ORDINANCE NO. 2147

AN ORDINANCE GRANTING CUNNINGHAM COMMUNICATIONS, INC., OF GLEN ELDER, KANSAS, A TEN (10) YEAR NONEXCLUSIVE RIGHT, AUTHORITY, POWER AND FRANCHISE TO ESTABLISH, CONSTRUCT, ACQUIRE, MAINTAIN AND OPERATE A CABLE SYSTEM WITHIN THE CITY OF BELOIT, KANSAS; TO RENDER, FURNISH AND SELL CABLE SERVICE FROM SUCH SYSTEM TO THE INHABITANTS OF THE CITY OF BELOIT, KANSAS; AND TO USE AND OCCUPY THE RIGHT-OF-WAY, AS DEFINED BY SAID ORDINANCE, AND OTHER PUBLIC PLACES WITHIN THE CORPORATE LIMITS OF SAID CITY FOR ITS CABLE SYSTEM, AS BY SAID ORDINANCE PROVIDED.

WHEREAS, pursuant to K.S.A. 12-2007 there was published in the official city newspaper on the 25th day of April, 2014, a Notice of Public Hearing, whereby notice was given that a public hearing on said application by Cunningham Communications, Inc., for a ten (10) year nonexclusive franchise with the City of Beloit, Kansas; and

WHEREAS, on the 6th day of May, 2014, a public hearing was held and conducted in accordance with the laws of the State of Kansas and said published Notice of Public Hearing, and it has been determined that Cunningham Communications, Inc. be granted a ten (10) year nonexclusive right, authority, power and franchise to establish, construct, acquire, maintain and operate a Cable System within the City of Beloit, Kansas; to render, furnish and sell Cable Service to the inhabitants of the City of Beloit, Kansas; and to use and occupy the Right-of-way, as defined by said ordinance, and other public places within the corporate limits of said City for its Cable Service, as by said ordinance provided, all for the benefit of its subscribers and viewers.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF BELOIT, KANSAS:

Section 1: DEFINITIONS. For the purposes of this Ordinance, the following words and phrases shall have the following meanings:

(a) "Cable Service" shall mean:
   i. the one-way transmission to subscribers of video programming, or other programming service, and
   ii. subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

(b) "Cable System" shall mean a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple subscribers within the City.

(c) "City" shall mean the City of Beloit, Kansas.

(d) "Downstream Transmission" shall mean the transmission of signals from the Headend to remote points on the Cable System or to interconnection points on the Cable System.

(e) "Facilities" or "Facility" shall mean any distribution or transmission component of a cable system.

(f) "FCC" shall mean the Federal Communications Commission of the United States government, or such successor agency or department.

(g) "Franchise Area" shall mean the area within the corporate boundaries of the City, which the Grantee is authorized to provide services under this Franchise, and any amendments thereto.

(h) "Franchise Revenues" shall mean 5% of monthly fee received by Grantee from Basic or Expanded Basic service rates collected from subscribers of the Grantee's Basic or Expanded Basic cable service; provided, however that such phrase shall not include: (i) revenues received from any advertising carried on the Cable system; (ii) revenues from optional services such as Expanded Cable, Pay Per View, Video on Demand, High Definition, Premium Channels, and rental of equipment; (iii) any taxes on Cable service which are imposed directly or indirectly on any subscriber thereof by any governmental unit or agency, and which are collected by the Grantee on behalf of such governmental unit or agency; (iv) any revenues derived from installation charges; or (v) revenue derived from public internet access.

(i) "Grantee" shall mean Cunningham Communications, Inc. and any other divisions or affiliates providing services over the Cable System.

(j) "Headend" shall mean a facility for signal reception and distribution on a Cable System including cables, antennas, wires, satellite dishes, monitors, switches, modulators, processors, and all other related equipment and facilities.

(k) "Non-Cable Services" shall mean those services not explicitly defined as Cable Services, including without limitation, telephone services.

(l) "Public improvement" shall mean any existing or contemplated public facility, building or capital improvement project, including, without limitation, streets, alleys, sidewalks, sewer, water, drainage, Right-of-way improvement and public projects.

(m) "Public project" shall mean any project planned or undertaken by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or Public improvements, or any other purpose of a public nature.

(n) "Right-of-way" shall mean present and future streets, alleys, Right-of-way and public utility easements, including public utility easements and Right-of-way dedicated in plats to the City.

