

ORDINANCE NO. 20-17

AN ORDINANCE AMENDING THE CONTRACT FRANCHISE OF EXTENET SYSTEMS, INC. TO CONSTRUCT, OPERATE AND MAINTAIN A WIRELESS TELECOMMUNICATION SYSTEM AS A COMPETITIVE INFRASTRUCTURE PROVIDER IN THE CITY OF OLATHE, KANSAS; AND APPROVING THE TRANSFER AND ASSIGNMENT OF SAID CONTRACT FRANCHISE TO EXTENET ASSET ENTITY, LLC.

WHEREAS, on April 3, 2012, ExteNet Systems, Inc. was granted a Contract franchise to construct, operate and maintain a wireless telecommunications system as a competitive infrastructure provider within the City (Ordinance No. 12-07); and

WHEREAS, ExteNet Systems, Inc. is currently undergoing a corporate restructuring and intends to transfer and assign its rights and obligations under the Contract franchise to its affiliate entity, ExteNet Asset Entity, LLC; and

WHEREAS, the City and ExteNet Systems, Inc. have negotiated the terms of this amendment to the Contract franchise with the primary purposes to: (i) allow for the proposed transfer and assignment; and (ii) to change the compensation formula from a gross receipts formula to a flat fee formula that is both simpler and consistent with the compensation formula of similar wireless franchisees.

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

SECTION 1. Section 1 of Ordinance No. 12-07 is hereby amended to read as follows:

“SECTION 1. DEFINITIONS.

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

- a. “City” - means the City of Olathe, Kansas, a municipal corporation duly organized in accordance with the laws of the State of Kansas.
- b. “Competitive infrastructure provider” shall have the same meaning as “wireless infrastructure provider”, as defined by K.S.A. 66-2019(b)(20).

- c. “Contract franchise” - means this Ordinance granting the right, privilege and franchise to Grantee to provide telecommunications within the City.
- d. “Facilities” - means the Grantee’s cables, wires, lines, towers, wave guides, optic fiber, antennae, receivers and any associated converters, or other equipment, comprising the Grantee’s System located within the Public Rights of Way, designed and constructed for the purpose of producing, receiving, amplifying or distributing Telecommunications service as a Competitive infrastructure provider to or from locations within the City.
- e. “Grantee” - means ExteNet Asset Entity, LLC, successor in interest to ExteNet Systems, Inc. (the original Grantee), pursuant to a certain asset backed securitization dated July 19, 2019, a Competitive Infrastructure Provider. References to Grantee shall also include as appropriate any and all future successors and assigns.
- f. “Public right-of-way” - means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts. The term does not include infrastructure located within the Public Rights-of-Way owned by the City or other third-parties, such as poles, ducts or conduits.
- g. “Telecommunications service” shall have the same meaning as “wireless services”, as defined by K.S.A. 66-2019(b)(19).”

SECTION 2. Section 3 of Ordinance No. 12-07 is hereby amended to read as follows:

“SECTION 3. USE OF PUBLIC RIGHT-OF-WAY.

- a. Pursuant to K.S.A. 66-2019, and amendments thereto, and subject to the provisions of this Contract franchise, Grantee shall have the right to construct, maintain and operate its

Facilities along, across, upon and under the Public right-of-way. Such Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

- b. Grantee's use of the Public right-of-way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the City, including, but not limited to, Chapters 12.08 and 12.14 of the Olathe Municipal Code and any amendments thereto. The City may exercise its home rule powers in its administration and regulation related to the management of the Public right-of-way; provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Grantee shall be subject to all applicable laws and statutes, and/or rules, regulations, policies, resolutions and ordinances adopted by the City, relating to the construction and use of the Public right-of-way.
- c. Grantee shall participate in the Kansas One Call utility location program.
- d. City may require Grantee to repair all damage to a Public right-of-way caused by the activities of Grantee, or of any agent, affiliate, employee, or subcontractor of Grantee, while occupying, installing, repairing or maintaining Facilities in a Public right-of-way and to return the right-of-way, to its functional equivalence before the damage pursuant to the reasonable requirements and specifications of the City. If Grantee fails to make the repairs required by the City, the City may effect those repairs and charge the provider 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 Grantee for violation of this subsection and may recover its damages, including reasonable attorney fees, if Grantee is found liable by a court of competent jurisdiction.
- e. If requested by the City, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, Grantee promptly shall remove its Facilities from the Public right-of-way or shall relocate or adjust its Facilities within the Public right-of-way at no cost to the City, providing such request binds all users of such right-of-way. Such relocation or

adjustment shall be completed as soon as reasonably possible within the time set forth in any written request by the City for such relocation or adjustment, providing that the City shall use its best efforts to provide Grantee with a minimum of one hundred eighty (180) days advance notice to comply with any such relocation or adjustment. Any damages suffered by the City or its contractors as a result of Grantee's failure to timely relocate or adjust its Facilities shall be borne by Grantee. Grantee shall designate one (1) person within its organization by his/her employment position to whom relocation notices shall be sent and with whom rests the responsibility to facilitate all necessary communications within Grantee's various areas.

Where a project referenced in the preceding paragraph is primarily for private benefit (provided, however, that projects that are a part of a City-created tax increment financing or transportation development district are not considered primarily for private benefit), the City shall require, as a condition of its approval of any request for alteration of the Public right-of-way from any private party or parties, that such private party or parties shall reimburse Grantee for the cost of relocation. Grantee understands however that the City has no obligation to collect such reimbursement."

SECTION 3. Section 4 of Ordinance No. 12-07 is hereby amended to read as follows:

"SECTION 4. COMPENSATION TO THE CITY.

