

**ORDINANCE NO. 1359-21**

**AN ORDINANCE GRANTING A FRANCHISE AND AUTHORIZING COX WIRELESS ACCESS, L.L.C, A WHOLLY OWNED SUBSIDIARY OF COX COMMUNICATIONS, TO CONSTRUCT, MAINTAIN AND OPERATE AS A COMPETITIVE INFRASTRUCTURE PROVIDER IN THE PUBLIC RIGHT-OF-WAY OF THE CITY OF VALLEY CITY, KANSAS.**

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

**Section 1. Definitions.**

For purposes of this franchise ordinance, the following words and phrases shall have the following meanings:

*" Affiliate"* means each person or entity which falls into one or more of the following categories: (a) each person or entity having, directly or indirectly, a controlling interest in Company; (b) each person or entity in which Company has, directly or indirectly, a controlling interest; or (c) each person or entity that, directly or indirectly, is controlled by a third party which also directly or indirectly controls Company.

*Cable service* is defined as set forth in 47 U.S.C. Section 522(6), and amendments thereto.

*City* means the City of Valley City, Kansas.

*Competitive infrastructure provider* means an entity which leases, sells or otherwise conveys Facilities located in the Public right-of-way, or the capacity or bandwidth of such Facilities for use by FCC licensed wireless telecommunications service providers in the provision of Telecommunications services, internet services, or other intrastate and/or interstate traffic, but does not itself provide services directly to end users within the corporate limits of the City, including a cable provider.

*Distributed antenna system ("DAS") facility or facilities* mean certain components of the Network consisting of distributed antenna systems which may be located on existing or new streetlights, stand-alone poles, third party utility poles, and other structures located on or within the ROW as permitted under this contract franchise ordinance, and which will be connected to underground and aboveground fiber optic cable, fiber handholes and enclosures, fiber repeaters and related equipment.

*Facility or facilities* means any portion or component of the Network located in, along, over, upon, under, or through the public right-of-way.

*Franchise fee* means the fees established under this article for each grant of access to the public rights-of-way.

*Grantee* means the franchisee, Cox Wireless Access, L.L.C., a wholly owned subsidiary of Cox Communications, Inc. a Delaware corporation.

*Network* means the franchisee's fiber network and distributed antenna system facilities or small wireless facilities, including the antenna nodes, poles, equipment cabinets, underground and aboveground fiber

optic cable, wires, lines, fiber handholes and enclosures, fiber repeaters and related equipment and appurtenance, and similar facilities and appurtenances, designed, constructed or occupied for the purpose of producing, receiving, amplifying or distributing telecommunications service to or from locations within the city.

*Law(s)* means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, permits, approvals or other applicable requirements of the city or other governmental entity or agency having joint or several jurisdiction over any aspect of this contract franchise agreement or the parties' activities hereunder, whether now existing or hereafter adopted, including but not limited to a city right-of-way management ordinance and the city's zoning and land use laws to the extent they are not inconsistent with state and federal law regulating use of the public rights-of-way, and any related laws, rules, or regulations and amendments thereto relating to the use and occupancy of the public rights-of-way.

*Public right(s)-of-way ("ROW")* 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 non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts, or facilities or property owned by the City even if located within the ROW.

*Small Wireless Facilities* or *Wireless Facilities* means a wireless facility that meets both of the following qualifications:

- a) All antennas are located inside an enclosure of not more than (6) six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of the antenna's exposed elements could fit within an imaginary enclosure of not more than (6) six cubic feet, and
- b) All other wireless equipment associated with the facility is cumulatively not more than (28) twenty-eight cubic feet on volume, or (50) fifty cubic feet in volume if the equipment was ground mounted before the effective date of this section. The following types of associated ancillary equipment are not included in the calculation of equipment volume pursuant to this subdivision:
  - i. An electric meter.
  - ii. Concealment elements.
  - iii. A telecommunications demarcation box.
  - iv. Grounding equipment.
  - v. A power transfer switch.
  - vi. A cutoff switch.
  - vii. Vertical cable runs for the connection of power and other services.

*Telecommunications service(s)* 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.

*Wireless Services Provider* means a provider of wireless services.

*Wireless Support Structure* means a freestanding structure, such as a pole, monopole, self-supporting tower, or suitable existing structure or alternative structure designed to support or capable of supporting Wireless Facilities. Wireless Support Structure does not include any telephone or electrical Utility pole or any tower used for the distribution or transmission of electrical service.