(o) "Upstream Transmission" shall mean the carrying of a transmission to the Headend from remote points on the Cable System or from interconnection points on the Cable System.

Section 2: GRANT OF FRANCHISE.

(a) Pursuant to K.S.A. 12-2001 et. seq., and K.S.A. 12-2006 et. seq., the City grants to the Grantee the nonexclusive right, privilege and franchise to construct, maintain, extend and operate its Facilities, in, through and along the Right-of-way for the purpose of providing Cable Services to the City and its inhabitants for the full term of this Franchise; subject to the terms and conditions of this Ordinance and applicable law.

(b) Nothing in this Agreement shall be interpreted as providing the Grantee the right, privilege or franchise to construct, maintain, extend or operate facilities, equipment, wiring, or attendant materials, in, through and along the Right-of-way for the purposes of providing Non-Cable Services to the City and its inhabitants, except as otherwise permitted by this Ordinance and applicable laws.

Section 3: FRANCHISE FEE.

(a) In partial consideration for the grant of this Franchise and the premises, Grantee agrees to pay and the City agrees to accept as adequate compensation and consideration for the Franchise granted in lieu of any occupation, license, or privilege tax or any lease or easement charge, a franchise fee as defined herein. The Grantee shall pay to the City as a Cable Service franchise fee a sum equal to five percent (5%) of Franchise Revenues derived from the operation of Grantee's Cable System to provide Cable Services within the corporate limits of the City.

(b) The franchise fee shall be paid annually to the City during the term of the franchise, for each preceding 12 month period. The Grantee shall pay the applicable fee to the city within forty-five (45) days of the last day of the applicable 12th month for which a fee payment is due. Payments received after the due date shall be subject to a one-time charge equal to ten percent (10%) of the payment due.

(c) The franchise fee shall be in lieu of all other licenses, charges, fees or impositions (other than the usual general or special ad valorem taxes or special assessments) which might be imposed by the City for the privilege of operating Grantee's Cable System and Facilities within the City.

Section 4: EFFECTIVE PERIOD. Upon compliance with Section 21, this Agreement shall be effective for ten (10) years from August 1, 2014 to July 31, 2024. Upon request by the City, the Grantee and the City may periodically conduct a meeting to review this Ordinance, and related performance and cooperation issues. Pursuant to K.S.A. 12-2001(b)(2) under no circumstances

shall this contract franchise ordinance exceed twenty (20) years from the effective date of the contract franchise ordinance.

Section 5: USE OF RIGHT-OF-WAY. In the use of the Right-of-way under this Ordinance, the Grantee shall be subject to all applicable local, state and federal law and regulations. In addition, Grantee shall comply with the following:

(a) The Grantee's use of Right-of-way shall in all matters be subordinate to the City's use of Right-of-way for any public purposes. The Grantee shall coordinate the placement of its Facilities in a manner which minimizes adverse impact on Public improvements, as reasonably determined by the City. Where placement is not otherwise regulated, the Facilities shall be placed with adequate clearance from such Public improvements so as not to impact or be impacted by such public improvement. Pole placement and clearance is defined in Article II, paragraph 2 of an Agreement between the Grantee and the City dated March 16, 2004. The Grantee shall pay the City an annual fee for each pole owned by the City that is used for attachments of the Grantee, payable at each annual franchise fee payment time; such fee shall be in the amount of $3.00 per pole if the total number of pole attachments is 500 or fewer, and $2.00 per pole for each additional pole attachment in excess of 500.

(b) All earth, materials, sidewalks, paving, crossings, utilities, public improvements or improvements of any kind injured, damaged, or removed by the Grantee in its activities under this Ordinance shall be fully repaired or replaced within a reasonable time by the Grantee at its sole expense and to the reasonable satisfaction of the City and the Grantee.

(c) The Grantee shall keep and maintain accurate records and as-built drawings depicting accurate location of all facilities constructed, reconstructed, or relocated in the Right-of-way after the date hereof and provide location information regarding specific future project locations to the City upon request. Where such information is available electronically, upon request from the City, Grantee agrees to provide such information in an electronic format. City agrees to use information obtained pursuant to this section only to locate utility facilities in connection with municipal projects and further agrees not to disclose such information to anyone other than City employees requiring such information to locate utility facilities in connection with municipal projects, except as required by law. Grantee and the City agree that such information is confidential and proprietary and agree that such information shall remain the sole property of the Grantee and agree that pursuant to K.S.A. 45-221(12), (18), as amended, such information does not constitute public records subject to K.S.A. 45-218, as amended. In the event that City is required by law to disclose such information, City shall provide the Grantee seven days advance notice of its intended disclosure of such information and shall take action as may be reasonably required to cooperate with the Grantee to safeguard such information.

