

ORDINANCE NO. 1512

**AN ORDINANCE GRANTING TO WILDFLOWER
TELECOMMUNICATIONS, LLC, ITS SUCCESSORS AND ASSIGNS, A
CONTRACT FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN
A TELECOMMUNICATIONS SYSTEM IN THE CITY OF COLBY,
KANSAS; ALL PURSUANT TO K.S.A. 12-2001 ET SEQ.**

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

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.

a. "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 served 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.

b. "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.

c. "Access line fee" - means a fee in an amount determined by the City, up to a maximum as set out in K.S.A. 12-2001 and amendments thereto, to be used by Grantee in calculating the amount of access line remittance.

d. "Access line remittance" - means the amount to be paid by Grantee to City, the total of which is calculated by multiplying the access line fee, as determined by the City, by the number of access lines served by Grantee within the City for each month in that calendar quarter.

e. "City" - means the City of Colby, Kansas.

f. "Communications System" or "System" means the cables, wires, lines, optic fiber, and any associated converters, equipment, or other facilities designed, constructed or occupied by Grantee or others for the purpose of producing, receiving, amplifying or distributing communications service to or from locations within the City.

g. "Contract franchise" - means this Ordinance granting the right, privilege and franchise to Grantee to provide telecommunications services within the City.

h. "Facilities" means any portion of a system located in, along, over, upon, under, or through the right-of-way.

i. "Grantee" - means Wildflower Telecommunications, LLC, a competitive telecommunications local exchange service provider providing local exchange service within the City. References to Grantee shall also include as appropriate any and all successors and assigns.

j. "Gross receipts" - shall mean only those receipts collected from within the corporate boundaries of the City and which are 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 Grantee 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; and (7) revenue received by Grantee from resellers or others which use Grantee's facilities. 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 Grantee 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 within the City.

k. "Local exchange service" - means local switched telecommunications service within any local exchange service area approved by the Kansas 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.

l. "Right-of-way" means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes, including but not limited to overhead lighting facilities, and including utility easements wherein the City now or hereafter acquires the

right and authority to locate or permit the location of utilities consistent with communications facilities. This term shall not include any county, state, or federal right-of-way or any property owned or controlled by any person or agency other than the City, except as provided by applicable laws or pursuant to an agreement between the City and any such person or agency. Right-of-way shall not include property owned or held by City and not typically considered right-of-way such as City parks and City buildings.

m. "Telecommunication 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 2. GRANT OF CONTRACT FRANCHISE.

a. There is hereby granted to Grantee this nonexclusive contract franchise to construct, maintain, extend and operate its facilities along, across, upon or under any public right-of-way for the purpose of supplying telecommunication services to the consumers or recipients of such service located within the corporate boundaries of the City, for the term of this contract franchise, subject to the terms and conditions of this contract franchise.

b. The grant of this contract franchise by the City shall not convey title, equitable or legal, in the public right-of-way, and shall give only the right to occupy the public right-of-way, for the purposes and for the period stated in this contract franchise. This contract franchise does not:

(1) Grant the right to use facilities or any other property, telecommunications related or otherwise, owned or controlled by the City or a third-party, without the consent of such party;

(2) Grant the authority to construct, maintain or operate any facility or related appurtenance on property owned by the City outside of the public right-of-way, specifically including, but not limited to, parkland property, any City building or structures, or public works facility property; or

(3) Excuse Grantee from obtaining appropriate access or attachment agreements before locating its facilities on the facilities owned or controlled by the City or a third-party.

c. As a condition of this contract franchise ordinance, Grantee is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by an appropriate governmental entity, including, but not limited to, the City, the Federal Communications Commission (FCC) or the Kansas Corporation Commission (KCC). Grantee shall provide City with copies of required permits. Grantee shall also comply with all applicable laws, statutes and/or ordinances.

d. This authority to occupy the public right-of-way shall be granted in a competitively neutral and nondiscriminatory basis and not in conflict with state or federal law.

