



ORDINANCE NO. 5986

AN ORDINANCE ADOPTING CHAPTER 3.96 OF THE ALBANY MUNICIPAL CODE (AMC) AND GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS SYSTEM FRANCHISE TO ZIPLY FIBER PACIFIC, LLC FOR THE CONSTRUCTION AND OPERATION OF A TELECOMMUNICATION SYSTEM; AND FIXING TERMS, CONDITIONS, AND COMPENSATION OF SUCH FRANCHISE

WHEREAS, pursuant to federal law and state statutes the City is authorized to grant non-exclusive franchises to occupy the City Rights-of-Way or other public property in order to construct, operate, use, and maintain telecommunications service, gas service, electricity, and other public utilities, within the municipal boundaries of the city of Albany; and

WHEREAS, the City of Albany has determined that the financial, legal, and technical ability of Ziplly Fiber Pacific, LLC is reasonably sufficient to provide services, facilities, and equipment necessary to meet the future telecommunication needs of the community.

NOW, THEREFORE, the people of the City of Albany do ordain as follows.

Section 1. AMC Chapter 3.96.010 through 3.96.350 is established to read as follows:

3.96.010 Franchise granted.

The City of Albany, hereinafter referred to as “City”, hereby grants to Ziplly Fiber Pacific, LLC, referred to as “Ziplly Fiber”, a limited liability company authorized to conduct business in Oregon, hereinafter referred to as “Franchisee”, the non-exclusive right and privilege to occupy the City’s Rights-of-Way for the purpose of construction, use, operation, and maintenance of a Telecommunications System. Franchisee shall use its Telecommunications System solely to provide Telecommunications Services (as defined in ORS 759.005(8)), private telecommunication network (as defined in ORS 759.005(4)) service, and internet access service (as defined in ORS 305.822(1)(b)) within the City and to place, erect, lay, maintain, and operate in, upon, over and under streets, alleys, avenues, thoroughfares, and public highways, places, and grounds within the City (collectively, “Public Ways”), poles, wires, conduits, cabinets, appurtenances, and other appliances and conductors (collectively, “Facilities”) for all communication purposes.

This Agreement and the grant of authority conferred herein are not exclusive. The City reserves the right to grant the authority to others to use the Franchise Area during the term of this Agreement. The Franchisee shall respect the rights and property of the City and other authorized users of the Rights-of-Way. This Agreement does not confer on Franchisee any right, title, or interest in any Right-of-Way beyond that expressly conferred herein. This Agreement does not confer any right or privilege to use or occupy any other property of the City or any other entity.

Nothing in this Agreement shall be construed to prevent the City from constructing sewers; from grading, paving, repairing, or altering any Right-of-Way, or from constructing, installing, repairing, or removing water mains or any other public work or improvement. If any of the Franchisee’s Telecommunications System interferes with the work described in this subsection, the Franchisee’s Telecommunications System shall be removed or replaced as set forth in AMC 3.96.040 of this Agreement.

3.96.020 Rules of construction; Definitions.

Throughout this Agreement, captions are intended solely to facilitate reading and reference and shall not affect the meaning and interpretation of this Agreement.

When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The word “shall” will always mean mandatory and not merely directory.

For the purpose of this Agreement, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise.

1. "City" means the City of Albany, Oregon and the area within its boundaries as extended in the future.
2. "Conduit" is an electrical raceway for the enclosure of electrical conductors and may consist of rigid conduit of electrical metallic tubing or plastic tubing.
3. "Council" means the legislative body of the City.
4. "Customer," "user" or "subscriber" shall mean any person or entity lawfully receiving telecommunications service.
5. "Facility" means any tangible component of the Franchisee's Telecommunications System including, but not limited to, fiber, wires, cables, pipes, mains, ducts, conduits, vaults, pedestals, poles, antennas, power boxes, cabinets, and electronic equipment.
6. "Franchise Administrator" means the City Manager or designee of the City of Albany.
7. "Franchisee" means Ziplly Fiber, its successors, legal representatives, or assigns.
8. "Gross Revenues" shall have the same meaning as ORS 221.515.
9. "Local" means Linn County, Oregon or Benton County, Oregon.
10. "May" is permissive.
11. "Minimum Annual Franchise Fee" means the minimum amount paid to the City of Albany under this Agreement.
12. "Person" includes an individual, corporation, association, firm, partnership, and joint stock company.
13. "Private Telecommunications Network" means a system for the provision of telecommunications service or any portion of telecommunications service, including the construction, maintenance, or operation of the system, by a person for the exclusive use of that person and not for resale, directly or indirectly.
14. "Public Place" includes any City-owned park, place, facility, or grounds within the City that is open to the public but does not include a street or bridge.
15. "Radio Common Carrier" means any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers and any town making available facilities to provide radio communications service, radio paging or cellular communications service for hire.
16. "Rights-of-Way" means the surface of, and the space above and below, any street, road, alley, highway, sidewalk, utility easement, public square, public park, or other public place owned or otherwise held by the City.
17. "Service Area" means the legal boundaries of the City and including any areas annexed during the term of the franchise.
18. "Street" includes the surface, the air space above the surface, and the area below the surface of any public street, alley, avenue, road, boulevard, thoroughfare, or public highway, other public right-of-way, including public utility easements, but does not include a bridge or public place.
19. "Shall" is mandatory.
20. "Technical Facilities" or "Facilities" shall mean all real property, equipment, and fixtures used by Franchisee in the distribution of its services through its system and includes, but is not limited to, poles, conduit, cables, wires, microwave transmitters, antennae, amplifiers, etc.