**Section 2. Grant of Contract Franchise.**

- (a) **Competitive Infrastructure Provider.** This contract franchise ordinance hereby grants to Cox Wireless Access, L.L.C., or any Affiliate the nonexclusive contract, right, privilege, and franchise to locate, construct, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain, facilities along, across, upon and under the ROW for the purpose of Cox Wireless Access, L.L.C. providing competitive infrastructure to third-party carriers to provide telecommunications services, internet services, or other intrastate or interstate traffic, subject to the terms and conditions of this contract franchise ordinance.
- (b) **Affiliate Contract Franchise.** Nothing in this contract franchise ordinance is intended to preclude the city from seeking or authorize the city to seek, a franchise from an affiliate or third party providing telecommunications services.
- (c) **Conveyance of Title.** This contract franchise ordinance shall not convey title, equitable or legal, in the ROW, and gives only the right to occupy the ROW, for the purposes and for the period stated herein and subject to the terms stated in this Contract Franchise Ordinance. This Contract franchise ordinance does not:
1. Grant the right to use Facilities or any other property, telecommunications 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 whether inside or outside of the ROW, specifically including, but not limited to, poles, street lights, buildings, towers, park property, City Hall property, or other facilities;
  3. Excuse the Grantee from obtaining appropriate access or attachment agreements or permits before locating its Facilities on Facilities or property owned or controlled by the City or a third-party;
  4. Grant to any licensee or lessee of Grantee or other third party a right of access or authority to the City's right-of-way without said licensee, lessee, or third party obtaining all necessary permits and authorizations from the City in accordance with Ordinance 1359-21 of the City or any then current ordinance or regulation of the City dealing with management of the ROW and, if determined necessary by the City, a contract franchise for said licensee, lessee, or third party.
  5. 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 or Network by any third party in violation of any federal, state, or local law.

- (d) **Cable Service.** This contract franchise ordinance does not provide Cox Wireless Access, L.L.C. the right to provide cable service to the city and inhabitants thereof. If, during the term of this franchise, Cox Wireless Access, L.L.C. desires to provide cable service within the corporate boundaries of the city, Cox Wireless Access, L.L.C. shall follow the requirements of K.S.A. 12-2021, *et seq.*, as amended, in providing notice and paying a video service provider fee to the city. In the event that K.S.A. 12-2021, *et seq.* is repealed or amended in such a way as to provide direct franchising authority to the City, Cox Wireless Access, L.L.C. shall promptly notify the city of its intent to provide cable service and renegotiate this contract franchise ordinance in accordance with applicable law prior to providing such service. Nothing in this contract franchise ordinance is intended to preclude the city from seeking, or authorize the city to seek, a franchise from Cox Wireless Access, L.L.C. or any subsidiary, affiliate, or third party providing cable services, to the extent any such franchise is permitted under applicable law at the time such service commences. Cox Wireless Access, L.L.C. and the city agree that nothing in this franchise is intended to authorize the city to seek from Cox Wireless Access, L.L.C., nor to require Cox Wireless Access, L.L.C. to obtain, a franchise to offer "open video systems" as that term is used in section 653 of the Telecommunications Act of 1996 (codified at 47 U.S.C. 573). Cox Wireless Access, L.L.C. and the city further agree, however, that this article does not authorize Cox Wireless Access, L.L.C. to offer "open video systems" without paying a fee on the gross revenues of the system operator for the provision of cable service in lieu of a franchise fee, pursuant to and in the manner described in 47 U.S.C. 573(c)(2)(b) and without complying with Federal Communication Commission (FCC) regulations promulgated pursuant to 47 U.S.C. 573.
- (e) This contract franchise ordinance is subject to and conditioned upon the terms and conditions of all applicable federal, state and local laws, existing now or in the future, and the parties shall comply with any such laws in the exercise of their rights and performance of their obligations under this contract franchise ordinance. "Laws" means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, permits, approvals or other applicable requirements of the city or other governmental entity or agency having joint or several jurisdiction over any aspect of this contract franchise ordinance or the parties' activities hereunder, whether now existing or hereafter adopted, including but not limited to the City's then current ROW management ordinance or regulations and the city's zoning and land use laws to the extent they are not inconsistent with state and federal law regulating use of the ROW, and any related laws, rules, or regulations and amendments thereto relating to the use and occupancy of the ROW.
- (f) The authority of Cox Wireless Access, L.L.C. to use and occupy the ROW 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 ROW provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Cox Wireless Access, L.L.C. shall comply with all laws, rules, and lawful city regulations, in effect now or as may be adopted in the future, governing the use of ROW, specifically including City of Valley City Ordinance No.1359-21 as amended or replaced, the City's zoning, land use, and subdivision regulations and amendments thereto.

