

## ORDINANCE NO. 673

**AN ORDINANCE GRANTING SOUTH CENTRAL WIRELESS, INC., A KANSAS CORPORATION, AND ITS SUBSIDIARIES, SUCCESSORS, TRANSFEREES AND ASSIGNS, A NON-EXCLUSIVE FRANCHISE TO ERECT, MAINTAIN AND OPERATE A TELECOMMUNICATIONS SYSTEM WITHIN THE CITY LIMITS OF CUNNINGHAM, KANSAS, PRESCRIBING THE TERMS AND CONDITIONS THEREOF AND PROVIDING FOR PAYMENTS TO BE MADE TO THE CITY OF CUNNINGHAM, KANSAS.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF CUNNINGHAM, KINGMAN COUNTY, KANSAS:**

### ARTICLE 1 DEFINITIONS

For the purpose of granting this Franchise, the following terms shall have the meaning as described herein, consistent with and governed by the provisions of K.S.A. 12-2001 *et seq.*:

1.1. Access Line. “Access line” shall mean and be limited to retail billed and collected residential lines; business lines; ISDN lines; PBX trunks and simulated exchange access lines provided by a central office based switching arrangement where all stations served by such simulated exchange access lines are used by a single customer of the provider of such arrangement. Access line may not be construed to include interoffice transport or other transmission media that do not terminate at an end user customer’s premises, or to permit duplicate or multiple assessment of access line rates on the provision of a single service or on the multiple communications paths derived from a billed and collected access line. Access line shall not include the following: Wireless telecommunications services, the sale or lease of unbundled loop facilities, special access services, lines providing only data services without voice services processed by a telecommunications local exchange service provider or private line service arrangements.

1.2. Access Line Count. “Access line count” means the number of access lines serving consumers within the corporate boundaries of the city on the last day of each month.

1.3. Access Line Fee. “Access line fee” means 5.0% of gross receipts as defined in Section 1.9. Grantee shall calculate the gross receipts and multiply such receipts by 5.0%. Grantee shall remit such fee to the City no more frequently than each quarter and not later than 45 days after the end of the remittal period. The City shall have the right to examine, upon written notice to the Grantee, no more than once per calendar year, those records necessary to verify the correctness of the gross receipts fee. If the gross receipts fee is determined to be erroneous, then the Grantee shall revise the gross receipts fee accordingly and payment shall be made upon such corrected gross receipts fee. If the City and the Grantee cannot agree on the gross receipts fee, or are in dispute concerning the amounts due under this section for the payment of gross receipts fees, either party may seek appropriate relief in a court of competent jurisdiction, and that court may impose all appropriate remedies, including monetary and injunctive relief, reasonable costs and attorney fees.

All claims authorized in this section must be brought within three years of the date on which the disputed payment was due. The gross receipts fee imposed under this section must be assessed in a competitively neutral manner, may not unduly impair competition, must be nondiscriminatory and must comply with state and federal law.

1.4. Access Line Remittance. "Access line remittance" means the amount to be paid by Grantee to the City, the total of which is calculated by multiplying the access line fee of 5.0% by the number of access lines served by Grantee within the City for each month in that calendar quarter. Such access line remittance fee shall be due not later than 45 days after the end of each calendar quarter.

1.5. City. "City" shall mean the City of Cunningham, Kansas, and shall include, when appropriate, the context of the territorial boundaries of the city limits of Cunningham, Kansas, as they now or shall hereafter exist.

1.6. City Council. "City Council" shall mean the present governing body of the City or any successor to the legislative powers of the present City Council.

1.7. Franchise. "Franchise" shall mean the permission, license, or authority given hereunder to conduct and operate a telecommunications system in the City, pursuant to this Ordinance passed by the City Council.

1.8. Grantee. "Grantee" shall mean South Central Wireless, Inc., its subsidiaries, successors, transferees or assigns of the Franchise granted herein.

1.9. Gross Receipts. "Gross receipts" means only those receipts collected from within the corporate boundaries of the City and which are derived from the following: (A) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (B) recurring local exchange access line services for pay phone lines provided by a telecommunications local exchange service provider to all pay phone service providers; (C) local directory assistance revenue; (D) line status verification/busy interrupt revenue; (E) local operator assistance revenue; and (F) nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills. All other revenues, including, but not limited to, revenues from extended area service, the sale or lease of unbundled network elements, nonregulated services, carrier and end user access, long distance, wireless telecommunications services, lines providing only data service without voice services processed by a telecommunications local exchange service provider, private line service arrangements, internet, broadband and all other services not wholly local in nature are excluded from gross receipts. Gross receipts shall be reduced by bad debt expenses. Uncollectible and late charges shall not be included within gross receipts. If a telecommunications local exchange service provider offers additional services of a wholly local nature which if in existence on or before July 1, 2002, would have been included with the definition of gross receipts, such services shall be included from the date of the offering of such services in the City.

