

**ORDINANCE NO. 2558**

**AN ORDINANCE GRANTING TO MOBILITIE, LLC, A NEVADA LIMITED LIABILITY COMPANY, A CONTRACT FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATION SYSTEM AS A COMPETITIVE INFRASTRUCTURE PROVIDER IN THE CITY OF GARDNER, KANSAS.**

**NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF GARDNER, KANSAS:**

**SECTION 1. DEFINITIONS.**

For the purposes of this Ordinance the following words and phrases shall have the meaning given herein. When not inconsistent within the context, words used in the present tense include the future tense and words in the single number include the plural number. The word “shall” is always mandatory, and not merely directory.

- a. “City” means the City of Gardner, Kansas.
- b. “Competitive Infrastructure Provider” means an entity which leases, sells or otherwise conveys Facilities located in the Public Right-of-Way, or capacity or bandwidth of such Facilities for use in the provision of Telecommunication Services, Internet services or other intrastate and interstate traffic, but does not itself provide services directly to end users within the corporate limits of the City.
- c. “Contract Franchise” means this Ordinance granting the right, privilege and Franchise to Grantee to provide Telecommunication Services within the City.
- d. “Facilities” means the Grantee’s “antennas”, “accessory equipment”, “wireless facilities”, “small cell facilities”, “transmission equipment”, “distributed antenna system” and any “wireless support structure” (all as such terms are defined or described in K.S.A. 66-2019, as amended) comprising the Grantee’s system located within the Public Rights-of-Way, and to the extent permitted under any applicable Laws (defined below), that are designed and constructed for the purpose of producing, receiving, amplifying, or distributing Telecommunication Services.
- e. “Grantee” means Mobilitie, LLC, a Nevada Limited Liability Company authorized to do business in Kansas, a Competitive Infrastructure Provider providing Telecommunication Services and capacity within the City. References to Grantee shall also include, as appropriate, any and all successors and assigns.
- f. “Gross Revenue” means and includes any and all income and other consideration of whatever nature in any manner gained or derived by Grantee or its affiliates from or in connection with the provision of competitive infrastructure and Telecommunication Services through Grantee’s Facilities, either directly by Grantee or indirectly through its affiliates, to customers of such Telecommunication Services within the City, including

any imputed revenue derived from commercial trades and barter equivalent to the full retail value of goods and services provided by Grantee. Gross Revenue shall not include: (a) sales, ad valorem, or other types of “add-on” taxes, levies, or fees calculated by gross receipts or gross revenues which might have to be paid to or collected for federal, state, or local government (b) non-collectable amounts due Grantee or its affiliates; (c) refunds or rebates; and (d) non-operating revenues such as interest income or gain from the sale of an asset.

- g. “Public Right-of-Way” 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, communications facilities for wireless services, or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts. The term does not include infrastructure located within the Public Rights of Way owned by the City or other third-parties, such as poles, ducts or conduits.
- h. “Telecommunication 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.

**SECTION 2. GRANT OF CONTRACT FRANCHISE.**

- a. There is hereby granted to Grantee this nonexclusive Contract Franchise to construct, maintain, extend and operate its Facilities along, across, upon or under any Public Right-of-Way for the purpose of supplying Telecommunication Services as a Competitive Infrastructure Provider and communication facilities within the corporate boundaries of the City, for the term of this Contract Franchise, subject to the terms and conditions of this Contract Franchise.
- b. The grant of this Contract Franchise by the City shall not convey title, equitable or legal, in the Public Right-of-Way, and shall give only the right to occupy the Public Right-of-Way, for the purposes and for the period stated in this Contract Franchise. This Contract Franchise does not:
  - (1) Grant the right to use Facilities or any other property, wireless communication related or otherwise, owned or controlled by the City or a third-party, without the consent of such party;
  - (2) Grant the authority to construct, maintain or operate any Facility or related appurtenance on property owned by the City outside of the Public Right-of-Way, specifically including, but not limited to, parkland property, City Hall property or public works facility property; or,

