to resolve complaints as soon as practicable after the date complaints are received.

**E. Prorated Billing Credit for Service Interruption.** Upon request, a Subscriber's account shall be credited a prorated share of the monthly charge for the service if the Subscriber is without service for any reason, except Subscriber-inflicted damages to Everest Midwest's equipment, for a period exceeding twenty-four (24) hours.

**F. Complaints Received by the City.** All Subscribers and Residents may direct complaints and inquiries regarding Everest Midwest's service or performance to the City. The City will promptly submit those complaints and inquiries to Everest Midwest. If the City concludes that Everest Midwest may not have attempted to resolve a dispute to the reasonable satisfaction of the Person initiating a complaint, and if the complaint remains unresolved, the City may conduct public hearings regarding the complaint. If a hearing is conducted, all parties to the dispute shall be invited to participate. A record shall be maintained of the hearing.

**10.07 Annual Report by Everest Midwest.** Within ninety (90) Days after the close of its fiscal year, Everest Midwest shall submit to the City a written annual report which shall contain the following information:

**A. Review of System Development.** A summary of the previous year's activities in the development of the System in the City, including, but not limited to, additions, deletions or improvements begun or discontinued during the reporting year, a summary of the type and number of Subscribers of each type, Subscribers gained or lost, and the status of any identified unserved areas, including but not limited to, the current house count, cost of System extension and estimated time of completion.

**B. Summary of Complaints/Compliance with FCC Customer Service Standards.** A summary of any written complaints received from Subscribers concerning the operation of the System, and information verifying compliance with applicable customer service standards. It is understood that reporting by Everest Midwest of compliance may, if Everest Midwest does not possess technology which can reasonably report compliance by jurisdiction serviced by Everest Midwest, be done on a consolidated basis by Everest Midwest.

**C. Other Required Information** Unless directed otherwise by this Franchise Agreement, all other reports, records, maps and other information required by this Franchise Agreement to be submitted to the City shall be included in the annual report.

**PART 4**  
**PROGRAMMING AND OTHER SERVICES**

**Section 11. Categories of Programming.**

Everest Midwest shall offer to Cable Service Subscribers a variety of programs generally available to Cable Communications Systems that is similar to programming provided to Everest Midwest customers in the Kansas City metropolitan area, designed to reflect the interests of the Residents of the City. It is recognized that programming may be affected by Channel capacity, programming availability, interests of Subscribers, and other circumstances.

**Section 12. Cable Service to Government and Public Educational Facilities.**

There will be no monthly charge for one Basic Service Drop for each governmental facility or public educational facility in the City, provided that the facility is located within 300 feet of the System. Installations over 300 feet from the System will be installed for a predetermined time and material charge. There will be no monthly charge for one Basic Service Drop at these facilities, but Everest Midwest may charge its standard monthly commercial additional outlet charge, if any, for installation of and service to additional Basic Service outlets. Additional outlets shall be installed or existing outlets shall be relocated for a predetermined fee for each additional outlet.

**Section 13. Government Channel.**

**13.01 Channel Established.** With sixty (60) Days written notice by the City, Everest Midwest shall provide a Channel for use by the City to present non-commercial local government information of interest to Subscribers in the City. Except as provided in Section 13.02, the City shall bear all costs associated with the provision of the Channel, including without limitation the cost of constructing any fiber return path and the cost of equipping and operating the Channel. The City may designate another agency or Person to operate the Channel.

**13.02 Obligations of Everest Midwest.** Everest Midwest will cooperate with the City in reviewing equipment needs and obtaining equipment at competitive prices and will provide the City, without charge to the City, with a character generator for operation of a billboard service on the government Channel. Additional equipment may be acquired by the City at the City's expense. Everest Midwest will provide up to eight (8) hours of technical assistance in installing that equipment to the City and up to twenty-five (25) hours of production training. Everest Midwest shall cooperate with the City or its designee to maintain the interconnection needed to present the Channel on the System and any instruction or assistance regarding the acquisition, maintenance and use of studio and production equipment that may be obtained for that purpose by the City. Everest Midwest shall provide at no cost to the City the required equipment to connect the City's cablecasting facilities to the System headend.

