

APPENDIX B. FRANCHISES

ARTICLE 16. XO KANSAS, INC.

Definitions. For the purpose of this franchise ordinance, the following words and phrases and their derivations shall have the following meaning:

'Cable' includes both the coaxial cable used to transmit signals of high frequency, and fiber optic cable that consists of a bundle of thin insulated glass strands used to transmit data, voice, video and other communications, and any other assembly of materials so classified generically as cable.

'Cable Service' means the one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any, which is required for selection and use of video programming or other programming service, as defined by 47 USC §522(6), any successor statute of similar import.

'City' means the City of Leawood, Kansas, a municipal corporation, and if applicable, the territorial boundaries of the City of Leawood as now constituted or as shall hereafter exist.

'Facilities' means lines, pipes, wires, cables, conduits, ducts, culverts, hoses, irrigation systems, manholes, poles, towers, vaults, pedestals, boxes, appliances, antennas, repeaters, micro cells, Pico cells, amplifiers, transmitters, gates, meters, appurtenances, or other equipment used by the franchisee for the purposes of conducting franchise operations and providing service to subscribers.

'Franchise Ordinance' means this ordinance passed to grant the telecommunications franchise to franchisee. This ordinance shall operate as an agreement or contract between the City and franchisee and shall be subject to the laws of the State of Kansas.

'Franchisee' means XO Kansas, Inc., or its successors, transferees, or assigns.

'Franchise Fee' means the fee imposed by the City on franchisee solely because of its status as such, in accordance to K.S.A. § 12-2001. It shall not include: [1] any tax, fee, or assessment of general applicability including any which are imposed on franchisee; [2] requirements or charges incidental to the awarding or enforcing the franchise ordinance, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages, [3] any permit fee or other fee imposed under any valid right-of-way ordinance, or [4] any other fee imposed by federal, state, or local law.

'Gross Revenues' means those revenues less uncollectible, derived from the following: [1] recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features, and measured local calls; [2] recurring local exchange access line services for pay phone lines provided by franchisee to all pay phone service providers; [3] local directory assistance revenue; [4] line status verification/busy interrupt revenue; [5] local operator assistance revenue; [6] nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills. All other revenues, including, but not limited to, revenues from extended area service, unbundled network elements, nonregulated services, carrier and end user access, long distance, and all other services not wholly local in nature are excluded from 'gross revenues.' Further, 'gross revenues' shall be reduced by bad debt expenses and uncollectible and late charges shall not be included within 'gross revenues.' If during the term of this franchise ordinance franchisee offers additional services of a wholly local nature which if in existence at the effective date of the franchise ordinance would have been included with the definition of 'gross revenues,' such services shall be included from the date of the offering of such services in the City for the remaining term of the franchise ordinance.

'Open Video System' means the provision of video programming service as described in and subject to 47 USC § 573, or a successor statute of similar import.

'Person' means any natural or corporate person, business association or business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.

'Right-of-Way' means the area on, below or above the present and future streets, alleys, avenues, roads, sidewalks, highways, parkways or boulevards dedicated as right-of-way.

'Service' means a commodity used by the public and provided through franchisee's facilities.

'Subscriber' means any person who receives services from franchisee services.

'Telecommunications' means the 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, as defined by 47 USC § 153(43), and successor statute of similar import.

'Telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes or users as to be effectively available directly to the public, regardless of the facilities used, as defined by 47 USC § 153(46), a successor statute or similar import.

'Utility Easement' means, for the purpose of this ordinance, an easement dedicated to the City for the purpose of utilities.

Section 2. Grant. Franchisee is hereby granted the right, privilege and franchise to construct, operate, and maintain facilities in, through and along the City's right-of-way and utility easements for the purposes of supplying local telecommunications services on a nonexclusive basis within the City, subject, however, to the terms and conditions herein set forth within this ordinance. As a condition of this grant, franchisee 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 KCC, subject to franchisee's right to challenge in good faith such requirements as established by the FCC, KCC or other City ordinance.

This franchise does not provide franchisee the right to provide cable service as a cable operator [as defined by 47 USC § 522(5)] within the City. Upon franchisee's request for a franchise to provide cable service as a cable operator [as defined by 47 USC § 522(5)] within the City, the City agrees to timely negotiate such franchise in good faith with franchisee. Franchisee agrees that this franchise does not permit franchisee to operate an open video system without payment of fees permitted by 47 USC § 573(c)(2)(B) and without complying with FCC regulations promulgated pursuant to 47 USC § 573.