The Grantee agrees to indemnify and hold the City harmless from any and all penalties of costs, including attorney's fees, arising from the actions of the Grantee,

or of the City at the written request of the Grantee, in seeking to safeguard the confidentiality of information provided by the Grantee to the City under this section.

In the event such information is required by force of law to be publicly disclosed, the Grantee shall have no further obligation under this section to provide the City with such information.

(d) Except in cases of an emergency, a minimum of fourteen (14) days prior to construction, reconstruction or relocation of any facilities in the Right-of-way, the Grantee shall submit to the City Administrator, or his or her designee, for approval, plans and specifications of the proposed installation. Such approval shall not be unreasonably withheld, delayed or conditioned. City review shall only concern matters related to the interests of the City as set forth in this Ordinance.

(e) The Grantee shall cooperate promptly and fully with the City and take all measures necessary to provide accurate and complete information regarding the nature and locations of its Facilities located within Right-of-way when requested by the City or its authorized agents for a Public project. Such location and identification shall be at the sole expense of the Grantee, without expense to the City, its employees, agents, or authorized contractors.

(f) As reasonably necessary, the Grantee shall relocate or adjust any Facilities located in the Right-of-way for a Public project within a reasonable time. Such relocation or adjustment shall be performed by the Grantee at its sole expense, without expense to the City, its employees, agents, or authorized contractors and shall be specifically subject to the rules and regulations of the City not inconsistent with this Ordinance pertaining to such. The Grantee shall cooperate with all private citizens and businesses requiring the Grantee to move Facilities. For projects which are not Public improvements, Grantee may charge reasonable fees for the temporary removal of Facilities according to a written schedule established by the Grantee.

(g) It shall be the primary responsibility of the Grantee to take adequate measures to protect and defend its Facilities in the Right-of-way from harm and damage. If the Grantee fails to accurately or timely locate Facilities when requested, the Grantee has no claim for costs or damages against the City and its authorized contractors or any other party authorized to be in the Right-of-way, except to the extent such harm or damage is caused by such party's negligent or intentional conduct. The City and its authorized contractors agree to take reasonable precautionary measures, including, but not limited to, calling for utility locations and observing marker posts, when working near Grantee's Facilities.

(h) Except in the event of an emergency, the Grantee shall notify the City not less than ten (10) days in advance of any construction, reconstruction, repair or relocation of Facilities which would require any street closure which reduces traffic flow. The City shall follow its policies in the grant or denial of such authority, which shall not be unreasonably delayed. Except in the event of an emergency, no such closure shall take place without such notice and prior authorization from the City.

In addition, all work performed in the traveled way or which in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected. For all work within the Right-of-way, the Grantee shall erect and maintain signs and other devices as required by City Ordinances, regulations and rules.

(i) All technical standards governing construction, reconstruction, installation, operation, testing, use, maintenance and dismantling of the Facilities in the Right-of-way shall be in accordance with applicable present and future federal, state and City law and regulations.

Section 6: PUBLIC TREE CARE. The City or Grantee may care, prune, trim and remove trees located in or on the City Right-of-way pursuant to the provisions of Section 15-309 of the City Code of the City of Beloit, as may be necessary to insure safety.

Section 7: LOCATION OF UNDERGROUND EQUIPMENT AND FACILITIES. Where necessary, the Grantee's equipment shall be placed underground in such locations as shall be determined by mutual agreement between the City and Grantee, without expense to the City.

Section 8: SHARING OF SPACE. The City encourages the conservation of Right-of-way by the sharing of space by all utilities. To the extent required by federal or state law, the Grantee shall permit any other franchised entity by appropriate contract or agreement negotiated by the parties to use any and all Facilities constructed or erected by the Grantee. All agreements and installations shall be subject to all existing future Ordinances and regulations of the City. Grantee agrees that it will not grant any entity rights to occupy the Right-of-way without providing notice to the City.