**13.03 Exportation of Channel.** Without written permission from the City, Everest Midwest may not export the government Channel. However, should Everest Midwest interconnect the System to Cable Communications System operated by Everest Midwest in other municipalities in the Kansas City area, Everest Midwest may provide in those municipalities the government Channel cablecast over the Cable Communications Systems provided to the City.

**13.04 Elimination of Channel.** Notwithstanding the provisions of Section 2.02 - Less Restrictive Terms, once required, the governmental Channel shall not be eliminated by Everest Midwest absent written authorization by the City.

**13.05 Everest Midwest Held Harmless.**

**A. City Obligation.** The City shall indemnify, defend and forever hold harmless Everest Midwest, its officers, employees, agents, licensees and Affiliates from and against any and all claims, judgments, costs, liabilities, damages, and expenses (including reasonable attorney's fees) arising out of or in connection with the use of the government Channel, including, but not limited to, the presentation of programming on the government Channel.

**B. Everest Midwest's Negligence or Willful Misconduct.** Notwithstanding anything to the contrary contained in this section, Everest Midwest shall not be so indemnified or reimbursed in relation to any matter, in any action, suit or proceeding in which Everest Midwest is negligent in the performance of its obligations under this Franchise, or has engaged in willful misconduct or criminal acts. Furthermore, notwithstanding anything to the contrary contained in this section, Everest Midwest shall be so indemnified or reimbursed in relation to any matter in which Everest Midwest is prevented by the Act, or other applicable federal, state or local law, from exercising any control over the activity upon which a claim is made against Everest Midwest. The City shall, however, if requested by Everest Midwest, provide a defense even though, in good faith, it believes at the commencement of any action that Everest Midwest may have engaged in the above-described conduct.

**C. Notice to City.** Everest Midwest shall immediately notify the City of any potential claim, demand, or other legal action for which Everest Midwest shall demand to be held harmless pursuant to this section.

**D. Payment by City.** Should payments be due and owing to Everest Midwest pursuant to this section, the City shall pay an interest charge, computed from the date payments became due and owing Everest Midwest, at the annual rate equal to the commercial prime interest rate in effect upon the due date plus two percentage points. The prime rate will be determined by the Bank of New York, or its successor, on the effective date on which interest becomes due. If there is a dispute about whether the City is obligated to hold harmless Everest Midwest, then pending resolution of any disputed obligation, Everest Midwest shall not set off any amount from its Franchise fee payments. The amount in which the City is obligated to indemnify Everest Midwest shall not exceed the amount permitted by law.

**E. Obscene Material.** Everest Midwest may prohibit on the government Channel provided hereunder any programming which contains obscene material, indecent material, or material soliciting or promoting unlawful conduct. Everest Midwest may require the City, or any Person designated by the City to manage the operation of the Government channel, to certify that the programming on that Channel does not contain any obscene material, indecent material, or material soliciting or promoting unlawful conduct, and that reasonable efforts will be undertaken to ensure that any live programming does not contain that material.

PART 5  
FINANCIAL

**Section 14.     Regulation of Rates.**

**14.01     Discretion to Regulate Rates.** The City reserves the right to exercise its authority under the Act, so long as that authority exists, to regulate the rates charged by Everest Midwest for Basic Service and affiliated equipment.

**14.02     FCC Submissions.** Should the City regulate rates, it shall provide copies of its submissions to the FCC to Everest Midwest at the time it submits the information to the FCC.

**Section 15.     Franchise Fee.**

**15.01     Payment to City.**

**A.         Use of Streets/Cost of Regulation.** In consideration of the rights, powers, and privileges, permission and authority granted by this Franchise Agreement, for the use of the City's Streets and other Rights-of-Way, Everest Midwest shall pay to the City an amount equal to three percent (3%) of its Gross Receipts received from the operation of the System in the City. Notwithstanding the foregoing Franchise fee provision, the City may, by ordinance, modify this section to require payment by Everest Midwest of a Franchise Fee in an amount up to five percent (5%) of its Gross Receipts. The gross receipts derived by Everest Midwest from the provision of any additional service are not included in the Franchise fee calculation described above, and Everest Midwest shall pay Franchise fees to the City with respect to any provision of additional service on a non-discriminatory and competitively neutral basis vis a vis other providers of similar services.

**B.         Payment of Fee.** Payment of Franchise fees shall be in lieu of all occupational, pole attachment or other license fees and charges imposed by the City.