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

a. Pursuant to K.S.A. 17-1902, 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, and above the public right-of-way. However, facilities above the right-of-way are permitted only under subsection e. of this section or as otherwise permitted by the City in writing. 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. 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, including, but not limited to the City's ordinance for communications services regulating the use and occupancy of the public right-of-way and amendments thereto, as may be amended from time to time.

c. Upon the request of City, and no more than once every twelve (12) months, Grantee shall provide City, in an electronic format mutually agreeable to both parties, maps identifying the location of Grantee's facilities.

d. City and Grantee may enter into a utility pole attachment agreement to cover issues specific to the attachment to the City's utility poles by Grantee.

e. Grantee is only allowed to place facilities above the public right-of-way when the Grantee's facilities are placed on an existing utility pole and when permitted by the pole owner. Grantee is not permitted to place any new utility pole within the public right-of-way unless otherwise permitted in writing by the City. In the event that a pole or poles to which Grantee's facilities are attached is to be removed and not replaced for any reason, Grantee agrees to either place its facilities underground or remove them from the City right-of-way.

f. Grantee shall participate in the Kansas One Call utility location program.

SECTION 4. COMPENSATION TO THE CITY.

Compensation made pursuant to this contract franchise ordinance shall be paid on a quarterly basis without invoice or reminder from the City and paid not later than forty-five

(45) days after the end of the remittal period. Said compensation shall be a \$0.50 fee per access line, pursuant to K.S.A. 12-2001(j) and amendments thereto, for local exchange service. Any increased access line fee shall be in compliance with the public notification procedures set forth in K.S.A. 12-2001.

SECTION 5. RECORD REVIEW.

The City shall have the right to examine, upon written notice to Grantee, no more than once per calendar year, those records necessary to verify the correctness of the compensation paid pursuant to this contract franchise ordinance.

SECTION 6. RESOLD SERVICES.

Grantee shall collect and remit compensation as described in Section 4 on those access lines that have been resold to another telecommunications local exchange service provider.

SECTION 7. INDEMNITY AND HOLD HARMLESS.

a. It shall be the responsibility of Grantee to take adequate measures to protect and defend its facilities in the public right-of-way from harm or damage. If Grantee fails to accurately or timely locate facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq., it has no claim for costs or damages against the City and its authorized contractors unless such parties are responsible for the harm or damage caused by their gross negligence. The City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near Grantee's facilities.

b. Grantee shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of Grantee, any agent, officer, director, representative, employee, affiliate or subcontractor of Grantee, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in the public right-of-way.

c. Grantee or City shall promptly advise the other in writing of any known claim or demand against Grantee or the City related to or arising out of Grantee's activities in the public right-of-way.

SECTION 8. INSURANCE REQUIREMENT AND PERFORMANCE BOND.

a. During the term of this contract franchise, Grantee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the State of Kansas. Should Grantee elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. Grantee shall provide not less than the following insurance:

(1) Workers' compensation as provided for pursuant to the laws of the state of Kansas with an employers' liability limit equal to the amount required by law.

(2) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with an aggregate limit of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. Upon request, the City shall be included as an additional insured with respect to liability arising from Grantee's operations under this contract franchise.

b. As an alternative to the requirements of subsection (a), Grantee may demonstrate to the satisfaction of the City with a non-revocable Letter of Credit that it is self-insured and as such Grantee has the ability to provide coverage 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 Grantee, or alleged to so have been caused or occurred.

SECTION 9. REVOCATION AND TERMINATION.

In case of failure on the part of Grantee to comply with any of the provisions of this contract franchise, or if Grantee should do or cause to be done any act or thing prohibited by or in violation of the terms of this contract franchise, the City shall abide by the requirements of K.S.A. 12-2001 which requires reasonable notice and an opportunity for a public hearing before the City governing body before a contract franchise ordinance may be revoked.

SECTION 10. RESERVATION OF RIGHTS.

a. The City specifically reserves its right and authority as a customer of Grantee and as a public entity with responsibilities towards its citizens, to participate to the full extent allowed by law in proceedings concerning Grantee's rates and services to ensure the rendering of efficient telecommunications service and any other services at reasonable rates, and the maintenance of 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 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 11. FAILURE TO ENFORCE.

The failure of either the City or the Grantee to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this contract franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City or the Grantee unless said waiver or relinquishment is in writing and signed by both the City and the Grantee.

