

FRANCHISE ORDINANCE NO. 2012-05

AN ORDINANCE GRANTING A FRANCHISE TO WINDSTREAM KDL, INC., ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, ERECT, OPERATE, MAINTAIN, AND OWN A TELECOMMUNICATIONS SYSTEM IN, UPON, ALONG, ACROSS, ABOVE, OVER, AND UNDER THE PUBLIC WAYS OF THE CITY OF BRYANT, ARKANSAS; AND ALL SUCH STRUCTURES, APPLIANCES, AND FIXTURES NECESSARY OR CONVENIENT FOR RENDITION OF TELECOMMUNICATIONS SERVICES, INCLUDING LOCAL AND LONG DISTANCE TELEPHONE SERVICE; TO PROVIDE THE CONDITIONS GOVERNING THE GRANT OF SAID FRANCHISE; TO PROVIDE FOR FRANCHISE FEES TO BE PAID; AND FOR OTHER PURPOSES

WHEREAS, the City of Bryant, Arkansas ("City") desires to grant a Franchise to Windstream KDL, Inc. ("Company"), its successors and assigns, to construct, erect, operate, maintain, and own a telecommunications system ("System") in, upon, across, along, above, over, and under the public ways of the City, for the purpose of rendering telecommunications service, and to provide for the conditions governing the grant of said Franchise; to provide for Franchise fees to be paid by the Company; and for other purposes;

NOW THEREFORE, BE IT ORDAINED as follows:

SECTION 1 - SHORT TITLE

This Ordinance shall be known and may be cited as the "Bryant – Windstream KDL Telecommunications Franchise Ordinance."

SECTION 2 - DEFINITIONS

For the purposes of this Ordinance, the following terms, phrases, words, and their derivations, shall have the meaning given herein. The word "shall" is always mandatory and not merely directory.

- (a) "City" is the City of Bryant, Arkansas.
- (b) "Company" is Windstream KDL, Inc., a corporation and the grantee of the rights under this Franchise.
- (c) "Council" is the Mayor and Council of the City of Bryant, Arkansas.
- (d) "IP enabled voice and data consumer services" means service provisioned to retail subscribers directly over the Windstream fiber network. It does not include Customer Premise Equipment, switches, routers, maintenance plans, and other ancillary products not directly provisioned over Windstream's fiber network.
- (e) "Person" is any person, firm, partnership, association, corporation, company, or organization of any kind.
- (f) "Public ways" means streets, avenues, alleys, bridges, viaducts, rights-of-way, easements, grounds and other public places owned or controlled by, leased to or granted to the City.

SECTION 3 - GRANT OF AUTHORITY

There is hereby granted by the City to the Company, subject to the terms and conditions hereinafter set forth, a Franchise for the right and privilege to construct, erect, operate, maintain, and own a System, including all poles, wires, cables, fibers, underground conduits, manholes, and other telecommunications fixtures and appliances necessary or convenient for the construction, maintenance and operation in this City of the System and any lines connected therewith, including, but not limited to, the rendition of local and long distance telephone service, in, upon, across, along, above, over, and under the public ways now laid out or dedicated, and all extensions thereof and additions

thereto, located within the City.

SECTION 4 - NON-EXCLUSIVE GRANT

Nothing herein contained shall be construed as giving the Company any exclusive privilege at any time during the term of this Franchise.

SECTION 5 - COMPLIANCE WITH APPLICABLE LAWS AND ORDINANCES

The Company shall, in connection with the protection of the health and safety of the public, during the term of this Franchise, be subject to the lawful exercise of the police power by the City and to such reasonable regulations governing public ways as the City shall hereafter by resolution or ordinance promulgate. Every installation by the Company shall be in accordance with the applicable codes then in force in the City.

SECTION 6 - AVAILABILITY OF RATES, TERMS, AND CONDITIONS

The Company, with the consent of the City, shall have the option of modifying the provisions of this Agreement to be consistent with the provisions of any franchise agreement subsequently entered into between the City and any other telecommunications service provider.