**C.         Revenue Not from Operation of Cable System.** This Franchise Agreement does not excuse the payment of any occupational license fee, charge or tax relating to any business endeavor for which Everest Midwest is not obligated to pay a Franchise fee.

**D.         Taxes of General Applicability.** This Franchise Agreement does not prohibit the City from imposing on Everest Midwest, as part of a group of businesses or activities, any tax, fee or assessment of general applicability that is not unduly discriminatory against operators of Cable Communications Systems or their subscribers.

**E.         Quarterly Payments.** Franchise fee payments shall be made within thirty (30) Days after the expiration of each quarter year ending December 31, March 31, June 30, and September 30, that is, January 30, April 30, July 30, and October 30. Each payment shall be accompanied by a statement of Gross Receipts received for the quarter in connection with the operation of the System in the City, and a report showing the computation of the fees.

**F.         Acceptance of Payment Not Accord or Release.** No acceptance of any payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of payment be construed as a release of any claim the City may have for further or additional sums payable under the provisions of this Franchise Agreement. All amounts paid by Everest Midwest shall be subject to audit by the City, at the City's expense, in accordance with the terms of this Franchise Agreement.



**G. Late Payment.** In the event that any payment is not made on or before the applicable date fixed in this section, Everest Midwest shall pay, as additional compensation, an interest charge, computed from that date, as the annual rate equal to the commercial prime interest rate in effect upon the due date plus two percentage points. The prime rate will be determined by the Bank of New York, or its successor, on the effective date on which interest becomes due.

**H. Early Termination of Franchise Agreement.** In the event the Franchise Agreement is terminated for any reason before its normal termination date, the franchise fee shall be prorated to reflect the time elapsed since the last payment was made to the City. Everest Midwest shall pay to the City no later than thirty (30) Days following termination of the Franchise the required percentage of Gross Receipts.

**15.02 Audits.** At the City's expense, the City may arrange for and conduct audits of the necessary financial records of Everest Midwest for the purpose of verifying Franchise fees. The City shall notify Everest Midwest at least seven (7) Days prior to the date it will begin reviewing Everest Midwest's records. At that time the City will, to be best of its ability, describe the records and documents it wants to review, and Everest Midwest shall make such of its books and records as may be relevant to the determination of Gross Receipts and Franchise fees due available for inspection. However, Everest Midwest shall not be required to make any portion of its books and records available if it reasonably believes making those books and records available would violate applicable law, including without limitation the privacy provisions contained in the Act. If the City or any Affiliate of the City shall construct or operate a Cable Communications System in the City, then any audits conducted pursuant to this section shall be conducted by an independent auditor who has agreed in advance only to verify Franchise fees and not to disclose any portion of Everest Midwest's books and records or other proprietary information to the City. Everest Midwest's records shall be reviewed during normal business hours at a convenient time and place made available by Everest Midwest. Such records and any copies thereof shall remain on the premises of Everest Midwest during the review. Nothing herein is intended to obligate the City to pay Everest Midwest's costs in responding to the City's audit.

**Section 16. Liability Insurance.**

**16.01 Insurance Required.** Everest Midwest shall maintain, throughout the term of this Franchise Agreement, liability insurance from a company qualified to do business in the State of Kansas insuring Everest Midwest and the City against all damages described in Section 17 in the minimum amounts of

\$1,000,000 for property damage to any one Person;

\$1,000,000 for property damage in any one accident;

\$1,000,000 for personal bodily injury or death to any one person or individual; and

\$1,000,000 for personal bodily injury or death in any one accident.

**16.02 Certificate of Insurance.** Everest Midwest shall submit a certificate of insurance to the City confirming that a satisfactory policy is in effect, which policy shall be renewed on its anniversary throughout the term of this Franchise Agreement. The policy shall contain a separate endorsement requiring the insurance company to notify the City in writing of any change in, or cancellation of, the policy at least ten (10) Days prior to any change or cancellation.

