ORDINANCE NO. 2148

AN ORDINANCE GRANTING CUNNINGHAM COMMUNICATIONS, INC., A TELECOMMUNICATIONS LOCAL EXCHANGE SERVICE PROVIDER PROVIDING LOCAL EXCHANGE SERVICE WITHIN THE CITY OF BELOIT, KANSAS.

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

Section 1: Pursuant to K.S.A. 2013 Supp. 12-2001 and amendments thereto, a contract franchise ordinance is hereby granted to Cunningham Communications, Inc., a telecommunications local exchange service provider providing local exchange service within the City of Beloit, Kansas ("City"), subject to the provisions set forth hereafter. The initial term of this contract franchise ordinance shall be for a period of three (3) years beginning August 1, 2014, and ending July 31, 2017. Thereafter, this contract franchise ordinance will automatically renew for seven (7) additional one (1) year terms (hereinafter the "renewal term"), unless either party notifies the other party of its intent to terminate the contract franchise ordinance at least ninety (90) days before the termination of the then current term. The additional term shall be deemed a continuation of this contract franchise ordinance and not as a new contract franchise ordinance or amendment. Pursuant to K.S.A. 2013 Supp. 12-2001(b)(2) under no circumstances shall this contract franchise ordinance exceed twenty (20) years from the effective date of the initial term of the contract franchise ordinance. Compensation for said contract franchise ordinance shall be established pursuant to Section 3 of this ordinance.

Section 2: For the purpose of this contract franchise ordinance, the following words and phrases and their derivations shall have the following meaning:

"Access line" shall mean and be limited to retail billed and collected residential lines; business lines; ISDN lines; PBX trunks and simulated exchange access lines provided by a central office based switching arrangement where all stations serviced by such simulated exchange access lines are used by a single customer of the provider of such arrangement. Access line may not be construed to include interoffice transport or other transmission media that do not terminate at an end user customer's premises, or to permit duplicate or multiple assessment of access line rates on the provision of a single service or on the multiple communications paths derived from a billed and collected access line. Access line shall not include the following: Wireless telecommunications services, the sale or lease of unbundled loop facilities, special access services, lines providing only data services without voice services processed by a telecommunications local exchange service provider or private line service arrangements.

"Access line count" means the number of access lines serving consumers within the corporate boundaries of the city on the last day of each month.

"Access line fee" means a fee determined by a city, up to a maximum as set out in K.S.A. 2013 Supp. 12-2001 and amendments thereto, to be used by a telecommunications local exchange service provider in calculating the amount of access line remittance.

"Access line remittance" means the amount to be paid by a telecommunications local exchange service provider to a city, the total of which is calculated by multiplying the access line fee, as determined in the city, by the number of access lines served by that telecommunications local exchange service provider within that city for each month in that calendar quarter.

"Gross receipts" means only those receipts collected from within the corporate boundaries of the city enacting the franchise and which are derived from the following: (A) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (B) recurring local exchange access line services for pay phone lines provided by a telecommunications local exchange service provider to all pay phone service providers; (C) local directory assistance revenue; (D) line status verification/busy interrupt revenue; (E) local operator assistance revenue; and (F) 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, the sale or lease of unbundled network elements, nonregulated services, carrier and end user access, long distance, wireless telecommunications services, lines providing only data service without voice services processed by a telecommunications local exchange service provider, private line service arrangements, internet, broadband and all other services not wholly local in nature are excluded from gross receipts. Gross receipts shall be reduced by bad debt expenses. Uncollectible and late charges shall not be included within gross receipts. If a telecommunications local exchange service provider offers additional services of a wholly local nature which if in existence on or before July 1, 2002, would have been included with the definition of gross receipts, such services shall be included from the date of the offering of such services in the city.

"Local exchange service" means local switched telecommunications service within any local exchange service area approved by the state corporation commission, regardless of the medium by which the local telecommunications service is provided. The term local exchange service shall not include wireless communication services.

"Telecommunications local exchange service provider" means a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, and a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto, which does, or in good faith intends to, provide local exchange service. The term telecommunications local exchange service provider does not include an interexchange carrier that does not provide local exchange service, competitive access provider that does not provide local exchange service or any wireless telecommunications local exchange service provider.

"Telecommunications services" 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.

Section 3: Compensation made pursuant to this contract franchise ordinance shall be paid on an annual basis without invoice or reminder from the City and paid not later than forty-five (45) days after the end of the remittal period. For the initial term of this contract franchise

ordinance, said compensation shall be a sum equal to five percent (5%) of gross receipts. Compensation during the renewal term of the contract franchise ordinance shall continue to be based on a sum equal to the initial term and compensation shall be paid as provided for in this section.

The City may provide notice to Cunningham Communications, Inc. prior to ninety (90) days before the end of the calendar year of the initial term or a renewal term that it intends to increase or decrease the percentage of gross receipts or amount per month per access line for the following calendar year. Any increased access line fee or gross receipt fee shall be fixed for a period of three (3) years, pursuant to K.S.A. 2013 Supp. 12-2001(l) and amendments thereto, and be made in compliance with the public notification procedures set forth in K.S.A. 2013 Supp. 12-2001(m) and amendments thereto. Any increased fee shall be collected and remitted under the terms of this contract franchise ordinance.

In the event the City elects compensation based on a gross receipts fee, nothing herein precludes the City from switching to an access line fee provided the City notifies Cunningham Communications, Inc. prior to ninety (90) days before the end of the calendar year that it intends to elect an access line fee for the following calendar year. Alternatively, in the event the City elects compensation based on an access line fee, nothing herein precludes City from switching to a gross receipts fee provided City notifies Cunningham Communications, Inc. prior to ninety (90) days before the end of the calendar year that it intends to elect a gross receipts fee for the following calendar year.