1.10. Franchise Revenue. "Franchise revenue" shall mean 5.0% of gross receipts in

accordance with K.S.A. 12-2001j(2).

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

1.12. Public Right of Way. “Public Right of Way,” pursuant to K.S.A. 17-1902(a) means only the area of real property in which the city has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

1.13. Property of Grantee. “Property of Grantee” shall mean all property owned and installed or used by Grantee in the conduct of its telecommunications business in the City and under the authority of the Franchise granted herein.

1.14. Telecommunications Local Exchange Service Provider. “Telecommunications local exchange service provider” means a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, and a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto, which does, or in good faith intends to, provide local exchange service. The term telecommunications local exchange service provider does not include an interexchange carrier that does not provide local exchange service, competitive access provider that does not provide local exchange service or any wireless telecommunications local exchange service provider.

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

1.16. Telecommunications System. “Telecommunications System” shall mean all equipment used to transport voice communications.

1.17. Subscriber. “Subscriber” shall mean any person or entity receiving, for any purpose, one or more of the services offered within Grantee’s Telecommunications System.

1.18. Person. “Person” shall mean any individual or association of individuals, or any firm, corporation or other business entity.

1.19. Telecommunications Facilities. “Telecommunications Facilities” shall mean property of the Grantee used in operation of the Telecommunications System.

**ARTICLE 2  
GRANT OF FRANCHISE**

2.1. General Grant. The City hereby grants to Grantee the right and privilege to construct, erect, operate, and maintain a Telecommunications System within the City and, in so doing, to use the Public Right-of-Way, as defined in Section 1.12 above, and in accordance with the provisions of K.S.A. 17-1902, by erecting, installing, constructing, repairing, replacing, reconstructing, maintaining, and retaining in, on, under, upon, or across any such Right-of-Way, such poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be necessary and pertinent to a Telecommunications System within the City.

2.2. Non-Exclusivity. The authority given to Grantee in Section 2.1. is not and shall not be deemed to be an exclusive right or permission. The City expressly reserves the right to grant similar non-exclusive franchises to other Persons and allow them to use the Streets of the City within the same or other areas of the City as Grantee at any time; provided, however, that such other franchises do not interfere or create interference with Grantee's Telecommunications System already established and said other franchisees shall not be extended preferential treatment over Grantee.

2.3. Modifications. The City, upon application of Grantee, shall agree to a modification of this Franchise Ordinance when necessary, to enable Grantee to take advantage of any developments in the telecommunications field which would afford Grantee an opportunity to more effectively, efficiently, or economically serve its Subscribers, and to enable Grantee to conform to the Rules and Regulations of the Kansas Corporation Commission and the Federal Communications Commission as they may be amended from time to time.

**ARTICLE 3  
TERM**

The term of this Ordinance shall be for a period of twenty (20) years from the effective date hereof.

**ARTICLE 4  
FORFEITURE**

In addition to all other rights and powers reserved or pertaining to the City, the City reserves as an additional, separate, and distinct remedy the right to revoke this Franchise and all rights and privileges of the Grantee hereunder for any of the following reasons:

- a. Grantee fails, after thirty (30) days prior written notice, to comply with any of the provisions of this Ordinance granting this Franchise or has by act or omission, violated any term or condition thereof;

- b. Any provision of this Ordinance is adjudged by a court of law as invalid or unenforceable, and the City Council finds that such provision constitutes a consideration material to the continuance of the Franchise granted herein; or
- c. Grantee becomes insolvent, Unable or unwilling to pay its debts for purposes of this Article 4 means unpaid bills for franchise fees from the city or an indication of interrupted service from residents of Cunningham where such interrupted service continues in spite of notice under subsection (a) above.

## **ARTICLE 5 ORDINANCE OF REVOCATION**

No revocation provided for in Article 4 shall be effective unless or until the City Council provides written notice to Grantee, and Grantee is given at least thirty (30) days to cure any alleged breach of Article 4 herein. If, upon expiration of the time to cure, City Council believes Grantee has failed to cure, the City Council must adopt an Ordinance setting forth the cause and reason for the revocation and the effective date thereof in order to effectuate any revocation. Such Ordinance shall not be adopted without thirty (30) days prior written notice thereof to Grantee along with an opportunity for Grantee to be heard on the proposed adoption of said proposed Ordinance. If the revocation as proposed in said Ordinance depends upon a finding of fact, such finding of fact must be made by the City Council after a conclusive hearing is provided, if requested by Grantee.