**Section 17. Indemnification and Damages.**

**17.01 Indemnification of City Officials.** Everest Midwest shall, at its sole expense, fully indemnify, defend and hold harmless the City, the members of the City Council, including the Mayor, and all other officials, employees and agents, boards or commissions of the City, when acting in their capacity as municipal officials, employees or agents, boards or commissions, from and against any and all claims, suits, and actions, liability and judgment for damages or otherwise:

**A. Damage to Person or Property.** For actual or alleged injury or death to individuals, or damage to property, including loss of use of property, whether or not the property is physically damaged or destroyed, in any way arising out of or through, or alleged to rise out of or through, any act or omission of Everest Midwest or its officers, agents, employees or contractors;

**B. Violation of Rights or Interests.** Arising out of or alleged to arise out of any claim for damages, with respect to Everest Midwest's operation of a System, for invasion of the right of privacy, defamation of any Person, or the violation or infringement of any copyright, trademark, trade name, service mark or patent, or any other right of any Person; or

**C. Statutory Violations.** Arising out of or alleged to arise out of Everest Midwest's failure to comply with the provisions of any statute, regulation or ordinance of the United States, State of Kansas, the City, or any local agency, applicable to Everest Midwest in its business.

**17.02 Defense of Actions.** Nothing in this Franchise Agreement shall be deemed to prevent the parties indemnified and held harmless from participating in the defense of any litigation by their own counsel at their sole expense. That participation shall not under any circumstances relieve the indemnifying party from its duty defending against liability or paying any judgment entered against that party.

**17.03 Limitation on Damages.** Should Everest Midwest indemnify, defend, and hold harmless the City as provided for in this Franchise Agreement, then Everest Midwest's liability and obligations shall be limited to the actual amount of any damages as finally agreed upon by Everest Midwest and the City, or determined by a court of competent jurisdiction, together with interest described in 18.04 below and reasonable expenses actually incurred in connection with any action, suit or proceeding arising out of the construction, maintenance or operation of Everest Midwest's Cable Communications System to which the City has been made a party. The City may not increase, modify, or alter in any way Everest Midwest's liability provided Everest Midwest has indemnified, defended, and held the City harmless in any of these proceedings.

**17.04 Interest Charge.** Should payments be due and owing the City pursuant to this section, Everest Midwest shall pay an interest charge, computed from the date payments became due and owing the City, at the annual rate equal to the commercial prime interest rate in effect upon the due date plus two percentage points. The prime rate will be determined by the Bank of New York, or its successor, on the effective date on which interest becomes due.

**17.05 City's Negligent or Willful Misconduct.** Notwithstanding anything to the contrary contained in this section, Everest Midwest shall not be required to provide indemnification in relation to any matter in which the City, or any of its officials, employees or agents, boards or commissions was negligent in the performance of its obligations under this Franchise Agreement, or has engaged in willful misconduct or criminal acts; provided, however, that Everest Midwest shall provide a defense even though, in good faith, it believes at the commencement of any action, that the City or any of its officials, employees or agents, boards or commissions, may have engaged in the above-described conduct. If Everest Midwest has provided indemnification in those circumstances, then Everest Midwest shall be reimbursed by the City for all amounts paid and expenses incurred by Everest Midwest in connection with that action, suit or proceeding, including reasonable attorney's

fees.

**Section 18. Performance Bond.** Everest Midwest shall at all times during the term of the Franchise maintain in full force and effect a corporate surety bond in a form approved by the City Attorney, in an amount of \$50,000, renewable annually, conditioned upon Everest Midwest's faithful performance of the provisions, terms and conditions of the Franchise granted and conferred by ordinance. In the event the City shall exercise its right to revoke the Franchise as granted herein, then the City shall be entitled to recover under the terms of said bond the full amount of any loss occasioned. This provision shall be in addition to and supplemental to any other bonds or other requirements as the City may, from time to time, establish by generally applicable ordinance or otherwise, including, but not limited to, any bond or deposit requirement established in connection with construction in or outside of the public Rights-of-Way.

PART 6

VIOLATIONS AND REMEDIES

Section 19. Procedure of Correcting Franchise Violations.

**19.01 Notice of Violation.** Should the City determine that Everest Midwest has violated one or more terms, conditions or provisions of this Franchise Agreement, a written notice shall be given to Everest Midwest informing it of an alleged violation (a "Violation Notice"). Everest Midwest shall have fourteen (14) Days from the date the Violation Notice is given to inform the City in writing of the action Everest Midwest will take to correct the violation (a "Correction Notice") and to begin corrective action, or to dispute that a violation has occurred (a "Notice of Dispute"). If corrective action is undertaken, it shall be completed within thirty (30) Days of the date the Violation Notice is given, unless Everest Midwest's Correction Notice shows that the correction action cannot be completed within thirty (30) Days with the exercise of all due speed or diligence, in which case Everest Midwest shall have a reasonable extension of time in which to complete the corrective action. Any Notice of Dispute shall specify the matter disputed by Everest Midwest and shall stay the running of any performance or corrective deadlines pertaining to the matter in dispute, and stay any other action the City may be permitted to take under this Franchise Agreement or applicable law.