21. "Telecommunications Service" (as defined in ORS 759.05(8)) and means any service provided for a fee to the public, or to such class of users as to be effectively available to the public without regard to the facilities used to provide the telecommunications; and for the purpose of voice, video or data transmission, including, but not limited to, local exchange service, access service, extended area service, call origination, interconnection, switching, transport, call termination and/or any other telecommunications service identified and authorized by the Federal Communications Commission ("FCC") or the Oregon Public Utility Commission. Telecommunications Service does not include any of the following: cable service as defined by 47 U.S.C. § 522; open video system service as defined in 47 C.F.R. § 76 (2009); private communications system services provided without using the public rights-of-way; over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the FCC or any successor thereto; direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996; or commercial mobile radio service as defined by 47 C.F.R. § 20.3 (2009).
22. "Telecommunications System" means all Facilities owned, leased, rented, maintained, or used by Franchisee for the purpose of providing Telecommunications Service and located in, under and/or above Rights-of-Way.

3.96.030 Effective date; Term.

The effective date of this Agreement shall be the first day of the full calendar month following the date the ordinance takes effect (the "Effective Date").

This Agreement, and all rights and obligations pertaining hereto, shall, subject to any applicable statutory or regulatory limitations on the maximum term allowed for public contracts, continue in full force and effect for an initial term of ten (10) years, commencing on the Effective Date. Unless sooner terminated by either party as set forth in AMC 3.96.280 below, at the end of the initial ten (10) year term, this Agreement shall be reviewed by both parties and must be in compliance with ORS 221.460(2020).

3.96.040 Construction; Excavation; and Relocation.

Franchisee shall maintain maps and data pertaining to all of its Facilities located in the City on file at an office in the State of Oregon. The City shall be allowed to inspect all such maps and data pertaining to its Facilities located in the City Rights-of-Way at any time during regular business hours upon not less than five (5) business days' prior notice. Upon request of the City and without charge, Franchisee shall provide current maps and data to the City showing the location of all Franchisee's Facilities within the City. Upon completion of any and all of its Facilities in the Public Right-of-Way, Franchisee shall provide a map or maps consistent with this Section to the City, showing the location as built of its installed Telecommunication System in the Rights-of-Way. Such as-built maps shall be in a form reasonably acceptable to the City Engineer and shall define specific locations of Facilities. City will not sell or transmit Franchisee maps or data to third parties unless permitted by Franchisee or required by law. The City will make available to Franchisee at no cost any relevant City-prepared maps or data.

Subject to applicable rules and regulations of the City, Franchisee may perform all excavations and other work necessary to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Facilities within Rights-of-Way shall, regardless of who performs the excavation, installation and/or construction, are and shall remain the responsibility of the Franchisee. Franchisee shall apply for and obtain all permits necessary for excavation, installation and/or construction of any Facilities located in the Rights-of-Way and shall pay all applicable fees due for City permits. Franchisee must also give such notice as required by law to other franchisees, licensees, or permittees of the City, and/or other units of government owning or maintaining facilities which may be affected by the proposed work.

Prior to beginning any excavation, installation, or construction work, Franchisee shall provide the City with an initial schedule and the estimated total cost of such work. When Franchisee's work under its permit is completed, Franchisee shall provide the City with the total amount of Right-of-Way, measured linearly, occupied by Franchisee's Telecommunications System, and with a map showing the location of its installed

Telecommunications System, as built. Such “as-built” maps shall be in a form reasonably acceptable to the City Engineer.