- (3) Excuse Grantee from obtaining appropriate access or attachment agreements before locating its Facilities on the Facilities owned or controlled by the City or a third-party.
- c. As a condition of this grant, Grantee is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the Federal Communications Commission (FCC) or the Kansas Corporation Commission (KCC). Grantee shall also comply with all applicable laws, statutes and/or City regulations (including, but not limited to those relating to the construction and use of the Public right-of- way or other public or private property). If Grantee desires or seeks to install, locate, or collocate its Facilities on any City-owned structures in the Public Right-of-Way, including, but not limited to, street lights, utility poles, storm sirens, traffic or pedestrian signals, or the like, Grantee and the City shall enter into a license agreement or pole attachment agreement setting forth the reasonable terms and conditions for said installation, location, or collocation.
- d. Grantee shall not provide any additional services for which a Franchise is required by the City without first obtaining a separate Franchise from the City or amending this Contract Franchise, and Grantee shall not knowingly allow the use of its Facilities by any third party in violation of any federal, state or local law. In particular, this Contract Franchise does not provide Grantee the right to provide cable service as a cable operator (as defined by 47 U.S.C. § 522 (5)) within the City. Grantee agrees that this Franchise does not permit it to operate an open video system without payment of fees permitted by 47 U.S.C. § 573(c)(2)(B) and without complying with FCC regulations promulgated pursuant to 47 U.S.C. § 573.
- e. This authority to occupy the Public Right-of-Way shall be granted in a competitively neutral and nondiscriminatory basis and shall not in conflict with state or federal law.

### **SECTION 3. USE OF PUBLIC RIGHT-OF-WAY.**

- a. Pursuant to K.S.A. 17-1902, and amendments thereto, and subject to the provisions of this Contract Franchise, Grantee shall have the right to construct, maintain and operate its Facilities along, across, upon and under the Public Right-of-Way. Such Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities or Public Right-of-Way users.
- b. Grantee's use of the Public Right-of-Way shall always be subject and subordinate to the reasonable public health, safety, and welfare requirements and regulations of the City. The City may exercise its home rule powers in its administration and regulation related to the management of the Public Right-of-Way; provided that any such exercise must be competitively neutral, may not be unreasonable or discriminatory, and may not violate any applicable state or federal law, rule, or regulation. Grantee shall be subject to all applicable laws and statutes, and/or rules, regulations, policies, resolutions and

ordinances (hereinafter “Laws”) adopted by the City, relating to the construction and use of the Public Right-of-Way, including, but not limited to the City’s ordinance for managing the use and occupancy of the Public Right-of-Way, codified at Gardner Municipal Code (GMC) Chapter 12.05, Public Rights-Of-Way, and amendments thereto, and the City’s zoning and land-use laws, including the City’s Land Development Code, GMC Title 17, and related rules, regulations and amendments thereto, to the extent such laws do not conflict with or are preempted by any Federal law or regulation.

- c. Grantee shall participate in the Kansas One Call utility location program.

**SECTION 4. COMPENSATION TO THE CITY.**

- a. In consideration of this Contract Franchise, Grantee agrees to remit to the City an annual Franchise fee of three percent (3%) of Gross Revenues. To determine the Franchise fee, Grantee shall calculate its Gross Revenues and multiply such amount by three percent (3%).
- b. Grantee shall pay franchise fees due and payable to the City on a quarterly basis without requirement for invoice or reminder from the City, and within 45 days of the last day of the quarter for which the payment of franchise fees due and payable to the City applies. If any franchise fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.
- c. Upon written request by the City, but no more than once per quarter, Grantee shall submit to the City a statement, executed by an authorized officer of Grantee or his or her designee, showing the amount of Gross Revenues for the period covered by the payment, and the manner in which the Franchise fee was calculated.
- d. No acceptance by the City of any Franchise fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise fee payment be construed as a release of any claim of the City.
- e. The City shall have the right to examine, upon written notice to Grantee no more often than once per calendar year, those records necessary to verify the correctness of the Franchise fees paid by Grantee.
- f. The Franchise fee required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 and 17-1902, and amendments thereto. The Franchise fee is compensation for use of the Public Right-of-Way and shall in no way be deemed a tax of any kind.