### **Section 3. Term.**

- (a) This contract franchise ordinance shall be effective for a term of five (5) years from the effective date of this contract franchise ordinance. Thereafter, this contract franchise ordinance shall automatically renew for three (3) additional five-year terms, unless a party notifies the other party of its intent to terminate the contract franchise ordinance prior to 180 days before the termination of the current term.

The additional terms are a continuation of this franchise and not a new franchise or amendment.

- (b) Upon written request of either the city or Cox Wireless Access, L.L.C., this contract franchise ordinance shall be renegotiated at any time in accordance with the requirements of K.S.A. 12-2001 and K.S.A. 17-1902, as amended, 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 Cox Wireless Access, L.L.C., including but not limited to the scope of the contract franchise ordinance granted to the Cox Wireless Access, L.L.C. or the compensation to be received by the city. The parties specifically acknowledge and agree that certain compensation and other provisions have been negotiated based upon pending orders, regulations, and guidance and that the parties agree that they shall work together in good faith to renegotiate this contract franchise ordinance if requested by the other party.
- (c) Amendments under this section, if any, shall be made by contract franchise ordinance as prescribed by statute. The contract franchise ordinance shall remain in effect according to its terms pending completion of any review or renegotiation provided by this section.

#### **Section 4. Compensation.**

- (a) **Competitive Infrastructure Provider Franchise Fee.** In consideration of this contract franchise ordinance, Cox Wireless Access, L.L.C. agrees to pay the city a franchise fee of one hundred and fifty dollars (\$150.00) per year per attachment for the attachment of wireless equipment to support DAS or SWF installations within the city on city owned infrastructure, third party and utility infrastructure, and newly placed Cox Wireless Access, L.L.C poles and other equipment within the city, provided that Cox Wireless Access, L.L.C. or any affiliate, pursuant to K.S.A. 12-2023, shall not be obligated to pay any recurring fees of any kind to the City for new strand mount micro-wireless facilities which are placed on Cox's affiliate Cox Communications Kansas, LLC owned existing overhead fiber/coaxial strand located within the City's right of way.

Cox Wireless Access, L.L.C. shall pay its franchise fee on the 15<sup>th</sup> day of the second month following the month in which the gross revenue is received.

- (b) **Permit Fees.** In addition to the franchise fees and other fees allowed by law, Cox agrees that it will pay all other city permit and review fees that exist as of the date of an application for the installation of any DAS or Small Wireless Facility or infrastructure that relate to the installation of the DAS or Small Wireless Facility. In addition to the above permit fees, Cox Wireless Access, L.L.C. agrees to pay a one-time application fee of One Thousand Dollars (\$1,000) for any application concerning the placement of a new pole intended to support one or more DAS or SWF facilities in the City's ROW. Cox Wireless Access, L.L.C. shall pay applicable permit and application fees upon submission of a complete application for the installation of a DAS or Small Wireless Facility per this article and after the date of Cox Wireless Access, L.L.C.'s submission of a complete application, the city shall not retroactively apply any new permit or licensing fees to the DAS or Small Wireless Facility.
- (c) Cox Wireless Access, L.L.C. shall reimburse the city for the publication costs related to the adoption or amendment of this contract franchise ordinance.
- (d) If any franchise fee, or any portion thereof, is not postmarked or delivered on or before the due date,

interest shall accrue from the due date until received, at an annual rate of ten percent (10%), or if lower, the highest percentage allowed by law.

- (e) Cox Wireless Access, L.L.C. shall keep accurate books of account at its principal office in Buhler, Kansas, or such other location of its choosing, for the purpose of determining the amounts due to the city pursuant to this subsection. The city shall have access to, and the right to examine, at all reasonable times, all books, receipts, files, records and documents of Cox Wireless Access, L.L.C. necessary to verify the correctness of compensation paid to the city, and to correct the same, if found to be erroneous. The city may only exercise its right to examine the books, receipts, files, records, and documents one time per year at a mutually agreeable time. If the statement of fees paid by Cox Wireless Access, L.L.C. is incorrect, Cox Wireless Access, L.L.C. shall promptly make payment upon such corrected statement. The city agrees to hold in confidence any non-public information it learns from Cox Wireless Access, L.L.C. to the fullest extent permitted by law.