All work by Franchisee in the Rights-of-Way shall be properly safeguarded for the prevention of accidents. All of Franchisee’s work under AMC 3.96.130 and 3.96.150 of this Agreement shall be done in strict compliance with all applicable laws, ordinances, rules and regulations of the City and the State of Oregon.

Within thirty (30) days of any change in location of Franchisee’s Telecommunications System, Franchisee shall provide a map to the City Engineer, showing the location of Franchisee’s Telecommunications System on whatever standard scale the City adopts for general use. The Franchisee shall also provide such maps in an electronic format acceptable to both the City and Franchisee.

In the event that emergency repairs to its Telecommunications System are necessary, Franchisee shall immediately notify the City of the need for such repairs. Franchisee may immediately initiate such emergency repairs and shall apply for appropriate permits the next business day following discovery of the emergency. Franchisee shall comply with all City ordinances and regulations relating to any excavations or construction undertaken during emergency repair work, including the payment of permits or license fees. If emergency work has been done in a manner or location unacceptable to the City, the City shall notify the Franchisee in writing. The Franchisee shall make all appropriate modifications and relocation within sixty (60) days of such written notice.

Franchisee shall comply with ORS 757.542 through ORS 757.562(2020) and the rules and regulations promulgated thereunder in making excavations.

The City shall have the right to require Franchisee to change the location of any of its Facilities located within the Rights-of-Way when public convenience and necessity requires such change, and the expense thereof shall be paid solely by Franchisee. Should Franchisee fail to remove or relocate any such Facilities by the date established by the City, which, except in the event of a public emergency, shall not be sooner than ninety (90) days after City’s written notice to remove/relocate, the City may cause or effect such removal or relocation, and the expense thereof shall be paid by Franchisee, including all direct, indirect or consequential costs and expenses incurred by the City due to Franchisee’s delay. If the City requires Franchisee to relocate any of its Facilities located within the Rights-of-Way, the City shall make a reasonable effort to provide Franchisee with an alternate location for such Facilities.

As permitted by applicable law, administrative rule, or regulation, the City may require Franchisee to remove and replace any overhead Facilities with underground Facilities at the same or different locations subject to Franchisee’s engineering and safety standards. The expense of such a conversion shall be paid by Franchisee, and Franchisee may recover its costs from its customers in accordance with state laws and administrative rules or regulations. Nothing in this subsection prevents the City and Franchisee from agreeing to a different form of cost recovery consistent with applicable statutes and administrative rules or regulations on a case-by-case basis.

Franchisee’s Telecommunications System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits, or other facilities that may have been laid in the Rights-of-Way by the City or pursuant to the City’s authority.

Upon Franchisee’s acquisition of any Facilities located in the Rights-of-Way, or upon any addition or annexation to the City of any area in which Franchisee owns or controls any Facilities in the Rights-of-Way, the Franchisee shall submit to the City a written statement describing all Facilities involved, along with any documentation evidencing such acquisition and specifying the location of all such Facilities. Such Facilities shall immediately be subject to the terms of this Agreement upon acquisition or control by Franchisee.

The City may require Franchisee to temporarily remove and/or relocate Facilities located in any Right-of-Way by giving not less than thirty (30) days' advance written notice to Franchisee. Prior to such removal and/or relocation, the City agrees to provide a suitable substitute location for such relocated Facilities to maintain service. The City will assist in acquiring any needed easements if required square footage is not available in the Rights-Of-Way. The cost of removal and relocation of its Facilities to accommodate public projects shall be paid by Franchisee; however, when such removal and relocation are to be temporary and both the initial and the subsequent relocation are for public projects and not at the request of or to accommodate a private party, initial relocation costs shall be paid by Franchisee and the costs of subsequent relocations occurring less than two years after the initial relocation shall be paid by the City.

Nothing in this Agreement shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or doing any work in any Rights-Of-Way consistent with National Electric Safety Code. The City shall coordinate any such work with Franchisee to avoid, to the extent reasonably foreseeable, any obstruction, injury, or restriction on the use of any of Franchisee's Facilities. Nothing in this Section relieves Franchisee from its obligations set forth herein.

3.96.050 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and failing to do so, the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.96.060 Restoration of rights-of-ways.

Whenever Franchisee disturbs the surface of any Right-of-Way for any purpose, Franchisee shall promptly restore the Right-of-Way to as good or better condition than it had been prior to such disturbance.