Section 3. Use of Public Right-of-Way and Utility Easements. Franchisee's facilities shall be located in the right-of-way and utility easements as now constructed and as further authorized by the City in accordance with all applicable laws, statutes and/or ordinances. Nothing in this agreement shall authorize Franchisee to locate its facilities on or within any City owned parkland property or any other City owned property unless authorized by separate agreement. Placement, changes, additions, replacements, maintenance and repairs to franchisee's facilities shall be conducted in compliance with any applicable ordinance and/or permit requirement. Franchisee will be responsible for obtaining all necessary permits as required by the City for work performed in the right-of-way and utility easements, as well as paying any associated permit fee. In addition, franchisee shall be subject to all technical specifications, design criteria, policies now or hereafter adopted or promulgated by the City, or any other appropriate governmental entity. In its use of the right-of-way and utility easements within the City, franchisee shall be subject to all right-of-way management ordinances and all other applicable rules, regulations, policies, laws, orders, resolutions, and ordinances now or hereafter adopted or promulgated by any appropriate governmental entity now or hereafter having jurisdiction, including, but not limited to the City in the reasonable exercise of its police powers.

Section 4. Franchise Fee. Franchisee shall pay the greater of \$12,000 or an annual sum of \$2.50 per lineal foot for all fiber in the right-of-way. This payment shall be due on the effective date of the ordinance and annually thereafter. In the event franchisee provides local service to customers within the City, franchisee shall notify the City Clerk. At such time, the franchise fee shall be the greater of the above prescribed amount, or five [5%] percent of its gross revenues as defined herein. Payment on the basis of gross revenues shall be made on a monthly basis without invoice or reminder from the City, and paid within forty-five [45] days after the last day of the applicable month.

All payments herein provided shall be in addition to, not in lieu of, all other taxes, charges, assessments, fees and impositions of general applicability that are or may be imposed by the City, with the exception of any annual occupation license. Franchisee shall pay interest at an annual rate of ten [10%] percent for each month or fraction thereof on any late payment of the charge provided for in this franchise ordinance.

Section 5. City's Right to Audit and Access to Records. If franchisee is providing service within the City, franchisee shall annually file with the City of Leawood a gross receipts report regarding all applicable monthly revenues and all relevant codes. Franchisee and the City agree that such information is confidential and proprietary and agree that such information shall remain the sole property of franchisee and agree that pursuant to K.S.A. § 45-221(18), as amended, such information does not constitute public records subject to K.S.A. § 45-218, as amended. In the event the City is required by to disclose such information, the City shall provide franchisee seven [7] days advance notice of its intent to disclose such information and shall take such action as may be reasonably required to cooperate with the franchisee to safeguard such information. The City shall also have access to and the right to examine, at all reasonable times, all books, receipts, files, records and documents of the franchisee necessary to verify the correctness of such statement and to correct the same, if found to be erroneous. If such statement of gross revenues is incorrect, then such payment shall be made upon such corrected statement, including interest on said amount at the annual rate of ten [10%] percent.

Regardless of whether franchisee is providing service within the City, the City's acceptance of any payment determined as hereinbefore provided to be deficient shall not be construed as a release of liability from the City or an accord or satisfaction of any claim that the City may have for additional sums owed by franchisee. In addition to access to the records of franchisee for audits, upon request, franchisee shall provide reasonable access to records necessary to verify compliance with the terms of this franchise ordinance.

Section 6. Term. This franchisee ordinance shall be effective for a term of one [1] year from the effective date.

- Section 7. Renegotiation of Franchise.** If the City has a good faith belief that franchisee is offering local telecommunications services within the City beyond those telecommunications services contemplated by this ordinance, the City may seek renegotiation of this franchise if the City reasonably believes that such services constitute local telecommunications services subject to a franchise fee under K.S.A. § 12-2001. In the event the City seeks renegotiation under such circumstances, franchisee agrees to negotiate with the City in good faith in a timely manner. Nothing herein shall preclude the City from seeking a separate franchise agreement with franchisee if the City has a good faith belief that franchisee is offering services other than telecommunications services that are subject to a franchise fee under K.S.A. § 12-2001. The purpose of this provision is to allow the City to ensure that franchisee is paying a franchise fee for all services for which a franchise fee is appropriate.
- Section 8. Description of Service.** Franchisee shall on a semi-annual basis provide the City with a description of new local telecommunications services offered within the City during the prior six-month period. In the event franchisee offers new services [other than telecommunications services, extended area service, unbundled network elements, nonregulated services, carrier and end user access and long distance], franchisee shall notify the City of such services on a semi-annual basis.
- Section 9. Franchisee Information.** Franchisee shall, at its own expense, annually submit to the City the following information:
- a. A report of the franchisee's gross revenues as referenced by Section 5 herein [only if franchisee is providing service within the City]; and
 - b. A summary of the previous year's development of franchise facilities, including but not limited to, the location of facilities during the year, and franchisee's plan of development of facilities for the next year – Note: in lieu of this requirement, franchisee's right-of-way director may meet in person with the City's Public Works Director to discuss these issues; and
 - c. Information as to the number of subscribers in the City of Leawood [only if franchisee is providing service within the City]. Note: this requirement does not include giving the identification of the subscribers.
- Section 10. Subscriber Rates.** Franchisee's charges to subscribers will comply with all applicable federal and state regulations. Upon request, franchisee shall file with the City Clerk a schedule of current rates in effect when such rates are not on file and publicly available from the KCC. When provided so by state or federal law, the City may at any time fix a reasonable schedule of maximum rates to be charged to the City and its residents.
- Section 11. Use of Facilities by Other Service Providers.** On a semi-annual basis, franchisee shall notify the City of the identity of local service providers that have been granted a certificate of convenience to offer local telecommunications services within the State of Kansas. Franchisee shall also provide the City on a semi-annual basis of the identity of entities with which franchisee has entered into an interconnection and/or resale agreement within the State of Kansas.