SECTION 7 - COMPANY LIABILITY - INDEMNIFICATION

It is expressly understood and agreed by and between the Company and the City that each, as an indemnifying party, shall hold the other, as an indemnified party, harmless from all loss sustained by the indemnified party, on account of any suit, judgment, execution, claim or demand whatsoever, resulting from negligence on the part of the indemnifying party in the construction, operation, or maintenance of the System in the City. In the event any claim or action is brought against the City for which the Company might be liable as an indemnifying party under this Section, the City shall

promptly give notice to the Company of such claim or action and a description of the source and nature thereof. Failure to promptly give such notice shall relieve the Company of any liability thereunder with respect to the claim or action of which such notice was not properly given. Upon timely notice of any claim or action within the scope of this Section, the Company shall have the right (but not the obligation) to negotiate a settlement or compromise (any such settlement or compromise being subject to the approval of the indemnified party, which approval shall not be unreasonably withheld) of any such claim or action, or to defend actions instituted at the sole cost and expense of the Company.

SECTION 8 - CONDITIONS ON STREET OCCUPANCY

A. USE - The Company, with the consent of the City, shall have the right to determine the number and location of all transmission and distribution structures, lines, and equipment for the proper operation of the System on the public ways, and the Company shall locate such System as is reasonable under the particular circumstances to cause minimum interference with the proper use of public ways. The City shall not grant any request for any use or occupancy of public ways in proximity to the System that would conflict with the Company's use or occupancy herein permitted or take action that is violative of this franchise that would be inconsistent or adverse to the Franchisee's use or occupancy of the System.

B. RESTORATION - In case of any disturbance by the Company of pavement, sidewalk, driveway, or other surfacing of the City, the Company shall at its own cost and expense, replace and restore all sidewalk, driveway or surface of any street or alley disturbed, to as reasonably good a condition as before said work was

commenced.

C. RELOCATION - The City reserves the right to perform any necessary public works or make any necessary public improvements to the City's rights-of-ways or airways (to the extent airways are related to facilities attached to or between poles) during the term of this Agreement. If, as a result of any action by the City, or by any action authorized by the City for the benefit of the public good, relocation of any of the Company's conduit or other facilities is required such relocation shall be accomplished at the sole expense of the Company, provided that the Company shall not be liable for the payment of any expense incurred by it in the event the Company is required to adjust or bury its facilities where such alteration is made necessary by an act of the City in its proprietary, non-governmental capacity or due to actions of a third party. Nothing in this Franchise shall be deemed a waiver of the City's right to require the Company to comply with all applicable zoning and other applicable regulatory ordinances or to pay any reasonable permit fees or to seek appropriate authorizations from the Company to perform any work in connection with the Franchise. Should the City close, eliminate, or discontinue use of any public street during the term of this Franchise, or any renewal term, this Franchise shall cease with respect to such streets upon the date of final action by the City with respect to the closure, elimination or discontinuance of such streets.

D. QUALITY. All work involved in the construction, operation, maintenance, repair, upgrade, and removal of the Network that is permitted by this Franchise shall be performed in a safe, thorough, reliable manner using materials of good and durable quality in accordance with generally accepted construction standards. If, at any time, it is determined by the City that any part of the Network is harmful to the health or safety of

any person then the Company shall at its own cost and expense, promptly correct all such conditions. For purposes of this subsection "promptly" shall mean twenty-four (24) hours, or a longer period of time if and only if additional time is granted in writing by the Director of Public Works or Mayor.

E. NEW CONSTRUCTION AND EXTENSION OF FACILITIES: Before the Company constructs new network facilities or extends existing network facilities, or before it uses network facilities that were in existence in the City prior to the effective date of this Agreement, the Company shall, as reasonably possible, provide to the City's Public Works Director its network location data in conformance with the City's standards. The City shall be notified of any extension of the network, construction, or other preparation for the extension of conduit or any facilities within public rights-of-way (not including lateral connections under sidewalks that do not interfere with the normal flow of traffic on the City streets or public rights-of-way for which permits have been issued).

F. TEMPORARY REMOVAL OF WIRE FOR BUILDING MOVING - The Company shall, on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising, or lowering of wires shall be paid by the person requesting the same, except where the person is the City, and the Company shall have the authority to require such payment in advance. The Company shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary wire changes unless there is an emergency.

G. UTILITY POLE AND USE RENTAL - The Company shall have the right

to use utility poles erected by the City upon obtaining prior permission from the City Manager or Mayor of the City, or her or his designate.

H. TREE TRIMMING - The Company may trim trees upon and overhanging the public ways as to prevent the branches of the trees from coming in contact with the wires, cables or facilities of the Company.