## **ARTICLE 6 INDEMNIFICATION**

Grantee shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of the Grantee, any agent, officer, director, representative, employee, affiliate or subcontractor of the Grantee, or their respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in a public right-of-way. The indemnification provided by this Article does not apply to any liability resulting from the negligence of the City, its officers, employees, contractors, or subcontractors.

## **ARTICLE 7 USE AND INSTALLATION**

7.1 Degree of Care. Grantee or any Persons erecting, constructing, or maintaining any of the Property of Grantee shall, at all times, employ due care or the highest degree of care required by law under the facts and circumstances and shall maintain and install the Property of Grantee in accordance with commonly accepted methods and principals so as to prevent failures and accidents likely to damage, injure or create a public nuisance.

7.2 Location of Facility. All Telecommunications Facilities shall be located so as to cause minimum interference with the proper use of the Public Right-of-Way and the rights and reasonable convenience of property owners abutting the the Public Right-of-Way. In no event shall such Telecommunications Facilities be located so as to substantially interfere with the usual public travel on any Public Right-of-Way within the City.

7.3 Damage to Public Property. Whenever Grantee or any person on its behalf causes any injury or damage to any public property or Street by or because of the installation, maintenance or operation of the Telecommunications Facilities, such injury or damage shall be immediately remedied in such fashion as directed by the City Superintendent at Grantee's expense.

7.4 Tree Trimming. Grantee shall have authority to trim trees upon and over the Streets of the City so as to prevent the branches of such trees from coming in contact with wires, cables and other Telecommunications Facilities. All trimming shall be done under the supervision of the City Superintendent at Grantee's expense.

7.5 Facilities Upgrades/Changes. Grantee shall exercise its right to place, remove, construct and reconstruct, extend and maintain its plant and appurtenances as the business, and purposes for which, may from time to time require along, across, on, over, through, above, and under any public right-of-ways including, but not limited to, streets, avenues, alleys, bridges and the public grounds and places within the limits of the City at Grantee's expense.

## **ARTICLE 8 REMOVAL AND ABANDONMENT OF PROPERTY**

If this Franchise is terminated or revoked, Grantee shall remove from the Public Right-of-Way all of its Telecommunications Facilities other than those which the City may permit to be abandoned in place. In the event of such removal, Grantee shall return the Public Right-of-Way to similar condition as it was in before the Telecommunications Facilities were placed.

## **ARTICLE 9 COMPENSATION**

In consideration of granting this Franchise to Grantee, Grantee shall pay to the City 5.0% of gross receipts in accordance with K.S.A. 12-2001j(2).

## **ARTICLE 10 COMPLIANCE WITH LAW**

Grantee shall, at all times during the term of this Franchise, be subject to all lawful exercises of the police power of the City and to such reasonable regulations as the City shall prescribe for the general conduct of persons providing telecommunications service within the City.

**ARTICLE 11  
SALE OR LEASE OF FRANCHISE**

This Franchise shall be deemed a privilege to be held in personal trust by Grantee. It may not be sold, transferred, leased, assigned or disposed of in whole or in part, either by force of voluntary sale, consolidation or otherwise, without prior notification to the City Council.

**ARTICLE 12  
MISCELLANEOUS PROVISIONS**

12.1. Supersedes Prior Ordinances. All Ordinances and parts of Ordinances in conflict herewith are hereby repealed as of the Effective Date of this Ordinance. This Ordinance specifically supersedes the previously adopted Ordinances.

12.2. Binding Effect. All provisions of this Ordinance shall be binding upon Grantee and all its subsidiaries, successors, transferees and assigns, whether expressly stated herein or not.

12.3. Approval. This Ordinance shall not take effect and be in force until after the expiration of sixty (60) days from the date of this final passage and acceptance by the Grantee, within said sixty (60) days, in writing.

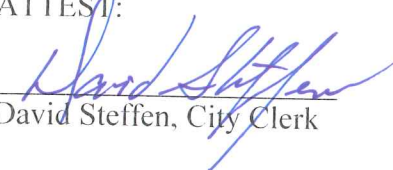
PASSED AND ADOPTED by the City Council of the City of Cunningham, Kansas on this 24<sup>th</sup> day of June, 2019.

EFFECTIVE DATE: June 27, 2019

CITY OF CUNNINGHAM, KANSAS

By:   
Aaron Murphy Mayor

ATTEST:

  
David Steffen, City Clerk



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