Section 12. Transfer of Franchise. Pursuant to the written permission of the City, which shall not be unreasonably withheld, franchisee shall have the right to assign this franchise, and the rights and privileges herein granted, to any person, firm or corporation, and any such assignee, by accepting such assignment, shall be bound by the terms and provisions hereof. City approval may be denied only upon a good faith finding by the City that the assignee lacks the legal, technical or financial qualifications to perform its obligations in accordance with this franchise ordinance or any other appropriate governmental requirement. If franchisee should seek approval to assign this franchise, franchisee shall notify the City in writing. All such assignments shall be in writing and authenticated copies thereof shall be filed with the City Clerk. This franchise shall be assignable only in accordance with the laws of the State of Kansas, as the same may exist at the time when any assignment is made. Any attempts to transfer, assign or otherwise dispose of the rights granted herein by the City or franchisee's facilities not conforming with the requirements of this section shall be null and void.

Section 13. Other Service Providers. Franchisee shall not interfere with any agreement between the City and another service provider. Additionally, if and when the City requires or negotiates to have another service provider cease to use its existing poles and to relocate its facilities underground, all other service providers using the same poles, including franchisee when applicable, shall also relocate their facilities underground at that time; provided, however, that such placement is economically reasonable. The City shall not unreasonably enter into such an agreement with another service provider, and notice of any intent to enter into such an agreement shall be timely provided to franchisee.

Section 14. Notification Procedure. Any required or permitted notice under this franchise ordinance shall be in writing. Notice upon the City shall be delivered to the City Clerk by first class United States Mail or by personal delivery. Notice upon franchisee shall be delivered by first class United States Mail or by personal delivery to:

XO Kansas, Inc.
Director, Regulatory and External Affairs
2700 Summit Ave., Suite 172
Plano, TX 75074

- Section 15. Indemnification.** Upon notice by the City, franchisee shall fully indemnify, defend and hold harmless the City, its officers, employees, agents and authorized contractors from and against any and all claims, demands, suits, proceedings, and actions, liability and judgment by other persons for damages, losses, costs, and expenses, including attorney fees or otherwise, to the extent caused by franchisee's actions and operations of its telecommunications service in accordance to this ordinance. The City agrees to immediately notify franchisee of any such claim, demand, suit, proceeding, and/or action, by providing written notice via certified mail to franchisee. Nothing herein shall be deemed to prevent the City, or any agent from participating in the defense of any litigation by their own counsel at their own expense. Such participation shall not under any circumstances relieve franchisee from its duty to defend against liability or its duty to pay any judgment entered against the City, or its agents.
- Section 16. Liability Insurance Requirement.** Franchisee shall file with the City evidence of liability insurance with an insurance company licensed to do business in Kansas 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 the service provider, or alleged to so have been caused or occurred. If franchisee is self-insured, it shall provide the City proof of compliance regarding its ability to self-insure and proof of its ability to provide coverage in the above amounts.
- Section 17. Performance and Maintenance Bond Requirements.** Franchisee shall at all times maintain in full force and effect a corporate surety bond in a form approved by the City Attorney, in an amount of \$50,000, for a term consistent with the term of this franchise ordinance plus one additional year, conditioned upon franchisee's faithful performance of the provisions, terms and conditions conferred herein. An annual bond automatically renewed yearly during this period shall satisfy this requirement.