- a. It is understood that Grantee's Facilities are primarily wireless communications antennas and their necessary transmission and accessory equipment, and that the Facilities might be attached to a wireless support structure, utility pole, street light or similar structure. In consideration of this Contract franchise, Grantee agrees to remit to the City an annual ROW Access Fee for each of Grantee's wireless antenna Facilities:
 - (1) \$25.00 per year, per structure, for each existing structure in the Right-of-way (e.g. an existing utility pole, or a city streetlight); or
 - (2) \$125.00 per year, per structure, for each new non-city owned structure in the Right-of-way (e.g., a new small cell monopole).
- b.

- c. Grantee shall pay all applicable ROW Access Fees without requirement for invoice or reminder from the City by January 1 each year. Said ROW Access Fee payments are due in advance and not in arrears. As to any new Facilities installed by or for Grantee during any calendar year, such fee may be prorated based on the number of days in the calendar year in which the Facilities were installed and shall commence upon the first day of the month following the effective date of the applicable ROW Permit for the Facilities. In such event, Grantee shall clearly identify the same and the proration amount when Grantee's payment is made.
- d. If any ROW Access Fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.
- e. Upon written request by the City, but no more than once per year, Grantee shall submit to the City a statement, executed by an authorized officer of Grantee or his or her designee, showing the manner in which the ROW Access Fees were calculated for the period covered by the payment.
- f. No acceptance by the City of any ROW Access Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any franchise fee payment be construed as a release of any claim of the City.
- g. The City shall have the right to examine, upon written notice to Grantee no more often than once per calendar year, those records necessary to verify the correctness of the ROW Access Fees paid by Grantee.
- h. The ROW Access Fee required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 and 66-2019, and amendments thereto. The ROW Access Fee is compensation for use of the Public right-of-way and shall in no way be deemed a tax of any kind."

SECTION 4. Section 8 of Ordinance No. 12-07 is hereby amended to read as follows:

SECTION 8. RESERVATION OF RIGHTS.

- a. Grantee agrees to maintain Grantee's property in good repair.
- b. In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers

under and by virtue of the laws of the State of Kansas as the same may be amended, its Home Rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.

- c. In granting its consent hereunder, Grantee does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas or applicable Federal laws and regulations, as the same may be amended, or under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- d. In entering into this Contract franchise, neither the City's nor Grantee's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the Contract franchise, neither the City nor Grantee waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Grantee may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-franchise ordinances and/or rulings."

SECTION 5. Section 11 of Ordinance No. 12-07 is hereby amended to read as follows:

"SECTION 11. POINT OF CONTACT AND NOTICES

Grantee shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of Grantee in the event of an emergency. Grantee shall provide the City with said local contact's name, address, telephone number, fax number and e-mail address. Emergency notice by Grantee to the City may be made by telephone to the City Clerk or the City Engineer. All other notices between the parties shall be in writing and shall be made by personal delivery, depositing such notice in the U.S. Mail, Certified Mail, return receipt requested, or by facsimile. Any notice served by U.S. Mail or Certified Mail, return receipt requested, shall be deemed delivered five (5) calendar days after the date of such deposit in the U.S. Mail unless otherwise provided. Any notice given by facsimile is deemed received by the next business day. "Business day" for purposes of this section shall mean Monday through Friday, City and/or Grantee observed holidays excepted.

The City:

Grantee:

City of Olathe, Kansas
100 East Santa Fe
P.O. Box 768
Olathe, Kansas 66051-0768
ATTN: City Clerk
(913) 971-8525 fax

ExteNet Asset Entity, LLC
3030 Warrenville Rd., Ste. 340
Lisle, IL 60532
Attention: Chief Financial Officer

With a copy (same address): Attention
General Counsel and a copy emailed to:
Notice@extenetsystems.com

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

SECTION 6. Section 12 of Ordinance No. 12-07 is hereby amended to read as follows:

“SECTION 12. TRANSFER AND ASSIGNMENT.

This Contract franchise is granted solely to the Grantee and shall not be transferred or assigned without the prior written approval of the City; provided that such transfer or assignment may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, or to an entity with which Grantee is under common ownership or control, upon written notice to the City. Additionally, Grantee’s obligations under this Contract franchise with regard to indemnity, bonding and insurance shall continue until the transferee or assignee has taken the appropriate measures necessary to assume and replace the same, the intent being that there shall be no lapse in any coverage as a result of the transfer or assignment. In the event of any transfer or assignment of either this Contract franchise or Grantee’s business or assets, Grantee shall: (1) timely notify the City of the successor entity; (2) provide a point of contact for the successor entity; and (3) advise the City of the effective date of the transfer or assignment.

Subject to the above provisions, the City recognizes and approves the transfer effective as of July 19, 2019 and assignment of this Contract franchise from ExteNet Systems, Inc. (the original Grantee) to its affiliate ExteNet Asset Entity, LLC.”

SECTION 7. Nothing in this amendment ordinance alters, varies or affects any of the terms, provisions or conditions of Ordinance No. 12-07 other than as stated in Sections 1-6 above, and all other terms, provisions and conditions of Ordinance No. 12-07 shall continue in full force and effect.

ATTACHMENT C

SECTION 8. Existing Sections 1, 3, 4, 8, 11, and 12 of Ordinance No. 12-07 are hereby repealed. Provided, however, the Compensation provisions of said existing Section 4 shall survive solely for the extent necessary for the purpose of the collection and remitting of any franchise fees due and outstanding thereunder.

SECTION 9. Effective Date. This amendment ordinance shall take effect and be in force from and after publication in an official City newspaper and the receipt of Grantee's acceptance of this amendment ordinance.

PASSED by the Governing Body this ____ day of _____, 2020.

SIGNED by the Mayor this ____ day of _____, 2020.

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Publish one time and return one Proof of Publication to the City Clerk and one to the City Attorney.