**19.02 Dispute Resolution.** If Everest Midwest has given a Notice of Dispute, the City shall consider Everest Midwest's dispute within thirty (30) Days after receipt of Everest Midwest's Notice of Dispute. The City shall provide written findings of fact and appropriate conclusions. Consideration shall be given to the matters described in Everest Midwest's notification of a dispute in a public hearing.

**19.03 Everest Midwest Options.** If after the hearing the disputed claim is upheld by the City, Everest Midwest shall have thirty (30) Days from the date of the mailing of the decision to remedy the violation or failure, unless corrective action cannot be completed within thirty (30) Days with the exercise of all due speed and diligence, in which case Everest Midwest shall have a reasonable extension of time in which to complete corrective action. Alternatively, Everest Midwest retains its rights to seek review of the disputed matter under applicable law. The submission of a matter to mediation or to a court of competent jurisdiction shall stay the running of the above-described correction period.

Section 20. Revocation and Removal.

**20.01 Revocation for Cause.** In addition to all other rights, powers and remedies available to the City, the City shall have the additional, separate and distinct right to revoke this Franchise and all title, rights, authority, power, privileges and permissions granted Everest Midwest authorized by this Franchise Agreement, as a result of and in response to, any of the following events or reasons:

**A. Fiscal Defects.** Everest Midwest becomes fiscally unable or unwilling to pay its debts;

**B. Bankruptcy.** Everest Midwest is adjudged to be bankrupt. However, should the City be prohibited from revoking the Franchise due to Everest Midwest's bankruptcy, Everest Midwest agrees, as a means of assuring future payments of the Franchise fees and assuring future compliance with all other requirements of this Franchise Agreement, to provide to the City within thirty (30) Days of an order of a court of competent jurisdiction adjudging Everest Midwest to be bankrupt, and entitled to the protection of state or federal bankruptcy laws, a bond in the amount of the Franchise fees paid by Everest Midwest to the City the previous year; or

C. **Fraud.** Everest Midwest commits an act of fraud, as determined by a court of competent jurisdiction, against the City in obtaining the Franchise, or upon being granted the continuation of the Franchise commits such an act against the City; or

D. **Failure to Correct Defect.** Everest Midwest substantially fails to cure or correct a material violation of this Franchise Agreement within the time period required following (1) receipt of a Violation Notice, absent Everest Midwest's delivery of a Notice of Dispute to the City under Section 19.01; (2) the mailing of a final decision by the City on a disputed matter as provided for in Section 19.02, absent Everest Midwest's pursuit of further remedies as provided for in Section 19.03; or (3) a final decision of a court of competent jurisdiction reviewing the disputed matter.

**20.02 Revocation by Ordinance.** Revocation of the Franchise shall be accomplished by passage of an ordinance. An ordinance revoking the Franchise shall include the reason for the City Council to justify revocation. The effective date of the revocation shall be stated in the ordinance. The Franchise Agreement shall terminate on the effective date of the revocation. An ordinance revoking the Franchise or a decision upholding a disputed claim shall not be passed without thirty (30) Days written notice to Everest Midwest that an ordinance to revoke the Franchise will be considered by the City Council. Everest Midwest shall retain the privilege to be heard by the City Council or any City Council committee regarding the proposed revocation ordinance. Everest Midwest shall not be declared in default or be subject to any sanction under any provision of this Franchise Agreement in any case subject to the provisions in Section 21.07 - Delays and Failures Beyond Control of Everest Midwest or the City, or in any case in which Everest Midwest is lawfully prevented from exercising control. Everest Midwest may request a review of the revocation findings and conclusions pursuant to the Kansas Administrative Procedure Act or any applicable law. Everest Midwest shall retain any other remedy which may be available to it under law.

**20.03 Continuance of Service after Revocation.** The City may require Everest Midwest to continue operating its System after revocation until such time as operation of the System can be transferred to a new owner or the City exercises its rights under Section 20.04 - Removal After Revocation.