Section 18. Reservation of Rights. In addition to any rights specifically reserved to the City by this franchise ordinance, the City reserves to itself every right and power available to it under the constitutions of the United States and the State of Kansas, and any other right or power, including, but not limited to all police powers and authority to regulate and legislate to protect and promote the public health, safety, welfare, and morals. Nothing in this franchise ordinance shall limit or govern the right of the City to exercise its municipal authority to the fullest extent allowed by law. The City shall have the right to waive any provision of the franchise, except those required by federal or state law, if the City determines: [a] that it is in the public interest to do so; and [b] that the enforcement of such provision will impose an undue hardship on franchisee or its subscribers. To be effective, such waiver shall be evidenced by a statement in writing signed by a duly authorized representative of the City. The waiver of any provision in any one instance shall not be deemed a waiver of such provision subsequent to such instance nor be deemed a waiver of any other provision of this franchise ordinance unless the statement so recites. Further, the City hereby reserves to itself the right to intervene in any suit, action or proceeding involving the provisions herein.

Section 19. Forfeiture of Franchise. In case of the failure of franchisee to comply with any of the provisions of this franchise ordinance, or if franchisee should do or cause to be done any act or thing prohibited by or in violation of the terms of this franchise ordinance, franchisee shall forfeit all rights and privileges granted by this franchise and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings:

- a. For violations concerning the use of the right-of-way and/or utility easements as described in Section 3 of this franchise ordinance and deemed by the Public Works Director to be a public nuisance and/or emergency, the following procedure shall apply. The City shall provide written notice by certified mail to franchisee of any such violation, setting forth in detail the conditions of neglect, default or failure complained of. Franchisee shall have fourteen [14] days subsequent to receipt of such notice to inform the City in writing of the action franchisee shall take to correct the violation. Such corrective action shall be completed within thirty [30] days subsequent to receipt of notice unless otherwise agreed to by the City. If, at the end of such period, the City deems that the conditions of such franchise have not been complied with by franchisee and that such franchise is subject to cancellation by reason thereof, the City shall enact an ordinance setting out the grounds upon which said franchise is to be canceled and terminated. If franchisee fails to take corrective action within the 30-day period set forth above, nothing herein shall preclude the City from maintaining an action against franchisee to recover damages as a result of such failure to take corrective action, including, but not limited to, reasonable costs of corrective action incurred by the City.

- b. For all other violations of the franchise ordinance, the following procedure shall apply. The City shall provide written notice by certified mail to franchisee of any such violation, setting forth in detail the conditions of neglect, default or failure complained of. Franchisee shall have ninety [90] days after the mailing of such notice in which to comply with the conditions of this franchise. If at the end of such period the City deems that the conditions of such franchise have not been complied with by franchisee and that such franchise is subject to cancellation by reason thereof, the City shall enact an ordinance setting out the grounds upon which said franchise is to be canceled and terminated.
- c. If within thirty [30] days after the effective date of an ordinance to terminate the franchise, in accordance with 19(a) or 19(b) herein, the franchisee shall not have instituted an action in the District Court of Johnson County, Kansas, to determine whether or not the franchisee has violated the terms of this franchise and that the franchise is subject to cancellation by reason thereof, such franchise shall be canceled and terminated at the end of such thirty-day period. If within such thirty [30] day period the franchisee does institute an action, as above provided, and prosecutes such action to final judgment with due diligence, then, if the court finds that the franchise is subject to cancellation by reason of the violation of its terms, this franchise shall immediately terminate after such final judgment is rendered and all available appeals exhausted.

In addition to any other remedy available herein or and at law or equity, either party shall have the authority to maintain civil suits or actions in any court of competent jurisdiction for the purpose of enforcing the provisions of this franchise ordinance and/or to abate nuisances maintained in violation thereof.

Section 20. Revocation of Franchise. In addition to all other revocation rights and powers herein or otherwise enjoyed by the City, the City shall have the additional and separate right to revoke this franchise and all rights and privileges of the franchisee as a result of and in response to any of the following events or reasons:

- a. Any provision of this franchise ordinance is adjudged by a Court of Competent Jurisdiction to be invalid or unenforceable and said judicial act and declaration is deemed by the Governing Body to constitute such a material consideration for the granting of this franchise ordinance as to cause the same to become null and void; or
- b. Franchisee commits an act of fraud or deceit against the City in obtaining the grant of this franchise herein conferred, or upon being granted franchisee commits such an act against the City.