All restoration of Rights-of-Way surfaces shall be subject to the approval of the City Engineer who may issue an order requiring correction of the restoration work. If the correction order is not complied with within thirty (30) days or any other such later time as may be specified in the order, the City may restore the surface of the Rights-of-Way, in which case Franchisee shall pay all reasonable costs of the restoration work to the City, including the resurfacing, inspection, supervision, and administrative costs of the resurfacing. If the City restores the surface of any Rights-of-way under this subsection, Franchisee shall also pay for the cost of issuing the correction order. If the work by Franchisee creates a public safety hazard as determined by the City Engineer, Franchisee may be required to repair or restore such Right-of-Way within twenty-four (24) hours of such determination or within such time as otherwise agreed upon by the City Engineer and Franchisee.

3.96.070 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work, or facility, to do any work that the City may find desirable on, over, or under any street, bridge, or public place, and to vacate, alter or close any street, bridge, or public place. If City vacates any portion of the public way containing facilities, City shall reserve an appurtenant easement for public utilities within that vacated portion within which Franchisee may continue to operate existing facilities under the terms of this franchise for at least the remaining term as set forth in AMC 3.96.030. Nothing in this Chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such

work done for or at the request of a private individual, entity, developer, or development shall be done at the expense of such private individual, entity, developer, or development.

3.96.080 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other imminent threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cables, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done in a manner that minimizes disruption to Franchisee's services and facilities, and City shall provide prompt notice to Franchisee. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense; provided, that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.96.090 Cables, wires – Rearrangement – Notice.

Whenever the City reasonably determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other alteration or improvement which will require rearrangement of Franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by any third persons whose activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government, to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.96.100 Tree trimming.

Subject to the provisions of this Chapter, Franchisee may trim trees, when necessary, in public rights-of-way for the operation of the lines, wires, cables and antennas or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

Franchisee may prune or cause to be pruned, using proper arboricultural practices, any tree located in the Right-of-Way which substantially interferes with Franchisee's Telecommunications System if Franchisee gives no less than fourteen (14) days' advance written notice to the City's Urban Forester, City Franchise Administrator, and any adjoining property owners. Such pruning work shall be the minimum amount required to alleviate the substantial interference with the operation of Franchisee's Telecommunications System. Any contractor engaged by Franchisee to perform work under this subsection must be approved by the City in advance of the performance of any work. Any wood, debris or other matter resulting from the pruning of trees shall be removed from the Right-of-Way on the same day pruning occurs.

3.96.110 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this Chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefor.

3.96.120 Temporary relocation at the request of third parties.

Whenever it is necessary to temporarily relocate or rearrange any Facility of Franchisee to permit the passage of any building, machinery or other object, Franchisee shall perform the work upon thirty (30) business days' written notice from the persons desiring to move the building, machinery, or other object. The notice shall: (1) demonstrate that the third party has acquired any necessary permit from the City; (2) detail the route of

movement of the building, machinery or other object; (3) provide that the person requesting the temporary relocation shall be responsible for Franchisee's costs; (4) provide that the requestor shall indemnify and hold harmless the City and Franchisee from any and all damages or claims resulting either from the moving of the building, machinery or other object or from the temporary relocation of Franchisee Facilities; and (5) be accompanied by a cash deposit or other security acceptable to Franchisee for the costs of relocation. Franchisee is not obligated to comply with any request to temporarily relocate or rearrange any Facility if the notice fails to meet any of the requirements in the previous sentence. The cash deposit or other acceptable security shall be in an amount reasonably calculated by Franchisee to cover Franchisee's costs of temporary relocation and restoration. Franchisee may, in its sole discretion, waive the cash deposit or other acceptable security requirement.

3.96.130 Right-of-way vacation.

If any Right-of-Way or portion thereof used by Franchisee is vacated by the City during the term of this Agreement, Franchisee shall, without expense to the City, remove its Telecommunications System therefrom and restore, repair, or reconstruct the Right-of-Way or portion thereof in as good or better condition as before the removal, unless the City Council specifically reserves to Franchisee the right to continue to use the vacated Right-of-Way. In the event of failure, neglect, or refusal of Franchisee, after ninety (90) days' notice by the City, to restore, repair, reconstruct, improve, or maintain such vacated Right-of-Way, the City may perform such work or cause such work to be performed. The direct, indirect, and consequential costs thereof, as a result of the Franchisee's delay, as determined by the City Council, shall be entered in the Docket of City Liens against any property of Franchisee, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. In the event of vacation under this Section, the City shall cooperate with Franchisee to identify alternative locations within the Rights-of-Way for placement of Franchisee's Facilities.