**20.04 Removal After Revocation.**

A. **Procedure.** Upon revocation of the Franchise and after a review of the revocation findings and conclusions by a court of competent jurisdiction, if review is sought by Everest Midwest, the City may require Everest Midwest to remove, at Everest Midwest's expense, any above-ground portion of its System for any Street or other Right-of-Way. In removing its System, Everest Midwest shall refill and compact, at its own expense, any excavation that shall be made, and shall leave all Streets and other Rights-of-Way, and private property, in reasonable condition, and without affecting, altering or disturbing in any way electric, telephone, gas, steam, or water utilities or other Cable Communications System operator cables, wires or attachments. The insurance, indemnity and damage provisions of this Franchise Agreement shall remain in full force and effect during the entire term of removal.

B. **Failure to Remove System.** If Everest Midwest fails to commence removal of its System, or the part that was designated, in accordance with this section, within one hundred eighty (180) Days after written notice of the City's demand for removal is given, or if Everest Midwest fails to complete removal within one (1) year after removal has begun, the City shall have the right to exercise one of the following options:

(1) **Assumption of Ownership.** Declare all right, title and interest to the System to be in the City or its designee with all right of ownership including, but not limited to, the right to operate the System or transfer the System to another for

operation. Upon that declaration by the City, Everest Midwest shall be entitled to receive an equitable price from the City for the value of the System as provided by federal law.

(2) **Abandonment of System.** Declare all right, title and interest to the System, or such part as the City may designate, to be removed at no cost to the City. The cost of the removal shall be recoverable pursuant to the insurance and indemnity provisions of this Franchise Agreement, or from Everest Midwest directly.

**20.05 Additional Duty to Remove Property.** The City may require Everest Midwest to remove any above-ground portion of the System if Everest Midwest ceases to use that part of the System in the City for a continuous period of twelve (12) months.

PART 7  
MISCELLANEOUS

**Section 21. Miscellaneous Provisions.**

**21.01 Time is of the Essence.** Whenever this Franchise Agreement sets forth any time for any action to be performed by, or on behalf of, Everest Midwest, that time shall be deemed of the essence.

**21.02 Federal, State and City Jurisdiction.** This Franchise Agreement shall be construed in a manner consistent with all applicable federal, state and local laws. Everest Midwest's rights are subject to the police powers of the City to adopt and enforce ordinances of general applicability necessary to the health, safety and welfare of the public. Everest Midwest shall comply with all applicable general laws and ordinances enacted by the City pursuant to that power not inconsistent with the terms of this Franchise.

**21.03 Subsequent Action by State or Federal Bodies.**

**A. Complete Agreement.** It is the intent of the City and Everest Midwest that the terms, conditions and obligations set forth in this Franchise Agreement shall govern their relationship for the full term of the Franchise Agreement. In the event that any court, agency commission, or other authority of competent jurisdiction (1) declares this Franchise Agreement invalid, in whole or in part, or (2) requires Everest Midwest either to: (a) perform any action which is inconsistent with any provision of this Franchise Agreement, or (b) cease performing any act required by any provision of this Franchise Agreement, then Everest Midwest shall not be required to comply with any terms declared invalid and shall comply with any requirements of the court.

**B. Clarification of Law.** Notwithstanding any other provision of this Franchise Agreement, the City and Everest Midwest agree that either party may seek a ruling as to the applicability to the terms of this Franchise Agreement of any court determination, federal or state law or regulation.

**21.04 Rights Reserved to the City.** In addition to any rights specifically reserved to the City by this Franchise Agreement, the City reserves to itself every right and power available to it under the constitutions of the United States and the State of Kansas, and any other right or power, including, but not limited to all police powers and authority to regulate and legislate to protect and promote the public health, safety, welfare and morals. Nothing in this Franchise Agreement shall limit or govern the right of the City to exercise its municipal authority to the fullest extent allowed by law to the extent not inconsistent with the terms of this Franchise. Everest Midwest further agrees to conduct its activities in accordance with all municipal ordinances, as amended from time to time, including, but not limited to, Westwood Municipal Code Secs. 13-101 *et seq.* to the extent not inconsistent with the terms of this Franchise.

**21.05 Access to Records.** In addition to access to the records of Everest Midwest for financial audits, Everest Midwest shall provide reasonable access to records necessary to verify compliance with the terms of this Franchise Agreement.