**SECTION 5. INDEMNITY AND HOLD HARMLESS.**

- a. It shall be the responsibility of Grantee to take adequate measures to protect and defend its Facilities in the Public Right-of-Way from harm or damage. If Grantee fails to

accurately or timely locate Facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et seq.*, it has no claim for costs or damages against the City and its authorized contractors unless such parties are responsible for the harm or damage caused by their gross negligence or intentional conduct. The City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near Grantee's Facilities.

- b. 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 degree that it is found by a court of competent jurisdiction to be caused by the negligence, gross negligence or wrongful act of Grantee, any agent, officer, director, representative, employee, affiliate or subcontractor of Grantee, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining Facilities in the Public Right-of-Way.
- c. If Grantee and the City are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the City under state law and without waiving any defenses of the parties under state or federal law. This section is solely for the benefit of the City and Grantee and does not create or grant any rights, contractual or otherwise, to any other person or entity.
- d. Grantee or City shall promptly advise the other in writing of any known claim or demand against Grantee or the City related to or arising out of Grantee's activities in the Public Right-of-Way.

**SECTION 6. INSURANCE REQUIREMENT AND PERFORMANCE BOND.**

- a. During the term of this Contract Franchise, Grantee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers maintaining an AM Best rating of A- or higher and that are licensed to do business in the State of Kansas. Should Grantee elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. Grantee shall provide not less than the following insurance:
  - (1) Workers' compensation as provided for under any worker's compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law;

- (2) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than TWO MILLION DOLLARS (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The Grantee may meet the policy limit requirements above in combination with commercial general liability policies and umbrella liability policies. The City shall be included as an additional insured with respect to liability arising from Grantee's operations under this Contract Franchise.
- b. As an alternative to the requirements of subsection (a), Grantee may demonstrate to the satisfaction of the City that it is self-insured and as such Grantee has the ability to provide coverage in an amount not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in aggregate, to protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death or property damage occasioned by Grantee, or alleged to so have been caused or occurred.
- c. Grantee shall, as a material condition of this Contract Franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance or evidence of self-insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice. Grantee shall make available to the City on request the policy declarations page and a certified copy of the policy in effect, so that limitations and exclusions can be evaluated for appropriateness of overall coverage.
- d. Grantee shall, as a material condition of this Contract Franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a performance bond in the amount of \$50,000, payable to the City to ensure the appropriate and timely performance in the construction and maintenance of Facilities located in the Public Right-of-Way, provided the aforementioned performance bond shall not be required if Grantee has currently posted and in place a comparable \$50,000 bond pursuant to the City's Ordinance regarding Use and Occupancy of the Public Right-of-Way, codified at GMC Chapter 12.05, Public Rights-Of-Way, and amendments thereto. The required performance bond must be with good and sufficient sureties, issued by a surety company authorized to transact business in the State of Kansas, and satisfactory to the City Attorney in form and substance.

## **SECTION 7. REVOCATION AND TERMINATION.**

In case of failure on the part of Grantee to comply with any of the provisions of this Contract Franchise, or if Grantee should do or cause to be done any act or thing prohibited by or in violation of the terms of this Contract Franchise, Grantee shall forfeit all rights, privileges and Franchise granted herein, and all such rights, privileges and Franchise hereunder shall cease, terminate and become null and void, and this Contract Franchise shall be deemed revoked or terminated, provided that said revocation or termination, shall not take effect until the City has completed the following procedures: Before the City proceeds to revoke and terminate this Contract Franchise, it shall first serve a written notice upon Grantee, setting forth in detail the

