

**CITY OF PHOENIX
PHOENIX, OREGON**

RESOLUTION NO. 925

**AN RESOLUTION GRANTING TO HUNTER COMMUNICATIONS INC., A NON-EXCLUSIVE
FRANCHISE AND RIGHT TO CONSTRUCT, OPERATE AND MAINTAIN A FIBER-BASED
SERVICE FACILITY; TO OCCUPY CITY RIGHTS-OF-WAY; AND TO PROVIDE FIBER-BASED
SERVICES IN THE CITY OF PHOENIX, OREGON EFFECTIVE JULY 1, 2015**

THE CITY OF PHOENIX RESOLVES AS FOLLOWS:

Section 1. Definitions - as used in this ordinance:

"City" means City of Phoenix, Oregon.

"Grantee" means Hunter Communications, Inc., the grantee of rights under this franchise, including its successors or assigns.

"Council" means the City Council of the City of Phoenix, Oregon.

"Data Services" means the transmission of information, facts, concepts or instructions in a formalized manner, suitable for communication, interpretation or processing, by any means or protocol of transmission, and the equipment necessary for such transmission. Voice and video services are sometimes included in data services. The definitions here are stated separately so as to be inclusive rather than exclusive of forms of fiber based services. Includes the sending and receiving of data from and to any ultimate customer.

"Facilities" means the conduits, cables, poles, wires, fibers, fixtures, underground lines, manholes and appurtenances thereto, including other technical Facilities necessary for the purpose of providing data, voice and video services.

"Gross revenues" means all revenues earned and received by the Grantee in the delivery of data, voice and video services within the City of Phoenix and is further defined in Section 8.

"Person" means any person, firm, partnership, association, corporation, limited liability company or organization of any kind.

"Rights of way" include streets, land paths, boulevards, avenues, circles, drives, lanes, roads, highway, bridges, alleys, sidewalks, and public utility easements, including the subsurface under and air space over these areas and similar public ways and extensions and additions thereto. This definition applies only to the extent of the City's right, title, interest or authority to grant a franchise to occupy and use such areas for siting telecommunications facilities. "Rights of way" excludes other property owned by the City, such as parks or public buildings.

"Video Services" means the transmission by any means or technology, of visual images, including moving and still images intended for perception by the human eye, either as a one way or two way transmission, and all equipment or facilities necessary for such transmission.

"Voice Services" includes providing processing and transmission of voice communications, including all equipment associated with such transmission. It also includes services related to or commonly sold in connection with the transmission of voice communications, such as, but not limited to, call waiting, call forwarding, voice mail and similar services. "Voice Services" includes all forms of transmission of voice communications, regardless of the medium or method of transmission.

"Ultimate consumer" means any entity that obtains services transmitted over Grantee's Facilities for its own use by any means, including purchase, lease or direct receipt of such services.

Section 2. Grant of Authority. City grants to Grantee the right and privilege, subject to all City of Phoenix ordinances, policies, rules and regulations, to construct, install, maintain and operate over, in, on and under the present and future City rights of way of the City of Phoenix, Facilities necessary for the purpose of providing fiber-based services. This franchise is not exclusive, and City reserves the right to grant a similar privilege to any other Person at any time during the period of this franchise. This grant is further subject to all prior rights, interests, agreements, permits easements or licenses granted by the City, and to the City's right to use the rights of way for any purpose it deems fit, including the same or similar purposes allowed Grantee hereunder. This franchise does not grant any rights with regard to attaching to or using any City or public property located within the rights-of-way (i.e. street lights or conduit). Such additional use of City property may be granted on an individual basis under a separate arrangement.

Section 3. Compliance with Laws, Rules and Regulations. The locations and methods of installation and maintenance of all Grantee's Facilities shall be subject at all times to regulation by the City (including City's ordinances and policies on street cuts and use of right-of-way), and all such Facilities shall be so constructed and maintained as to interfere as little as practicable with street or other traffic. Nothing herein however shall be construed to change or modify any applicable Oregon law regarding Grantee's ability to recover costs for any relocation of its Facilities. All of such Facilities shall be installed and at all times maintained by Grantee in accordance with industry standards. Grantee shall change the location of or remove any pole, conduit, structure or Facility within the public right of way when the City determines that the public convenience requires such changes or removal. The expense of said change shall be paid by Grantee.

Section 4. Grantee Liability, Indemnification of City and Insurance.