To revoke this franchise in accordance with the provisions of this section regarding Revocation of Franchise, the following procedure shall apply. The City shall enact an ordinance setting out the grounds upon which said franchise is to be canceled and terminated. Prior to the enactment of such ordinance, franchisee shall be provided with timely written notice by certified mail, and franchisee shall be allowed to address the Governing Body before final consideration of such ordinance. If within thirty [30] days after the effective date of such ordinance to terminate the franchise the franchisee shall not have instituted an action in the District Court of Johnson County, Kansas, to determine whether or not the franchise was appropriately terminated in accordance to the provisions of this section and is subject to cancellation by reason thereof, such franchise shall be canceled and terminated at the end of such thirty-day period. If, within such thirty [30] day period, the franchisee does institute an action, as above provided, and prosecutes such action to final judgment with due diligence, then, if the Court finds that the franchise is subject to cancellation by the reason addressed by this section, this franchise shall immediately terminate after such final judgment is rendered and all available appeals exhausted.

Section 21. Miscellaneous Provisions.

- a. Nonexclusive Clause. The privilege to construct, erect, operate and maintain franchisee's facilities and to provide service within the City is nonexclusive. The City expressly reserves the right to grant other franchises to other persons. However, no such additional franchise shall in any way affect the rights or obligations of franchisee.
- b. Exclusive Benefit of Franchise Right by Franchisee. The rights granted to franchisee by this franchise ordinance shall be for the sole use of franchisee to provide telecommunications services as authorized herein. These rights are for the exclusive benefit of franchisee, except where otherwise provided herein, or when authorized by the City.
- c. Franchisee is Without Remedy Against the City. Franchisee shall have no remedy or recourse whatsoever against the City for any loss, cost, expense, or damage arising from the enactment of the provisions or requirements of this franchise ordinance, or for the failure of the City to have the authority to grant, all, or any part, of the franchise ordinance granted. Second, franchisee expressly acknowledges that it accepted the franchise ordinance granted in reliance upon its independent and personal investigation and understanding of the power and authority of the City to grant the franchise conferred upon franchisee. Third, franchisee acknowledges by its acceptance of this franchise ordinance that it has not been induced to enter into this franchise upon any understanding, or promise, whether given verbally or in writing by or on behalf of the City, or by any other person concerning any term or condition of this franchise ordinance not expressed herein. Finally, franchisee acknowledges by the acceptance of this franchise that it has carefully read the provisions, terms, and conditions of this franchise ordinance and is willing to, and does accept, all of the risk attendant to the provisions, terms, and conditions.

- d. Federal, State and City Jurisdiction. This franchise ordinance shall be construed in a manner consistent with all applicable federal, state, and local laws. Notwithstanding any other provisions of this franchise ordinance to the contrary, the construction, operation and maintenance of franchise facilities by franchisee or its agent shall be in accordance with all laws and regulations of the United States, the State, and any political subdivision thereof, or any administrative agency thereof, having jurisdiction. In addition, franchisee shall meet or exceed the most stringent technical standards set by regulatory bodies, including, but not limited to the City, now or hereafter having jurisdiction. Franchisee's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Franchisee shall comply with all applicable general laws and ordinances enacted by the City pursuant to that power. Finally, franchisee's failure to comply with any law or regulation governing the operation of said franchise facilities may result in a forfeiture of the franchise in accordance with the provisions of this franchise ordinance.
- e. Attachment to Poles. Nothing in this franchise ordinance shall be construed to require or permit any telephone, electric light or power wire attachments by either the City or franchisee on the poles of the other. If such attachments are desired by either party, then a separate non-contingent agreement shall be prerequisite to such attachments.
- f. Failure to Enforce. The failure of either party to enforce and remedy any noncompliance of the terms and conditions of this franchise shall not constitute a waiver of rights nor a waiver of the other party's obligations as provided herein.
- g. Force Majeure. Each and every provision hereof shall be subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond franchisee's or the City's control.
- h. Severability. Any section, subsection, sentence, clause, phrase, or portion of this franchise ordinance is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section 22. Repeal of Other Ordinances. All other ordinances, agreements and resolutions or parts thereof inconsistent or in conflict with the terms hereof shall be canceled, annulled, repealed, and set aside; provided, that this franchise ordinance shall not take effect or become in force until the requirements for adopting a franchise ordinance under Kansas statute have occurred.

Section 23. Effectiveness. This franchise ordinance is made under and in conformity with the laws of the State of Kansas. Before the final passage of this ordinance, it shall be read at three [3] regular meetings of the Governing Body. After final passage, this ordinance shall take effect and be in force after the expiration of sixty [60] days from the date of final passage by the Governing Body and after publication in the official City newspaper for two [2] consecutive weeks following final passage, unless a proper protest is filed, or franchisee fails to provide written acceptance within the sixty [60] day period.

(Ord. 1944; Effective Date 04-20-2002)