neglect or failure complained of, and Grantee shall have sixty (60) days thereafter in which to comply with the conditions and requirements of this Contract Franchise. If at the end of such sixty (60) day period the City deems that the conditions have not been complied with, the City shall take action to revoke and terminate this Contract Franchise by an affirmative vote of the City Council present at the meeting and voting, setting out the grounds upon which this Contract Franchise is to be revoked and terminated; provided, to afford Grantee due process, Grantee shall first be provided reasonable notice of the date, time and location of the City Council's consideration, and shall have the right to address the City Council regarding such matter. Nothing herein shall prevent the City from invoking any other remedy that may otherwise exist at law. Upon any determination by the City Council to revoke and terminate this Contract Franchise, Grantee shall have thirty (30) days to appeal such decision to the District Court of Johnson County, Kansas. This Contract Franchise shall be deemed revoked and terminated at the end of this thirty (30) day period, unless Grantee has instituted such an appeal. If Grantee does timely institute such an appeal, such revocation and termination shall remain pending and subject to the court's final judgment. Provided, however, that the failure of Grantee to comply with any of the provisions of this Contract Franchise or the doing or causing to be done by Grantee of anything prohibited by or in violation of the terms of this Contract Franchise shall not be a ground for the revocation or termination thereof when such act or omission on the part of Grantee is due to any cause or delay beyond the control of Grantee or to bona fide legal proceedings. Nothing herein is intended to prevent either party from invoking any other remedy that may otherwise exist at law.

#### **SECTION 8. RESERVATION OF RIGHTS.**

- a. The City specifically reserves its right and authority as a customer of Grantee and as a public entity with responsibilities towards its citizens, to participate to the full extent allowed by law in proceedings concerning Grantee's rates and services to ensure the rendering of efficient Telecommunication Services and any other services at reasonable rates, and the maintenance of Grantee's property in good repair.
- b. In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, its Home Rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- c. In granting its consent hereunder, Grantee does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, or under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- d. In entering into this Contract Franchise, neither the City's nor Grantee's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the Contract Franchise, neither the City nor Grantee waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Grantee may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-Franchise ordinances and/or

rulings.

## **SECTION 9. FAILURE TO ENFORCE.**

The failure of either the City or the Grantee to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Contract Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City or the Grantee unless said waiver or relinquishment is in writing and signed by both the City and the Grantee.

## **SECTION 10. TERM AND TERMINATION DATE.**

- a. This Contract Franchise shall be effective for a term of ten (10) years, beginning on the Effective Date of this Contract Franchise and ending ten (10) years after the Effective Date as set forth herein. Thereafter, this Contract Franchise will automatically renew for up to fifteen (15) additional one-year (1) terms, unless either party notifies the other party of its intent to terminate the Contract Franchise at least ninety (90) days before the termination of the then current term. The additional terms shall be deemed a continuation of this Contract Franchise and not as a new Franchise or amendment.
- b. Upon written request of either the City or Grantee, this Contract Franchise shall be renegotiated at any time in accordance with the requirements of state law upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or Grantee, including but not limited to the scope of the Contract Franchise granted to Grantee or the compensation to be received by the City hereunder.
- c. Amendments under this Section, if any, shall be made by Contract Franchise ordinance as prescribed by statute. This Contract Franchise shall remain in effect according to its terms, pending completion of any review or renegotiation provided by this section.
- d. In the event the parties are actively negotiating in good faith a new contract Franchise ordinance or an amendment to this Contract Franchise upon the termination date of this Contract Franchise, the parties by written mutual agreement may extend the termination date of this Contract Franchise to allow for further negotiations. Such extension period shall be deemed a continuation of this Contract Franchise and not as a new contract Franchise ordinance or amendment.

## **SECTION 11. POINT OF CONTACT AND NOTICES.**

Grantee shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of Grantee in the event of an emergency. Grantee shall provide the City with said local contact's name, address, telephone number, fax number and e-mail address. Emergency notice by Grantee to the City may be made by telephone to the City Clerk or the Public Works Director. All other notices between the parties shall be in writing and shall be made by personal delivery, depositing such notice in the U.S. Mail, Certified Mail, return receipt requested, or by facsimile. Any notice served by U.S. Mail or Certified Mail, return receipt requested, shall be deemed delivered five (5) calendar days after the date of such

deposit in the U.S. Mail unless otherwise provided. Any notice given by facsimile is deemed received by the next business day. "Business day" for purposes of this section shall mean Monday through Friday, excepting the City's published observed holidays.