Section 9: TECHNICAL REQUIREMENTS FOR CABLE SYSTEM.

(a) General. The Grantee's Cable System operated hereunder shall at all times be operated and updated, as needed, so that at a minimum, it is conformance with all applicable and current federal, state and local technical specifications and standards, including but not limited to, technical specifications contained in FCC rules and regulations, or any other applicable law which may supersede such rules. As a supplement to the technical standards, the Grantee shall operate the system in a manner to provide to all subscribers video and audio signals of consistently good quality.

Section 10: PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS.

(a) Access Channel. The Grantee shall make available a public, educational and governmental (PEG) access channel as specified in this Section.

1) The Grantee shall make available one (1) access channel for City non-commercial uses and purposes and for non-commercial purposes of other institutions and of the public generally, at no cost to the City or others.

The above access channel shall be of the same transmission quality as other channels of the cable system. Grantee shall serve as Designated Access Manager for public use of such access channel.

(b) Grantee shall provide free cable service and internet access to the City at the Municipal Building.

Section 11: CABLE SYSTEM SERVICE STANDARDS. The Grantee shall provide service standards which comply, at a minimum, with Cable System service standards required by the FCC.

Section 12: ACCESS TO INFORMATION AND CITY AUDIT REGARDING GRANTEE EQUIPMENT, FACILITIES AND REVENUES. The Grantee shall provide the City, or City audit representatives, with reasonable access to Grantee records, revenue codes and information documenting the total Franchise Revenues from Cable Service as defined in this Ordinance. The Grantee shall comply with all reasonable requests for information in the performance of any audit and shall pay 50% of the actual and reasonable costs of such audit, not to exceed $2,500 per audit.

Section 13: INDEMNIFICATION AND HOLD-HARMLESS. The Grantee, its successors and assigns, shall at all times save and hold harmless the City from all liability, costs, damages, and expenses of any kind, for the payment of which the City may become liable to any person, firm, or corporation by reason of any claim or damages to the extent caused by the failure of the Grantee, its employees, agents, or servants to exercise due care and diligence in the construction, installation, maintenance, and operation of Cable Services and the transmission, distribution of such services within the City or outside the City.

Section 14: ASSIGNMENT OF FRANCHISE. Pursuant to the written permission of the City and the submission of FCC form 394 or such successor form, the Grantee shall have the right to assign the Franchise granted under this Ordinance, and the associated rights and privileges to any person, firm or corporation, and any such assignee, by accepting such assignment, shall be bound by the terms and provisions hereof. If the Grantee should seek approval to assign this Franchise, the Grantee 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 federal law and the laws of the State of Kansas, as the same may exist at the time when any assignment is made. In the event that Grantee assigns this Franchise to a wholly owned subsidiary or affiliate of Grantee, such assignment shall require thirty (30) days prior written notice to the City and shall not require City approval.

Section 15: CONDITIONS OF FRANCHISE. This Franchise is granted and accepted under and subject to all applicable laws and under and subject to all of the orders, rules and regulations now or hereafter adopted by governmental bodies now or hereafter having jurisdiction, each and every provision hereof shall be subject to Acts of God, fires, strikes, riots, floods, war and other causes beyond the Grantee's control. This Franchise shall not be exclusive.

Section 16: OTHER FRANCHISES. Grantee agrees that the City may grant to other providers one or more franchises to provide Cable Service and other services. To avoid unfair competition due to disparate franchise obligations, if the City grants franchise rights to other providers in competition with Grantee, Grantee may petition the City to modify terms of this Ordinance to adjust or eliminate terms that are more burdensome or costly than the terms of a competing provider's franchise. The City shall schedule a public hearing on the petition within 60 days of receipt and shall issue a written decision granting or denying such petition within 60 days of such hearing.

Section 17: CHANGES IN LAW OR REGULATIONS. The City or the Grantee may seek modification of this Ordinance due to changes in federal or state laws or regulations in accordance with the following procedures:

(1) The party seeking modification shall serve the other party notice of a request for modification under this Section. The notice shall specify: (i) the changes in laws or regulations on which the modification request is based; and (ii) the desired modifications.

(2) Within 60 days of delivery of the notice, representatives of the City and the Grantee shall meet to develop mutually agreeable modifications to the Ordinance. Any mutually agreeable modifications shall be presented to the City Commission as recommendations for modification to the Ordinance under this Section.