3.96.140 Maintenance of facilities.

Franchisee shall be solely responsible for performing all required maintenance and improvements to its Telecommunications System and for installing all safeguards reasonably necessary to prevent injury to any person, or to any publicly or privately owned property, and Franchisee shall be solely responsible for all costs thereof. Franchisee shall not construct its Telecommunications System in a manner that requires any of its customers to install cables, ducts, conduits, or other facilities in, under, or over the Rights-of-Way. Franchisee shall be responsible, at its own expense, for repairing any trench settlement or other paving defect resulting from the installation of Facilities in the Rights-of-Way.

3.96.150 Discontinued use of facilities.

Whenever Franchisee intends to permanently discontinue use of part or all its Telecommunications System, Franchisee shall submit a completed application to the City Engineer for approval, describing the Facility or Facilities involved and the date on which the Franchisee intends to discontinue its use. Franchisee may remove the Facility or request that the City permit the Facility to remain in place, which permission shall *be in the sole discretion of the City*. If Franchisee is permitted to abandon its Facilities in place as evidenced by written consent from the City, Franchisee shall submit to the City a deed or other form of documentation acceptable to the City Attorney transferring ownership of such Facilities in the Rights-of-Way to the City.

After the transfer of ownership is complete, the Franchisee shall have no further obligation or the Facilities. Notwithstanding Franchisee's request that any such Facility remain in place, the City Engineer may require the Franchisee to remove the Facility from the Rights-of-Way, or modify the Facility, or a combination of both, in order to protect the public health and safety, or otherwise serve the public interest. Franchisee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until the City consents to Franchisee's abandonment, or Franchisee removes or modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another person or entity having authority to construct and maintain such Facilities, Franchisee shall be responsible for all necessary repairs and relocations of the Facilities, as well as restoration of the Public Rights-Of-Way, in the same manner and degree as if the Facilities were in active use. Franchisee shall also retain all liability for such Facilities.

3.96.160 Hazardous substances.

Franchisee shall comply with all applicable state and federal laws, statutes, regulations, and orders concerning hazardous substances relating to Franchisee's Telecommunications System in the Rights-of-Way. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(16)(2020).

Upon reasonable notice to Franchisee and in the presence of an authorized representative of Franchisee, the City may inspect Franchisee's facilities in the Right-of-Way to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Franchisee's Telecommunications System.

In removing or modifying any of its Facilities as provided in this Agreement, Franchisee shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

City and Franchisee expressly acknowledge that the City shall have no liability whatsoever for any claims, damages or harm caused by or related to the existence or release of Hazardous Substances in or by Franchisee's Telecommunications System, or for Franchisee's failure to adequately address or clean up such Hazardous Substances. Franchisee shall indemnify City for any claims, damages, or harm according to the requirements set forth in AMC 3.96.260 of this Agreement.

3.96.170 Performance, compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City, and are adopted and enforced in a reasonable, uniform, and nondiscriminatory manner. No provision of this franchise shall be construed as a waiver of local, State or Federal law, or as a limit of liability.

Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction, or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City.

The location, construction, extension, installation, maintenance, removal, and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.96.180 Franchise fee; Payment; and Auditing.

As compensation for the benefits and privileges granted pursuant to this Agreement, and in consideration for use of the Rights-of-Way, the Franchisee shall pay to the City, on a quarterly basis, a franchise fee for the duration of this Agreement.

Effective on the date when Franchisee begins construction of facilities in the City, and until the franchise's expiration as provided in AMC 3.96.030 Franchisee shall pay to the City quarterly the greater of: (1) seven percent (7%) of gross revenues collected by Franchisee and derived from Franchisee's provision of all services authorized and delivered pursuant to this agreement within the corporate limits of the City, or (2) a minimum fee of \$750.00 per quarter will be due the City for administration of this agreement and for use of the City's

Right-of-Way. If the seven percent (7%) of gross revenues exceeds the minimum fee each quarter, then the greater amount will be due the City.

This franchise fee shall be sent by check or electronic funds transfer and received by the finance department of the City of Albany before the last business day of the month following the month revenues were received by the Franchisee, e.g., Ordinance approval July 13, Effective Date August 13, Payment period begins September 1 through November 30, Quarterly payment due December 31. If a payment is not received by the date set forth above, the payment shall be deemed delinquent and shall accrue interest at a rate of nine percent (9%) per annum.

Payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this Chapter.

No acceptance of any franchise fee payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim that the City may have for further or additional sums payable.