**21.06 Nonenforcement by City.** Everest Midwest shall not be relieved of its obligation to comply with any of the provisions of this Franchise Agreement by reason of any failure of the City to enforce prompt compliance.

**21.07 Delays and Failures Beyond Control of Everest Midwest or the City.** Notwithstanding

any other provisions of this Franchise Agreement, no party to this Franchise Agreement shall be liable for delay in performance of, or failure to perform, in whole or in part, its obligations pursuant to this Franchise Agreement due to strike, unavailability of materials or equipment, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, civil disturbance, sabotage or vandalism, Subscriber tampering or interference, act of public enemy, accident, fire, flood or other events, where that party has exercised all due care in the prevention thereof to the extent that those causes or other events are beyond its control. In the event that any delay in performance or failure to perform affects only part of a party's capacity to perform, it shall perform to the maximum extent it is able to do so and shall take all steps within its power to correct the cause(s). Everest Midwest and the City agree that in correcting the cause(s), they shall take all reasonable steps to do so in as expeditious a manner as possible. Everest Midwest or the City shall notify the other party in writing of the occurrence of an event covered by this section within a reasonable period of time after it learns of its occurrence.

**21.08 Publication Costs.** All costs and expenses associated with any required publication of the ordinance adopting this Franchise Agreement in a local newspaper shall be paid by Everest Midwest.

**21.09 Severability.** If any provision of this Franchise Agreement is held by a court or by any federal or state agency to be invalid as conflicting with any federal or state law, rule or regulation now or hereafter in effect, or is held by the court or agency to be modified in any way in order to conform to the requirements of any law, rule or regulation, the conflicting provision shall be considered to be a separate, distinct and independent part of this Franchise Agreement, and that holding shall not affect the validity and enforceability of any other provision of this Franchise Agreement.

**21.10 Written Notice.** All notices, reports or demands required to be given in writing under this Franchise Agreement shall be deemed to be given when delivered personally to Everest Midwest or to the City or when forty-eight (48) hours have elapsed after it is deposited in the United States mail in a sealed envelope, with registered or certified mail postage prepaid thereon, addressed to the party to which notice is being given. The address may be changed by either party upon notice to the other party given as provided in this section. At the time of this continuation of Everest Midwest's Franchise by the City Council, the addresses of the parties are as follows:

**Everest Midwest:**

Everest Midwest Licensee  
LLC, d/b/a Everest Midwest

**City of Westwood:**

City of Westwood, Kansas  
4700 Rainbow Boulevard  
Westwood, KS 66205  
ATTN: Mayor

**21.11 Titles.** Titles to sections and subsections of this Franchise Agreement are provided for ease of locating information within the Franchise Agreement. A title shall not be deemed to change or alter the meaning of any section or subsection. The language of each section and subsection shall control its interpretation.

**21.12 Conflicting Provisions.** Specific provisions of this Franchise Agreement in conflict with any ordinance, or part of any ordinance, of a general nature, shall apply.

**21.13 Effect on Previous Ordinances.** All ordinances or parts of ordinances in conflict with the provisions of this ordinance, and more particularly Ordinance \_\_\_\_, are hereby repealed and Everest Midwest and the City hereby mutually release one another from any and all claims under such ordinances.

**21.14 Periodic Review.** Everest Midwest and the City shall from time to time, but in no event



less than every three (3) years, meet to review the terms of this Franchise Agreement and to identify and resolve any problems resulting therefrom. If modification of this agreement is deemed necessary, it shall be in accordance with Section 21.15-Modification.

**21.15 Modification.** Except as otherwise provided in this Franchise Agreement, or by applicable law, no provision of this Franchise Agreement, including any appendix, shall be amended or otherwise modified, in whole or in part, except by an instrument in writing duly executed by the City and Everest Midwest.

IN WITNESS WHEREOF, Ordinance Number \_\_\_ authorizing the grant of the Franchise to Everest Midwest was adopted by the governing body of the City of Westwood, Kansas on \_\_\_\_\_, 2001, and this Franchise Agreement has been executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 2001.

THE CITY OF WESTWOOD, KANSAS

By: \_\_\_\_\_  
Mayor

EVEREST MIDWEST LICENSEE LLC

By: \_\_\_\_\_

19-48