### **Section 5. – Installation of the Facilities.**

- (a) Pursuant to the grants provided herein, Cox Wireless Access, L.L.C. shall have the right to construct, maintain, and operate the Facilities along, across, upon, and under the ROW.
- (b) Cox Wireless Access, L.L.C. shall construct and maintain the facilities in a skillful and workmanlike manner that does not obstruct or hinder the usual travel or public safety on such ROW, and that does not obstruct or interfere with the legal use of the ROW by other utilities. Cox Wireless Access, L.L.C. shall be solely responsible for communicating with Kansas One-Call, or for taking other necessary measures to determine the location of public improvements or other facilities located in the ROW. Cox Wireless Access, L.L.C. shall install facilities in accordance with traffic control plans for temporary construction work that are approved by the city, which approval shall not unreasonably be withheld, conditioned or delayed. Cox Wireless Access, L.L.C. shall coordinate the placement of its facilities in the ROW in a manner that minimizes adverse impact on public improvements, as reasonably determined by the city engineer.
- (c) Cox Wireless Access, L.L.C. shall be the city's point of contact and all communications shall be through Cox Wireless Access, L.L.C. Cox Wireless Access, L.L.C. 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 Cox Wireless Access, L.L.C. in the event of an emergency. Cox Wireless Access, L.L.C. shall provide the city with the local contact's name, address, telephone number, fax number and e-mail address.
- (d) Cox Wireless Access, L.L.C. shall cooperate with the city and follow all legally binding city policies and state and local ordinances with respect to aesthetics.
- (e) In addition to the approvals required by this section, Cox Wireless Access, L.L.C. must obtain and is responsible for any necessary permit, license, certification, grant, registration, and any other authorization or approval required by the city (collectively, the "permits and approvals") relating to the installation, maintenance, and repair of the facilities or network and for the use and occupancy of the ROW, including but not limited to all permits and approvals required under a city ROW ordinance or zoning regulation and that are not inconsistent with state and federal laws regarding the regulation of the public ROW. The city shall process each valid and administratively complete application for requested permits and approvals in accordance with the time requirements of applicable laws, and

shall not unreasonably or unlawfully withhold or delay any permits and approvals. Cox Wireless Access, L.L.C. shall comply with any condition or requirement set forth in any permit and approval, if they comply with the laws.

- (f) When Cox Wireless Access, L.L.C. is allowed to place DAS or Small Wireless Facilities above ground under this section, Cox Wireless Access, L.L.C. may attach its DAS or Small Wireless Facilities to an existing utility pole pursuant to a properly executed agreement with the pole owner and or to cable strand owned by Cox Wireless Access, L.L.C. or any affiliate, subject to obtaining an encroachment permit. Cox Wireless Access, L.L.C. agrees that in areas where there are existing poles, Cox Wireless Access, L.L.C. will work with the owner of that existing pole to collocate DAS or Small Wireless Facilities, but only when the pole owner is willing to allow such attachment and where such attachment is feasible from a safety, technical, and engineering (structural and radio frequency coverage) perspective. Any necessary replacement of any pole to accommodate the attachment shall be subject to the proper exercise of the city's police powers, and in no instance shall Cox Wireless Access, L.L.C. erect a new pole absent the city's prior authorization.
- (g) In granting this contract franchise ordinance, the city makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of facilities on any particular segment of the ROW. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon Cox Wireless Access, L.L.C.
- (h) Cox Wireless Access, L.L.C. shall take all reasonable measures necessary to maintain accurate and complete records in electronic format, of all facilities constructed, reconstructed, or relocated in the ROW. Cox Wireless Access, L.L.C. shall cooperate promptly and fully with the city and take all reasonable measures necessary to provide accurate and complete information regarding the nature and horizontal and vertical location of its facilities located within the ROW when requested by the city or its authorized agents for a public project. Such location and identification shall be at the sole expense of Cox Wireless Access, L.L.C. without expense to the city, its employees, agents, or authorized contractors.
- (i) Cox Wireless Access, L.L.C. may trim trees overhanging the ROW that may come into contact with Cox Wireless Access, L.L.C. facilities in accordance with Ordinance No. 1359-21 of the City or any then current ordinance or regulation of the City dealing with management of the ROW. S

#### **Section 6. Cox Wireless Access, L.L.C. and City access to the facilities.**

Subject to the requirements of Valley City Ordinance No. 1359-21, or any then current ordinance or regulation of the City dealing with management of the ROW, Cox Wireless Access, L.L.C. will be given reasonable access to each of the facilities in the ROW for the purposes of routine installation, repair, maintenance or removal of facilities.

#### **Section 7. Maintenance and repair.**

- (a) Cox Wireless Access, L.L.C. shall pay for the electricity and other utilities services it consumes in its operations at the rates charged by the servicing utility companies.