If the City determines that Franchisee made any underpayment, and that the underpayment exceeded five percent (5%) of the amount due, Franchisee shall pay interest compounded monthly at the current rate nine percent (9%). Interest shall be due on the entire underpayment from the date on which payment was due until the date on which full payment is received. If the Franchisee disputes the City's determination of underpayment, the Franchisee shall place the disputed amount in an interest-bearing escrow account jointly controlled by the parties until final resolution. Interest shall accrue to the prevailing party.

The City, its agents, and representatives shall have the authority to inspect, review and audit all of Franchisee's books, maps, and records, directly concerning any and all amounts due under this Agreement, upon not less than thirty (30) days' prior written notice to Franchisee. Franchisee shall keep all books, maps, and records so as to accurately show the same and shall have such books, maps, and records available during normal business hours within the City's metropolitan region. Any review by the City under this subsection shall be completed within three (3) years from the date payment was due. If the City requests in writing that Franchisee provide, or cause to be provided, copies of any information reasonably within the scope of the review, and Franchisee fails within thirty (30) days of receipt of the request to provide, or cause to be provided, such information, then the three (3) year period shall be extended by one day for each day or part thereof beyond thirty (30) days that Franchisee fails to provide, or fails to cause to be provided, such requested information.

3.96.190 Taxes, fees, and charges.

Nothing in this Chapter shall give the Franchisee any credit against any uniform, nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments or any business tax imposed on Franchisee, or against any charges imposed upon the Franchisee, or against any changes imposed upon the Franchisee's property.

Payment of the franchise fee due under this Agreement shall not exempt the Franchisee from the payment of any other license fee, permit fee, tax or charge on the business, occupation, property, activity, or income of the Franchisee that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, permit fee, inspection fee, tax, or charge.

3.96.200 Sale of subscriber lists prohibited.

Except as otherwise expressly permitted by law, the Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency, or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.96.210 Abandonment; Removal of facilities upon expiration.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease, or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

Upon expiration of this Agreement, Franchisee shall either remove its Facilities in accordance with ORS 221.470(2020) or seek City's written consent to leave its Facilities in place pursuant to AMC 3.96.150 of this Agreement.

3.96.220 Reports and inspection.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable which exists within the Albany city limits and the calculation of the franchise fee paid and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The Franchise Administrator of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee.

3.96.230 Change of law; Amendment of franchise agreement.

This Agreement may be amended from time to time to conform to any changes in the controlling federal or state law, or other changes material to this Agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This Agreement also may be amended by mutual consent of the parties or their successors-in-interest. Any amendments hereto shall be by written instrument executed with the same formalities as this Agreement.

To the extent any lawful City rule, ordinance, or regulation is adopted or amended and is generally imposed on all similarly situated persons or entities, the rule, ordinance, or regulation shall apply without need for amendment of this Agreement. The City shall provide Franchisee with notice of any such change in law prior to its adoption.

3.96.240 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges, and authority to other persons similar to, or different from, those granted by this Chapter, or in constructing, installing, maintaining, or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

3.96.250 Insurance and bonding.

The Franchisee shall, for the purposes of carrying out the provisions of this Section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a certificate of insurance evidence thereto with the Franchise Administrator, good and sufficient policies covering:

1. Workers' Compensation Insurance as required by the State of Oregon including Employers' Liability with limits of \$1,000,000; Franchisee shall ensure that each of its subcontractors complies with these same requirements and shall contain a Waiver of Subrogation against the City; and
2. Commercial General Liability Insurance with limits of \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a per-project basis; and
3. Business Automobile Liability Insurance, for any owned, hired, or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident; and
4. Pollution Liability Insurance with limits of \$5,000,000 each incident and in the aggregate. If policy is on a "claims made" basis it must provide a 24-month tail or reporting period.

The City of Albany, its officers, agents, and employees, shall be named an additional insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

Franchisee shall be financially responsible for all pertinent deductibles, self-insured retention and/or self-insurance. This insurance shall not be canceled or materially altered without thirty (30) days' written notice first being given to the City's Franchise Administrator. If the insurance is canceled or materially altered within the term of this Agreement, Franchisee shall provide a replacement policy with the same terms.

Each policy, Workers' Compensation, Commercial General Liability, Business Automobile Liability, Pollution Liability shall contain a waiver of subrogation against the City.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction bond and a performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement.