(3) If the City and the Grantee cannot develop a mutually agreeable recommendation for modification within a reasonable time, then the City and the Grantee shall submit to the City Council their respective proposals for modification under this Section.

(4) The City Commission shall review the proposals and comments of interested parties at a public hearing. The City Council shall then issue a decision concerning any modification to the Ordinance under this Section.

(5) The Grantee may appeal under applicable law a denial of a modification proposal under this Section.

Section 18: NOTICE TO PARTIES. For the purpose of this Agreement, notice to the City will be to: City Administrator, P.O. Box 567, Beloit, Kansas 67420. For the purpose of this Agreement, notice to the Grantee will be to: Brent Cunningham, Cunningham Communications, Inc., P.O. Box 108, Glen Elder, Kansas 67446. Notice will be effective upon delivery, by hand delivery or by first class mail to the above address until the City or the Grantee notifies the other, in writing, of a change in address.

Section 19: RIGHTS AND DUTIES OF GRANTEE UPON EXPIRATION OF ORDINANCE. Upon expiration of this Ordinance, whether by lapse of time, by agreement between the Grantee and the City, or by forfeiture thereof, the Grantee has the right to remove from public property all of its Facilities used in its business within reasonable time after such expiration or

forfeiture, but in such event, it shall be the duty of the Grantee immediately upon such removal, to restore the Right-of-way from which its Facilities are removed to as good condition as before removal and without cost to the City.

Section 20: TERMINATION OR FORFEITURE OF FRANCHISE.

(a) In case of failure on the part of the Grantee, its successors and assigns, to comply with any of the provisions of this Ordinance, or if the Grantee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the terms of this Ordinance, the Grantee, its successors and assigns, shall forfeit all rights and privileges granted by this Ordinance 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 and all additional provisions as required by the State and federal law.

(b) Before the City proceeds to forfeit the Franchise, as in this section prescribed, it shall first serve a written notice as provided by the Notice provision of this Ordinance, setting forth in detail the conditions of neglect, default or failure complained of, and the Grantee 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 ninety (90) day period, the City deems that the conditions of such Franchise have not been complied with by the Grantee and that such Franchise is subject to cancellation by reason thereof, the City, in order to terminate the Franchise shall enact an Ordinance setting out the grounds upon which the Franchise is to be canceled and terminated. If within thirty (30) days after the effective date of the Ordinance, the Grantee has not instituted an action in the District Court of Mitchell County, Kansas to determine whether or not the Grantee 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.

(c) If within such thirty (30) day period the Grantee does institute an action, as above provided, to determine whether or not the Grantee has violated the terms of this Franchise and that the Franchise is subject to cancellation by reason thereof and prosecutes such action to final judgment with due diligence, then, in the event the court finds that the Franchise is subject to cancellation by reason of the violation of its terms, this Franchise shall terminate thirty (30) days after such final judgment is rendered and available appeals exhausted.

Section 21: EFFECTIVENESS. This Ordinance shall become effective after the following: 1) prior to the Grantee considering action on this Ordinance, it shall hold a public hearing for public comments on the franchise issue after publication notice in the official city newspaper of the City of Beloit, Kansas, at least one week prior to the public hearing; 2) the Ordinance has been published in the official city paper once a week for two consecutive weeks; and 3) the expiration of 60 days from the date of final passage without the submission of a rejection in

writing by the Grantee.

Section 22: SEVERABILITY. If any provision, section or subsection of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions, sections, or subsections or applications of this Ordinance which can be given effect without the invalid provision, section or subsection or application, and to this end the provisions, sections, and subsections of this Ordinance are declared to be severable.

Section 23: REPEAL. Ordinance No. 1985 is hereby repealed.

Section 24: GRANTEE ACCEPTANCE. This Ordinance shall be in full force and effect after the expiration of sixty (60) days from the passage and all terms and conditions understood and accepted by Grantee unless previously rejected in writing by Grantee delivered by certified mail to the City.

PASSED and ADOPTED by the Governing Body and signed by the Mayor this 6th day of May, 2014.

Tom Naasz

Tom Naasz, Mayor

ATTEST:

Amanda J. Lomax

Amanda J. Lomax, City Clerk

APPROVED AS TO FORM:

Katie J. Cheney

Katie J. Cheney, City Attorney