- (b) Cox Wireless Access, L.L.C. shall, at Cox Wireless Access, L.L.C.'s sole cost and expense, perform all maintenance and repairs reasonably needed to maintain its facilities in good condition and neat and orderly appearance, and in compliance with all applicable laws including Ordinance No. 1359-21 of the city, or any then current ordinance or regulation of the City dealing with management of the ROW. In the event any facility requires replacement because such part cannot be repaired, Cox Wireless Access, L.L.C. shall, at Cox Wireless Access, L.L.C.'s sole cost and expense, replace the irreparable facility. Cox Wireless Access, L.L.C. shall not cause rubbish, garbage or debris on or around the facilities and shall not permit any rubbish, garbage or debris to accumulate on or around any enclosed areas around the facilities. If the city gives Cox Wireless Access, L.L.C. written notice of a failure by Cox Wireless Access, L.L.C. to maintain the facilities, Cox Wireless Access, L.L.C. shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice.
  
- (c) Cox Wireless Access, L.L.C. shall be responsible for any damage, ordinary wear and tear excepted, to street pavement, existing facilities and utilities, curbs, gutters, sidewalks, landscaping, and all other public or private facilities, to the extent caused by Cox Wireless Access, L.L.C.'s construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of facilities in the ROW. Cox Wireless Access, L.L.C. shall promptly repair such damage and restore the ROW and any affected adjacent property to a safe and satisfactory condition to the city in accordance with the city's applicable street or ROW restoration standards, or to the property owner if not the city. If Cox Wireless Access, L.L.C. fails to make the repairs required by the city, the city may affect those repairs and charge Cox Wireless Access, L.L.C. the cost of those repairs. If the city incurs damages as a result of a violation of this subsection, then the city shall have a cause of action against Cox Wireless Access, L.L.C. for violation of this section, and may recover its damages, including reasonable attorney fees, if Cox Wireless Access, L.L.C. is found liable by a court of competent jurisdiction. Cox Wireless Access, L.L.C.'s obligations under this section shall survive for one (1) year past the completion of such reparation and restoration work and return of the affected part of the ROW by Cox Wireless Access, L.L.C. to the city, or such longer period as may be established by the city's ROW ordinance, rules or regulations or other applicable laws.

**Section 8. Non-interference.**

- (a) Cox Wireless Access, L.L.C. shall operate its network in a manner that will not cause interference with city non-public safety communications systems and to the services and facilities of other licensees or lessees of city property located at or near the Facilities that were in operation prior to the installation of the network or that are in operation prior to any modifications Cox Wireless Access, L.L.C. may make to the network.
  
- (b) Cox Wireless Access, L.L.C.'s network and facilities shall not cause interference with public safety communications systems operated by city or any other public agency, regardless of the date such systems or any components thereof have been placed in service. Nor shall Cox Wireless Access, L.L.C.'s network and facilities cause interference with the city's use of the Cox Wireless Access, L.L.C. poles for the city's intended city purpose.
  
- (c) If such interference with the facilities described in subsections (a) or (b) occurs, Cox Wireless Access, L.L.C. shall, upon receipt of written notice from the city, immediately commence commercially reasonable, diligent, efforts to correct or eliminate such interference. If such interference cannot be corrected by Cox Wireless Access, L.L.C. to the reasonable satisfaction of the city within the cure period set forth in the city's notice, which notice shall not be less than



30 days, absent an emergency or danger to public health and safety requiring shorter notice, such interference shall be deemed a material breach under this contract franchise ordinance and city may terminate the contract franchise ordinance. Interference caused by actions of Cox Wireless Access, L.L.C.'s customer(s) remains the responsibility of Cox Wireless Access, L.L.C.

**Section 9. Indemnity and hold harmless.**

- (a) It shall be the responsibility of Cox Wireless Access, L.L.C. to take adequate measures to protect and defend its facilities in the ROW from harm or damage. If Cox Wireless Access, L.L.C. fails to accurately or timely locate facilities when requested, it has no claim for costs or damages against the city and its authorized contractors unless such party is responsible for the harm or damage 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 Cox Wireless Access, L.L.C.'s facilities.
- (b) Cox Wireless Access, L.L.C. shall indemnify, defend, and hold harmless the city, its agents, representatives, officers, officials, employees and contractors, from and against all liability, claims, demands, losses, damages, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense to the extent resulting from activities undertaken by Cox Wireless Access, L.L.C. or any agent, officer, director, representative, employee, or affiliate of Grantee pursuant to this contract franchise ordinance, except to the extent arising from or caused by the gross negligence or willful misconduct of the city, its agents, representatives, officers, officials, employees or contractors.
- (c) Cox Wireless Access, L.L.C. waives all claims, demands, causes of action, and rights it may assert against the city on account of any loss, damage, or injury to any portion of the network, or any loss or degradation of the services provided by the network resulting from any event or occurrence except for any loss, damage, or injury to any portion of the network, or any loss or degradation of the services provided by the network, resulting from the gross negligence or willful misconduct of the city.
- (d) The city will be liable, if at all, only for the cost of repair to damaged portions of the facilities arising from the gross negligence or willful misconduct of the City or its employees. The city, its agents, officers, employees, or contractors, shall not be liable for any damage from any cause whatsoever to the facilities, specifically including, without limitation, damage, if any, resulting from the city's maintenance operations adjacent to the facilities or from vandalism or unauthorized use of the facilities, except to the extent such damage is caused by the gross negligence or willful misconduct of city, its officers, or employees. The city will in no event be liable for indirect or consequential damages.
- (e) In no event shall Cox Wireless Access, L.L.C. be liable for indirect or consequential damages in connection with or arising from this contract franchise ordinance, or its use of the network or ROW.
- (f) Cox Wireless Access, L.L.C. or the city shall promptly advise the other in writing of any known claim or demand against Cox Wireless Access, L.L.C. or the city related to or arising out of the Cox Wireless Access, L.L.C.'s activities in a ROW.