3.96.260 Indemnification.

Subject to the limitations set forth in ORS 30.260 through ORS 30.300, the Oregon Tort Claims Act, and the Oregon Constitution each party shall indemnify, defend and hold harmless the other, and the other's officials, agents and employees, against any and all claims, demands, causes of action, suits, proceedings, damages, costs, reasonable attorney's fees or liabilities ("Claims") arising out of, pertaining to, or occurring through the exercise of, the rights and privileges retained by, granted to, or exercised by that party pursuant to this Agreement. Each party shall give to the other notice in writing of any such Claims within twenty (20) days of the date that party receives notice of any such Claims. Neither party shall settle, compromise, or take any action prejudicial to the other's defense of or interest in such Claims without the express written consent of the other party.

Franchisee also shall indemnify the City for any damages, claims, additional costs, or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Franchisee's failure to remove, adjust or relocate any of its Facilities in the Rights-of-Way in a timely manner in accordance with a relocation schedule furnished to Franchisee by the City Engineer, unless Franchisee's failure arises directly from the City's negligence or willful misconduct.

Franchisee agrees to forever indemnify the City against any claims, suits, actions, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of any hazardous substance as defined in ORS 465.200(16)(2020) caused by Franchisee's ownership, operation, or maintenance of a Telecommunications System in the Rights-of-Way.

3.96.270 Assignment, transfer, merger, lease, or mortgage.

This Agreement shall not be assigned nor any of Franchisee's Telecommunications System located in the Rights-of-Way sold, mortgaged, assigned, or otherwise transferred, without the prior written consent of the City, which will not be unreasonably withheld, except to entities that control, are controlled by, or are under common control with, the Franchisee, or in the event that only *de minimis* assets are sold, assigned, or transferred. The Franchisee shall notify the City of any proposed transfers to such entities no less than thirty (30) days in advance of such assignment or transfer. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance.

Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Franchisee's Telecommunications System for the purpose of financing the acquisition of equipment for, or the construction and operation of, Franchisee's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights under this Agreement.

In determining whether the City will consent to any sale, lease, mortgage, assignment, merger or transfer of the Franchisee's Telecommunications System, the City may inquire into the technical, legal, and financial qualifications of the prospective party with respect to its ability to perform under this Agreement, and the City may condition its consent upon satisfactory results of such inquiry. Franchisee shall assist the City with any such inquiry. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer, or merger. In the event such transfer is approved by the Oregon Public Utilities Commission, the City will automatically consent.

No sale, lease, mortgage, assignment, transfer, or merger for which the City's consent is required may occur until the Franchisee's successor, assignee or lessee has complied with the requirements of this Agreement, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by official act.

Within ten (10) days after execution and delivery of any instrument so consented to by the City, Franchisee shall file with the City Clerk an executed counterpart or certified copy thereof.

3.96.280 Rights; Forfeiture; Termination; Remedies.

In addition to any other rights set out elsewhere in this Agreement, the City reserves the right to declare a forfeiture of this Agreement and all of Franchisee's rights arising hereunder, upon the occurrence of one or more of the following:

1. The Franchisee violates any material provision of this Agreement and fails to cure the violation within thirty (30) calendar days of receiving notice of the violation from the City.
2. The Franchisee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City.
3. There is a final determination that Franchisee has failed, refused, neglected or is otherwise unable to obtain or maintain any permit required by any federal or state regulatory body regarding Franchisee's operation of its Telecommunications System within the City.
4. Franchisee fails to complete construction of any approved Facilities for more than eighteen (18) months after approval unless the City and Franchisee agree in writing to an extension for completion of such construction.
5. Franchisee becomes unable or unwilling to pay its debts or is adjudged a bankrupt.

For purposes of this subsection, the following provisions are, without limitation, material to this Agreement, thus allowing the City to exercise any of its rights under this Agreement:

1. The invalidation, failure to pay or any suspension of Franchisee's payments of franchise fees to the City under this Agreement.
2. Any failure by Franchisee to submit timely reports regarding the calculation of its franchise fees to the City.
3. Any failure by Franchisee to provide or maintain the liability insurance required under this Agreement.
4. Any failure by Franchisee to post or maintain any bond(s) required under this Agreement.
5. Any failure by Franchisee to provide copies of requested information as required in AMC 3.96.180 of this Agreement.
6. Any failure by Franchisee to otherwise fully comply with the requirements of this Agreement.

This Agreement may be terminated by mutual written consent of the parties at any time.

Either party may terminate this Agreement at any time for default, including but not limited to those occurrences set forth in this Section by providing not less than thirty (30) days' prior written notice to the other party, provided, however that this Agreement shall automatically terminate if Franchisee does not pay the franchise fee required under AMC 3.96.180 within one hundred and eighty (180) days of its due date and has been given not less than thirty (30) days' written notice to cure the delinquency.