SECTION 9 - APPROVAL OF TRANSFER OF THIS FRANCHISE

The Company shall have the right to transfer or assign this Franchise effective upon the assignee or transferee filing in the Office of the City Clerk an instrument, lawfully executed, reciting the fact that such assignee or transferee has accepted this Franchise and agreeing to be bound by each and every one of the terms and provisions hereof. The Company shall have the right to mortgage or pledge a portion or all of the network in order to secure financing of the Company's operations obtained in the ordinary course of business of the Company. Notwithstanding the foregoing, no assignment, mortgage or pledge entered into by the Company shall relieve any person, including the assignee, mortgagor or pledgor, of any of the terms and conditions of this Agreement. Should any person, including the Company, default or otherwise be deemed in violation of the terms of this Agreement, the City shall be permitted to exercise all its rights, privileges and remedies pursuant to this Agreement.

SECTION 10 - SUPERVISION AND INSPECTION

The City shall have the right to inspect all work performed by the Company on, along, in, or across any of the public ways of the City to ensure compliance with the rules and regulations of the City and any pertinent ordinances governing installations which affect, or might affect, such public ways. The Company shall maintain its System in

reasonable operating condition at all normal times during the term of this Franchise. An exception to this condition is automatically in effect when service furnished by the Company is interrupted, impaired, or prevented by fires, strikes, riots or other occurrences beyond the control of the Company, or by storms, floods, or other casualties, in any of which events the Company shall do all things reasonably within its power to restore normal service.

SECTION 11 - TERM OF FRANCHISE

Except as otherwise provided in this Franchise, the Franchise and rights herein granted shall take effect and be in force from and after the final passage hereof, as required by law, and upon filing of acceptance by the Company with the City Clerk, and shall continue in force and effect for a term of ten (10) years after the effective date of this Franchise.

SECTION 12 - PAYMENT TO CITY

The Company shall pay to the City in consideration of this Franchise an annual amount equal to 4.25% of its gross revenues derived from retail subscribers of its IP enabled voice and data consumer services who are located within the corporate limits of the City. The Company may, to the extent allowed by law, bill its subscribers within the corporate limits of the City such Franchise fee and reflect such charge on its invoices to subscribers within the corporate limits of the City. The payments required by this Section shall be due quarterly, as invoiced by the City, with respect to the previous year's revenues, throughout the term of this Franchise, except that the first payment shall be for that portion of the prior year subsequent to acceptance by the Company of this Franchise.

SECTION 13 - ADJUSTMENTS TO FRANCHISE FEES

The amount, if any, of a tax, fee, charge or imposition of any kind required, demanded or exacted by or on behalf of the City on any account, other than ad valorem taxes on property, shall operate to reduce to the extent of such tax, fee, charge or imposition, the amount due from the percentage of revenues as provided in Section 12 above.

SECTION 14 - FAILURE TO ENFORCE RIGHTS

Either party's failure to enforce, on one or more occasions, to insist upon or seek compliance with any term contained within this Franchise Agreement will not be considered a waiver to enforce such rights, nor shall such failure excuse the other party from complying with all terms contained in the Franchise Agreement at all times during the effective term of this Franchise Agreement.

SECTION 15 - PENALTIES

A material violation by the Company of the terms of this Franchise and a refusal by the Company, after notification by the City, to rectify such violation as quickly as is reasonably possible under the circumstances, shall authorize the City to cancel this Franchise.

SECTION 16 - PARTIAL INVALIDITY AND REPEAL PROVISION

If any section, sentence, clause, or phrase of this Ordinance is for any reason held to be illegal, ultra vires, or unconstitutional, such invalidity shall not affect the validity of the remaining portions of this Ordinance if the invalidity does not substantially alter the meaning thereof. All ordinances and agreements and parts of ordinances and agreements in conflict herewith are hereby repealed.

SECTION 17 - ACCEPTANCE OF AGREEMENT

The Company shall have sixty (60) days from and after the passage and approval of this Ordinance to file its written acceptance thereof with the City Clerk, and upon such acceptance being filed, this Ordinance shall take effect and be in force from and after the date of this passage and approval by the Mayor, and shall effectuate and make binding the agreement provided by the terms hereof.

SECTION 18 - AUTHORIZATION


This Franchise Ordinance is based on an agreement authorized by the Mayor and Council of the City of Bryant, Arkansas.

This 23 day of February, 2012.

Attest:


CITY CLERK OF BRYANT

BRYANT, ARKANSAS


MAYOR

Approved and accepted by the Bryant City Council, this 23 day of February, 2012.

WINDSTREAM KDL, INC.

By: _____