**Section 10. Insurance requirement and performance bond.**

- (a) During the term of this franchise, Cox Wireless Access, L.L.C. shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers with an A.M. Best rating of no less than A-:VII. Cox Wireless Access, L.L.C. shall provide not less than the following insurance:
- (1) Workers' compensation as provided for under any workers' 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 with limits of insurance not less than \$2,000,00 each occurrence, \$2,000,000 annual aggregate, \$2,000,000 completed Operations/Product Aggregate covering claims for bodily injury, property damage, personal and advertising injury, completed operation/product liability and contractual liability arising from the activities and operations of the franchisee and independent contractors operating on their behalf. The city shall be included as an additional insured. The insurance for the additional insured shall be as broad as the insurance for the named insured and apply on a primary/noncontributor basis and include protection for completed operations/products claim. Coverage for the additional insured shall include defense expense. If in order to accomplish the required limits of insurance, the franchisee must purchase an excess liability/umbrella policy, such policy shall be written on a follow form basis and be as broad as the underlying insurance. The city shall be included as additional insured to the policy.
  - (3) Business Auto Liability Insurance with limits of insurance not less than \$1,000,00 Combined Single Limit for bodily injury and property damage covering ownership or use of all owned, hired and non-owned autos used in connection with the Franchisee operations and activities. The city shall be included as additional insured to the auto liability policy.
- (b) As an alternative to the requirements of subsection (a), Cox Wireless Access, L.L.C. may demonstrate to the satisfaction of the city that it is self-insured and as such Cox Wireless Access, L.L.C. has the ability to provide coverage in an amount not less than \$1,000,000.00 per occurrence and \$2,000,000.00 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 Cox Wireless Access, L.L.C., or alleged to so have been caused or occurred.
- (c) Cox Wireless Access, L.L.C. shall, as a material condition of this 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 30 days prior written notice. Cox Wireless Access, L.L.C. 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) Cox Wireless Access, L.L.C. shall, as a material condition of this franchise, prior to the commencement of any work and prior to any renewal of this franchise, deliver to the city a performance bond in the amount of \$100,000.00, payable to the city to ensure the appropriate and timely performance in the construction and maintenance of facilities located in the ROW as set forth in this article; to ensure Cox Wireless Access, L.L.C.'s repair and restoration of its damage to its

facilities or the ROW; and to ensure Cox Wireless Access, L.L.C.'s removal of its facilities, as set forth herein. The required performance and maintenance 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 11. Taxes.**

Cox Wireless Access, L.L.C. agrees that it will be solely responsible for the payment of any and all applicable taxes, fees and assessments levied on its ownership, use and maintenance of the network and this contract franchise ordinance. Pursuant to Section 79-5(a)(26) of the Kansas Revenue and Taxation Code, as amended, the city hereby advises, and Cox Wireless Access, L.L.C. recognizes and understands, that Cox Wireless Access, L.L.C.'s use of the ROW and/or Cox Wireless Access, L.L.C. facilities may create a possessory interest subject to real property taxation and that Cox Wireless Access, L.L.C. may be subject to, and responsible for, the payment of real property taxes levied on such interest. Cox Wireless Access, L.L.C. will cooperate with the county appraiser in providing any information necessary for the appraiser to make a property tax determination. Cox Wireless Access, L.L.C. reserves the right to challenge any such assessment, and the city agrees to reasonably cooperate with Cox Wireless Access, L.L.C. in connection with any such challenge.