**The City:**

The City of Gardner  
120 East Main Street  
Gardner, KS 66030  
ATTN: City Clerk

**Grantee:**

Mobilitie, LLC  
660 Newport Center Drive, Suite 200  
Newport Beach, CA 92660  
ATTN: General Counsel  
(877) 999-7070  
[assetmgmt@mobilitie.com](mailto:assetmgmt@mobilitie.com)  
[legal@mobilitie.com](mailto:legal@mobilitie.com)

or to such replacement addresses that may be later designated in writing.

**SECTION 12. TRANSFER AND ASSIGNMENT.**

This Contract Franchise is granted solely to the Grantee and shall not be transferred or assigned without the prior written approval of the City; provided that such transfer or assignment may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, or to an entity with which Grantee is under common ownership or control, upon written notice to the City. The parties acknowledge that the City's consent, which shall not be unreasonably withheld, shall be solely with regard to the transfer or assignment of this Contract Franchise. In the event of any transfer or assignment of either this Contract Franchise or Grantee's business or assets, Grantee shall: timely notify the City of the successor entity; provide a point of contact for the successor entity; and advise the City of the effective date of the transfer or assignment. Additionally, Grantee's obligations under this Contract Franchise with regard to indemnity, bonding and insurance shall continue until the transferee or assignee has taken the appropriate measures necessary to assume and replace the same, the intent being that there shall be no lapse in any coverage as a result of the transfer or assignment.

**SECTION 13. CONFIDENTIALITY.**

Information provided to the City under this Contract Franchise shall be governed by confidentiality procedures in compliance with K.S.A. 45-215 and 66-1220a, et seq., as amended. Grantee agrees to indemnify and hold the City harmless from any and all penalties or costs, including attorney's fees, arising from the actions of Grantee, or of the City, at the written request of Grantee, in seeking to safeguard the confidentiality of information provided by Grantee to the City under this Contract Franchise.

**SECTION 14. ACCEPTANCE OF TERMS.**

Grantee shall have sixty (60) days after the final passage and approval of this Contract Franchise to file with the City Clerk its acceptance in writing of the provisions, terms and conditions of this Contract Franchise, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths; and when so accepted, this Contract Franchise and acceptance shall constitute a contract between the City and Grantee subject to

the provisions of the laws of the state of Kansas, and such contract shall be deemed effective on the later date Grantee files acceptance with the City or publication of this Contract Franchise in accordance with Statute (the “Effective Date”).

**SECTION 15. PAYMENT OF PUBLICATION COSTS.**

In accordance with Kansas Statute, Grantee shall be responsible for payment of all costs and expense of publishing this Contract Franchise, and any amendments thereof.

**SECTION 16. SEVERABILITY.**

If any clause, sentence, or section of this Contract Franchise, or any portion thereof, shall be held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared invalid; provided, however, the City or Grantee may elect to declare the entire Contract Franchise is invalidated if the portion declared invalid is, in the judgment of the City or Grantee, an essential part of the Contract Franchise; provided, however, if Grantee is required by law to enter into a Contract Franchise with the City, the parties agree to act in good faith in promptly negotiating a new Contract Franchise, and this Contract Franchise shall remain in effect according to its terms pending completion of any renegotiation provided by this section.

**SECTION 17. FORCE MAJEURE.**

This nonexclusive Contract Franchise, grant, and privilege is granted under and subject to all applicable laws and under and subject to all of the orders, rules, and regulations now or hereafter adopted by governmental bodies now or hereafter having jurisdiction. However, each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond Grantee’s or the City’s control.

**SECTION 18. EFFECTIVE DATE OF ORDINANCE.**

This Contract Franchise shall take effect and be in force from and after its passage, approval by the City, acceptance by the Grantee, and publication in the official City newspaper.

PASSED by the City Council this \_\_\_ day of \_\_\_\_\_, 2017.

APPROVED by the Mayor this \_\_\_ day of \_\_\_\_\_, 2017.

CITY OF GARDNER, KANSAS

/s/

\_\_\_\_\_  
Chris Morrow, Mayor

(SEAL)

Attest:

/s/

\_\_\_\_\_  
City Clerk

Approved as to form:

/s/

\_\_\_\_\_  
Ryan Denk, City Attorney