SECTION 12. TERM AND TERMINATION DATE.

a. This contract franchise shall be effective for a term of five (5) years from the effective date of this contract franchise ordinance. Thereafter, this contract franchise will renew for additional one (1) year terms, unless either party notifies the other party of its intent to terminate or renegotiate the contract franchise at least one hundred eighty (180) days before the termination of the then current term. The additional term shall be deemed a continuation of this contract franchise and not as a new franchise or amendment.

b. Upon written request of either the City or Grantee, this contract franchise shall be renegotiated at any time in accordance with the requirements of state law upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or Grantee, including but not limited to the scope of the contract franchise granted to Grantee or the compensation to be received by the City hereunder.

c. If any clause, sentence, section, or provision of K.S.A. 12-2001, and amendments thereto, shall be held to be invalid by a court or administrative agency of competent jurisdiction, provided such order is not stayed, either the City or Grantee may elect to terminate the entire contract franchise. In the event of such invalidity, if Grantee is required by law to enter into a contract franchise with the City, the parties agree to act in good faith in promptly negotiating a new contract franchise.

d. Amendments under this section, if any, shall be made by contract franchise ordinance as prescribed by statute. This contract franchise shall remain in effect according to its terms, pending completion of any review or renegotiation provided by this section.

e. In the event the parties are actively negotiating in good faith a new contract franchise ordinance or an amendment to this contract franchise upon the termination date of this contract franchise, the parties by written mutual agreement may extend the termination date of this contract franchise to allow for further negotiations. Such extension period shall be deemed a continuation of this contract franchise and not as a new contract franchise ordinance or amendment.

f. Pursuant to K.S.A.12-2001 under no circumstances shall this contract franchise ordinance exceed twenty (20) years from the effective date of the contract franchise ordinance.

SECTION 13. 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 Manager and/or the Director of Public Utilities. All other notices between the parties shall be in writing and shall be made by personal delivery or by depositing such notice in the U.S. Mail, Certified Mail, return receipt requested. 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. "Business day" for purposes of this section shall mean Monday through Friday, City observed holidays excepted.

City:

Tyson J. McGreer
City Manager
585 N. Franklin Avenue
Colby, KS 67701
(785) 460-4410
manager@cityofcolby.com

Grantee:

Daniel P. Friesen, President
102 N. Main
Buhler, KS 67522
(620) 543-2580
Daniel@ideatek.biz

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

SECTION 14. CONFIDENTIALITY.

Information provided to the City under K.S.A. 12-2001 shall be governed by confidentiality procedures in compliance with K.S.A. 45-215 *et seq* and amendments thereto. Grantee agrees to indemnify and hold the City harmless from any and all penalties or costs, including attorney's fees, arising from the actions of Grantee, or of the City at the written request of Grantee, in seeking to safeguard the confidentiality of information provided by Grantee to the City under this contract franchise.

SECTION 15. COMPETITIVE NEUTRALITY.

The City agrees that under K.S.A.12-2001, and other state and federal laws, this contract franchise ordinance must be competitively neutral and may not be unreasonable or discriminatory to any telecommunications local exchange operating in the City. In entering into this contract franchise ordinance, the City specifically recognizes it must ensure all other telecommunications local exchange services providers operating in the City are subject to a substantially similar contract franchise ordinance within a timely manner not to exceed one hundred and eighty (180) days from either the time this contract franchise ordinance becomes effective, or from the date a telecommunications local change service provider beings to offer local exchange service in the City. It is the City's sole responsibility to identify the telecommunications local exchange service providers operating in City, and utilize all available legal means, if necessary, to ensure all such telecommunications local exchange service providers are subject to a substantially similar contract franchise ordinance.

SECTION 16. SEVERABILITY.

If any clause, sentence, or section of this contract franchise, or any portion thereof, shall be held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared invalid; provided, however, the City or Grantee may elect to declare the entire contract franchise invalidated if the portion declared invalid is, in the judgment of the City or Grantee, an essential part of the contract franchise.

SECTION 17. FORCE MAJEURE.

Each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond Grantee's or the City's control.

SECTION 18. CONTROLLING LAW.

The contract franchise granted herein, and this ordinance, are subject to the laws of the State of Kansas.

SECTION 19. This ordinance shall take effect and be in force from and after its approval, and publication in the official City newspaper.

PASSED BY THE GOVERNING BODY and approved by the Mayor this 18th day of December, 2012.

Gary L. Adrian, Mayor

ATTEST:

Joni L. Ketchum, City Clerk

Seal

APPROVED AS TO FORM:

John D. Gatz, City Attorney