### **Section 12. Nondiscrimination.**

- (a) Cox Wireless Access, L.L.C. will not, on the grounds of race, religion, color, sex, disability, national origin or ancestry, discriminate or permit discrimination against any person in the use of the ROW or in activities under this franchise.
- (b) **Equal Protection.** If any other provider of wireless infrastructure or an entity whose business may consist of small cell deployment is lawfully authorized by the City or by any other State or federal governmental entity to provide such services using facilities located wholly or partly in the public rights-of-way of the City, the City shall within thirty (30) days of a written request from Cox Wireless Access, LLC, modify this Franchise to insure that the obligations applicable to Cox Wireless Access, LLC are no more burdensome than those imposed on the new competing provider(s). If the City fails to make modifications consistent with this requirement, Cox Wireless Access, LLC's Franchise shall be deemed so modified thirty (30) days after the initial written notice. As an alternative to the Franchise modification request, the Cox Wireless Access, LLC shall have the right and may choose to have this Franchise with the City be deemed expired thirty (30) days after written notice to the City. Nothing in this Franchise shall impair the right of Cox Wireless Access, LLC to terminate this Franchise and, at Cox Wireless Access, LLC's option, negotiate a renewal or replacement franchise, license, consent, certificate or other authorization with any appropriate government entity.
- (c) **Most Favored Municipality.** Should Cox Wireless Access, LLC, after the Parties' execution and delivery of this contract franchise ordinance, enter into a franchise agreement or franchise ordinance with another municipality in Kansas, which agreement or ordinance contains financial benefits or other provisions for such municipality which, taken as a whole and balanced with the other terms of such agreement, are in City's opinion substantially superior to those in this franchise ordinance, the City shall have the right to require that Cox Wireless Access, LLC modify this franchise ordinance to incorporate the same or substantially similar superior benefits.

**Section 13. Transfer and assignment.**

This franchise shall be assignable in accordance with the laws of the State of Kansas. Cox Wireless Access, L.L.C. shall provide the city written notice of any transfer or assignment within thirty (30) days, including notice of the name and address of the assignee and contact information. Grantee's obligations under this contract franchise ordinance 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 any transfer or assignment.

**Section 14. Default; abandonment; expiration or termination of contract franchise.**

- (a) A "default" shall be deemed to have occurred if a party fails to cure a breach, within thirty (30) days after written notice specifying such breach, provided that if the breach is of a nature that it cannot be cured within thirty (30) days, a default shall not have occurred so long as the breaching party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.
- (b) Upon a party's failure to timely cure a breach after city notice, and upon expiration of the above cure periods, then the other party may terminate this contract franchise and pursue all remedies provided for in this contract franchise and/or any remedies it may have under applicable law or principles of equity relating to such breach.

In addition to the remedies set forth herein, the city shall have the right to terminate this contract franchise if (i) the city is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the ROW; or (ii) if Cox Wireless Access, L.L.C.'s licenses are terminated, revoked, expired, or otherwise abandoned. Such termination rights under subsection (i) shall be subject to Cox Wireless Access, L.L.C.'s rights to just compensation, if any, from the federal, state or local government requiring such removal for any taking of a protected property right.

- (c) In the event Cox Wireless Access, L.L.C. ceases to operate and abandons the network, any facility, or parts thereof, for a period of ninety (90) days or more, Cox Wireless Access, L.L.C. shall, at its sole cost and expense and within ninety (90) days from the date of abandonment, vacate and remove the network or the abandoned part thereof. If such removal disturbs the facility or adjacent property (including ROW or city real property), Cox Wireless Access, L.L.C. shall also, at its sole cost and expense, restore or repair the ROW, each facility, and any adjacent property to its original condition, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment or other aesthetic improvements made by Cox Wireless Access, L.L.C. to the facility or adjacent property. Alternatively, the city may allow Cox Wireless Access, L.L.C., in the city's sole and absolute discretion, to abandon the network, or any part thereof, in place and convey it to the city.
- (d) Upon expiration or termination of this contract franchise for any reason, Cox Wireless Access, L.L.C. shall have the right to remove any and all of its Facilities within sixty (60) days after such termination or expiration, or, subject to the approval of the City Engineer said approval not to be unreasonably withheld, to transfer any and all of its Facilities to another entity authorized to place facilities in the ROW. Cox Wireless Access, L.L.C. has the duty, immediately upon any such removal, to restore the ROW from which the facilities are removed to as good a condition as the same were before removal was performed. If Cox Wireless Access, L.L.C. fails to remove or transfer its Facilities

within sixty (60) days, the city may, at its option, remove any or all of the Facilities at Cox Wireless Access, L.L.C.'s expense, or take ownership of any or all of Facilities for the city's use and/or disposal.