Upon termination of this Agreement, the disposition of the Franchisee's property and Facilities that occupy the Rights-of-Way shall be governed by AMC 3.96.150 of this Agreement.

In addition to any other rights set out elsewhere in this franchise, the City may terminate this franchise if Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other State, Federal or local laws as set forth in this franchise, and the violation continues for 45 days after Franchisee receives notice of the violation from the City. All remedies and penalties under this franchise, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty.

The remedies and penalties contained in this Chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this Chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this Chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition, or obligation itself.

3.96.290 Force majeure.

Neither the City nor the Franchisee shall hold the other responsible for damages or delay in performance caused by acts of God, strikes, lockouts, accidents, or other events beyond the control of the other or the other's employees and agents.

3.96.300 Severability; Renegotiation.

In the event any provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

If any change in federal or state law materially affects any provision of this Agreement, including any change in the laws governing the services which may be assessed franchise fees, the City and the Franchisee may mutually agree to renegotiate the terms of this Agreement. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the party receiving the notification request accepts the offer to renegotiate, the parties shall have ninety (90) days to conduct and complete the renegotiation.

3.96.310 Public records.

Franchisee acknowledges that information submitted to the City is open to public inspection under the Oregon Public Records Law, ORS 192.311 through 192.478. Franchisee is responsible for becoming familiar with and understanding the provisions of the Oregon Public Records Law.

Franchisee may identify information, submitted to the City as confidential pursuant to ORS 192.355(4), such as trade secrets, financial records, customer information or technical information. Franchisee shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information, prior to submitting such information to the City. Franchisee shall also provide a written explanation as to why such information is confidential under state or federal law. The City shall treat any information so marked as confidential until the City receives any request for disclosure of such information. City shall make reasonable efforts to provide the Franchisee notice of a request for information marked as confidential, including a copy of the request, within ten (10) business days of receiving any such request. Franchisee shall have five (5) business days within which to provide a written response to the City before the City will disclose any of the requested confidential information. The City shall retain the sole discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

3.96.320 Choice of law; Venue; Notice.

The laws of the State of Oregon shall govern the validity of this Agreement, its interpretation and performance, and other claims related to it. Venue for litigation shall be in the Circuit Courts in and for Linn County, Oregon.

Any notice provided for under this Agreement shall be sufficient if in writing and (1) delivered personally to the other party, (2) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express), or (4) sent by facsimile transmission.

Any such notice or communication delivered by personal delivery shall be deemed delivered and effective upon actual receipt. Any notice or communication sent by United States mail, postage prepaid, shall be deemed delivered and effective five (5) days after mailing. Any notice or communication sent by overnight courier shall be deemed delivered and effective one (1) business day after dispatch. Any notice or communication sent by facsimile transmission shall be deemed delivered when receipt of the transmission is generated by the transmitting machine. To be effective against either party, such facsimile transmission shall be confirmed by telephone notice to the other party.

3.96.330 Complete agreement.

This Franchise Agreement, including any attachments and laws, rules and regulations incorporated herein or to which this Agreement is subject, constitutes the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement.

3.96.340 Dispute costs; Attorneys' fees.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors' rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceeding is commenced. If any legal action, arbitration, or other proceeding is brought to construe, interpret, or enforce the

terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action, or other proceeding.

3.96.350 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors, and assigns. Franchisee, however, shall not make any assignment without written consent of the City, and any assignment made without the City's consent, shall be null and void. Notwithstanding the previous sentence, Franchisee may assign this franchise without the City's consent, (1) to an entity controlled by, under common control with, or controlling Franchisee; or (2) by mortgage, hypothecation, or other security instrument to secure indebtedness.

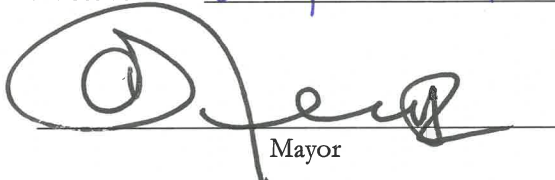
Section 2. Franchise effective only upon acceptance of Franchisee.

This franchise is effective on the date provided herein only upon written acceptance of its terms by an authorized representative of Franchisee.

Passed by the Council: July 13, 2022

Approved by the Mayor: July 13, 2022

Effective Date: August 12, 2022



Mayor

ATTEST:

Allison R. Reise

City Clerk