Section 4: The City shall have the right to examine, upon written notice to the telecommunications local exchange service provider, no more than once per calendar year, those records necessary to verify the correctness of the compensation paid pursuant to this contract franchise ordinance. If the gross receipts or access line fee is determined to be erroneous, Cunningham Communications, Inc. shall revise the gross receipts or access line fee accordingly and make payment upon such corrected gross receipts or access line fee.

Section 5: As a condition of this contract franchise ordinance, Cunningham Communications, Inc. 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 Federal Communications Commission (FCC) and/or the Kansas Corporation Commission (KCC), subject to Cunningham Communications, Inc.'s right to challenge in good faith such requirements as established by the FCC, KCC or other City Ordinance. Cunningham Communications, Inc. shall also comply with all applicable laws, statutes and/or ordinances, subject to Cunningham Communications, Inc.'s right to challenge in good faith such laws, statutes and/or ordinances.

Section 6: Nothing stated or contained herein shall be construed as giving Cunningham Communications, Inc. any exclusive privileges, nor shall it affect any prior or existing rights of Cunningham Communications, Inc. to maintain a telecommunications system within the City.

Section 7: Cunningham Communications, Inc. shall collect and remit compensation as described in Section 3 on those access lines that have been resold to another telecommunications local exchange service provider.

Section 8: The City agrees to provide Cunningham Communications, Inc. with notification in the event that it annexes property into the corporate boundaries of the City that would require Cunningham Communications, Inc. to collect and pay a franchise fee on access lines or gross receipts which prior to the annexation of the property Cunningham Communications, Inc. was not required to collect and/or pay. The City agrees to provide Cunningham Communications, Inc. with notification in the event the City renumbers or renames any streets that would require Cunningham Communications, Inc. to collect and pay a franchise fee on access lines or gross receipts which prior to the renumbering or renaming of the streets Cunningham Communications, Inc. would not have been required to collect and/or pay. The City agrees that in the event the City does not provide Cunningham Communications, Inc. with notice of an annexation or renumbering and/or renaming of the streets, Cunningham Communications, Inc. shall not be liable to the City for payment of franchise fees on the annexed property or renumbered and/or renamed streets for any time period prior to the City providing the required notice to Cunningham Communications, Inc..

Section 9: The City agrees that pursuant to K.S.A. 2013 Supp. 12-2001(j) (1), (2) and amendments thereto, that the franchise fee imposed under this contract franchise ordinance must be assessed in a competitively neutral manner, may not unduly impair competition, must be nondiscriminatory and must comply with state and federal law.

Section 10: Any required or permitted notice under this contract franchise ordinance shall be made in writing. Notice upon the City shall be delivered to the city clerk by first class United States certified mail, return receipt requested. Notice upon Cunningham Communications, Inc. shall be delivered by first class, United States certified mail, return receipt requested, to: Brent Cunningham, Cunningham Communications, Inc., P.O. Box 108, Glen Elder, KS 67446.

Section 11: Failure to Enforce. The failure of either party to enforce and remedy any noncompliance of the terms and conditions of this contract franchise ordinance shall not constitute a waiver of rights nor a waiver of the other party's obligations as provided herein.

Section 12: Force Majeure. Each and every provision hereof shall be subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond Cunningham Communications, Inc.'s or the City's control.

Section 13: Most Favored Nation. Pursuant to K.S.A. 17-1902, City represents and warrants that all benefits, terms and conditions in this Contract franchise are and, during the term of this Contract franchise, will continue to be no less favorable to Grantee than those currently being offered to or that may be offered and agreed to by City and any other local exchange carrier, telecommunications carrier, video services provider, competitive infrastructure provider or Internet Protocol services provider, regardless of the form or nature of the agreement with any other carrier or provider.

Section 14: Cunningham Communications, Inc. has entered into this contract franchise ordinance as required by the City and K.S.A. 2013 Supp. 12-2001 and amendments thereto. If any clause, sentence, section, or provision of K.S.A. 2013 Supp. 12-2001 and amendments thereto, shall be held to be invalid by a court of competent jurisdiction, either the City or Cunningham Communications, Inc. may elect to terminate the entire contract franchise ordinance. In the event a court of competent jurisdiction invalidates K.S.A. 2013 Supp. 12-2001 and amendments thereto, if Cunningham Communications, Inc. is required by law to enter into a contract franchise ordinance with the City, the parties agree to act in good faith in promptly negotiating a new contract franchise ordinance.

Section 15: In entering into this contract franchise ordinance, neither the City's nor Cunningham Communications, Inc.'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 ordinance, neither the City nor Cunningham Communications, Inc. waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Cunningham Communications, Inc. may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of this contract franchise ordinance or any present or future laws, ordinances, and/or rulings which may be the basis for the City and Cunningham Communications, Inc. entering into this contract franchise ordinance.

Section 16: The parties agree that in the event of a breach of this contract franchise ordinance by either party, the non-breaching party has the right to terminate the contract franchise ordinance. Prior to terminating the contract franchise ordinance, the non-breaching party shall first serve a written notice upon the breaching party, setting forth in detail the nature of the breach, and the breaching party shall have thirty (30) days thereafter in which to cure the breach. If at the end of such thirty (30) day period the non-breaching party deems that the breach has not been cured, the non-breaching party may take action to terminate this contract franchise ordinance.

Section 17: This contract franchise ordinance is made under and in conformity with the laws of the State of Kansas. The contract franchise ordinance shall not be effective until the ordinance granting the same has been adopted as provided by law.

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