**Section 15. Notices.**

Except in emergencies, all notices by one party to the other shall be made by personal delivery, by depositing such notice in the U.S. mail, certified mail, return receipt requested, or by facsimile. Any notice served by 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, city and Cox Wireless Access, L.L.C.-observed holidays excepted. Emergency notices shall be provided by telephone, with written notice immediately following by facsimile.

Notices shall be addressed to the city as follows:

City of Valley City  
Attn: City Clerk  
P.O. Box 188  
Valley City, Kansas

With a copy to:

City of Valley City  
Attn: City Attorney  
P.O. Box 188  
Valley City, Kansas

Notice to Cox Wireless Access, L.L.C. shall be addressed to the company as follows:

Cox Wireless Access, L.L.C.  
Attn: Cox Business  
901 S. George Washington Blvd  
Wichita, KS 67211

With copy to:

Cox Communications  
6205B Peachtree -Dunwoody Road  
Atlanta, Georgia 30328  
Attn: VP of Government Affairs

Notice shall be given as required by the terms of this contract franchise ordinance. Notice shall be provided to the above-named addressees unless directed otherwise in writing by the city or Cox Wireless Access, L.L.C. Both Cox Wireless Access, L.L.C. and the city shall provide to the other contact information with telephone and facsimile numbers for use in emergencies.

**Section 16. Acceptance.**

Prior to the effective date of this franchise, Cox Wireless Access, L.L.C. shall file with the city clerk its acceptance in writing of the provisions, terms and conditions of this contract franchise ordinance, which

acceptance shall be duly acknowledged before an officer authorized by law to administer oaths. When so accepted, the ordinance and acceptance shall constitute a contract between the city and Cox Wireless Access, L.L.C. subject to the provisions of the laws of the state of Kansas.

**Section 17. Reservation of rights.**

- (a) The City specifically reserves its right and authority as a customer of the company and as a public entity with responsibilities towards its citizens, to participate to the full extent allowed by law in proceedings concerning the company's rates and services to ensure the rendering of efficient telecommunications service at reasonable rates, and the maintenance of the company'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, Cox Wireless Access, L.L.C. 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.

**Section 18. Entire Agreement; Modification; Waiver.**

This contract franchise ordinance constitutes the entire agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties, oral or written, relating to the subject matter hereof are merged into and superseded by this contract franchise ordinance. The parties agree that this Agreement is the project of joint draftsmanship and that should any of the terms be determined by a court, or in any type of quasi-judicial or other proceeding, to be vague, ambiguous and/or unintelligible, that the same sentences, phrases, clauses or other wording or language of any kind shall not be construed against the drafting party. Any modification or amendment to this contract franchise ordinance shall be of no force and effect unless it is in writing, signed by the parties, and adopted pursuant to the requirements of state law. No waiver of any of the provisions of this contract franchise ordinance shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the party making the waiver.

**Section 19. Severability.**

If any clause, sentence, or section of this contract franchise ordinance, or any portion thereof, shall be declared by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared to be invalid; provided, however, the City or Cox Wireless Access, L.L.C. may elect to declare that the entire agreement is invalidated if the portion declared invalid is, in the judgment of the City or Cox Wireless Access, L.L.C., an essential part of this contract franchise ordinance.

**Section 20. Survival of Terms.**

All of the terms and conditions in this contract franchise ordinance related to payment, removal due to termination or abandonment, indemnification, limits of City's liability, attorneys' fees and waiver shall survive termination of this contract franchise.

**Section 21. Governing law and venue.**

- (a) As a condition of this contract franchise ordinance, Cox Wireless Access, L.L.C. 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 FCC or the Kansas Corporation Commission (KCC), subject to Cox Wireless Access, L.L.C.'s right to challenge in good faith such requirements as established by the FCC, KCC or other City regulations. Cox Wireless Access, L.L.C. shall also comply with all applicable laws, statutes and/or City regulations, subject to Cox Wireless Access, L.L.C.'s right to challenge in good faith such laws, statutes, and/or City regulations.
- (b) The obligations and undertakings of both parties hereto shall be performed at Valley City, Sedgwick County, Kansas. In the event that any legal proceeding is brought to enforce the terms of this franchise, the same shall be brought in state or federal courts, as appropriate, having jurisdiction for Sedgwick County, Kansas.

**Section 22. Effective date of franchise.**

The effective date of this franchise shall be the 7<sup>st</sup> day of October, 2021, following its publication, or publication of a summary of this ordinance, in the official city newspaper.

**PASSED AND APPROVED BY THE GOVERNING BODY OF THE CITY OF VALLEY CENTER, KANSAS, this 5<sup>th</sup> day of October, 2021, and **SIGNED BY THE MAYOR.****

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Lou Cicirello, Mayor

SEAL

ATTEST:

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Kristi Carrithers, City Clerk