1. Grantee 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 City.
2. To the fullest extent permitted by law, Grantee shall defend, save harmless and indemnify City from any loss or claim against City on account of or in connection with any activity of Grantee in the construction, operation or maintenance of its Facilities, provided such loss or claim is not as a result of the City's negligence. Nothing contained in this foregoing indemnity provision or any other indemnity provision in this franchise, shall be construed to require the Grantee to indemnify the City, the City's related parties, architects, architect's consultants and agents and employees of any of them and anyone else acting for or on behalf of the City for damages, losses, liabilities, costs and expenses due to the sole negligence or willful misconduct of the City, the City's related parties, architects, architect's consultants and agents and employees of any of them and anyone else acting for or on the City's behalf. The City acknowledges that under no circumstances will the Grantee be liable under this franchise for special, consequential or punitive damages or damages with respect to economic loss.
3. This franchise shall not be effective until Grantee secures, and shall at all times be conditioned upon Grantee maintaining, a comprehensive liability insurance policy which shall contain the following provisions:
 - a. Grantee shall obtain, at Grantee's expense, and keep in effect at all times during the term of this franchise, public liability and property damage insurance that protects Grantee and the City, as well as the City's officers, agents, and employees, from claims arising from claims referred to in section 4.2. The insurance shall provide coverage at all times of not less than \$2,000,000 for personal injury to each person, \$4,000,000 for each occurrence, and \$1,000,000 for each occurrence involving property damages, plus

cost of defense; or a single limit policy of not less than \$4,000,000 covering all claims per occurrence, plus cost of defense. The insurance policies may provide for self-retention or deductibles in reasonable amounts. The limits of the insurance shall be subject to statutory changes as to the maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise.

- b. Grantee, and its subcontractors, if any, will comply with the Oregon Worker's Compensation Law at all times.
- c. City, its officers, directors, and employees shall be added as additional insured with respect to the Grantee's general liability insurance policy. Grantee will require that its insurance carrier give the City 30 days written notice of any change in insurance coverage.
- d. There shall be no cancellation, material change, exhaustion of aggregate limits, or intent not to renew insurance coverage without 30 days written notice to City. Any failure to comply with this provision will not affect the insurance coverage provided to City. The 30 days notice of cancellation provision shall be physically endorsed on the policy.
- e. Coverage provided by Grantee must be underwritten by an insurance company deemed acceptable by City. City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating or not authorized to transact business in Oregon.
- f. As evidence of the insurance coverage required by this franchise, Grantee shall furnish a Certificate of Insurance to City. This franchise shall not be in effect until the required certificates have been received and approved by City. The Certificate will specify and document all provisions within this franchise. A renewal certificate will be sent to City 10 days prior to coverage expiration.

Section 5. Conditions on Right of Way Occupancy.

1. **Use.** Grantee shall construct, install, maintain and operate its Facilities in designated City rights of way to the industry standard and City's satisfaction, in compliance with all state laws and regulations and City ordinances, rules, policies and regulations; and in a manner so as to cause minimum interference with the proper use of streets, alleys, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, alleys or other public ways or places.
2. **Restoration.** In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Grantee, Grantee shall, at its own cost and expense and in a manner approved by City, replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley disturbed. If Grantee fails to make restoration as required, City may cause the repairs to be made at the expense of Grantee.
3. **Relocation.** Except as provided below, if the removal or relocation of Facilities is caused directly by an identifiable development of property and the removal or relocation of Facilities occurs within the area to be developed, or is made for the convenience of a customer, Grantee may charge the expense of removal or relocation to the developer or customer provided it is not contrary to any laws. Grantee shall be solely responsible for enforcing collection from the developer or customer. City may require Grantee to relocate its Facilities. If the removal or relocation of Facilities results from City's need to provide public Facilities, is a City project, or is otherwise requested by City and is made for the purpose of improving a street to City standards or other improvement for the benefit of the public, Grantee will remove or relocate its Facilities at Grantee's expense within a reasonable time frame after notification by City. In cases of capital improvement projects undertaken by City, Grantee shall convert existing overhead distribution Facilities to underground at Grantee's expense if requested to do so by City. City agrees to comply with provisions of applicable law when requiring such conversion. In the event that any

electric utilities, cable facilities and telecommunication facilities are reimbursed by the City or any agency thereof for the placement of cable underground or the movement of cable, Grantee shall be reimbursed upon the same terms and conditions as any telecommunications, electrical or other utilities.

4. **Placement of Facilities.** Grantee shall not place its Facilities where they will interfere with any existing or future City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer or water facility. Grantee will consult with City's Public Works Department prior to placement of Facilities, and will comply with all City ordinances, policies, rules and regulations in connection with its placement of Facilities. Whenever all existing electric utilities, cable facilities and telecommunications facilities are located underground within a public right of way of the City, Grantee must also locate and relocate its facilities underground.
5. **Temporary Rearrangement of Facilities.** Grantee shall, consistent with City policies, ordinances, rules and regulations, arrange to temporarily raise, lower, or otherwise move its Facilities to permit the moving of buildings or other objects if the Person wishing to move the building or other object makes a reasonable arrangement to reimburse Grantee for its expenses in rearranging its Facilities. Nothing contained in this section shall preclude City from requiring Grantee to move its Facilities at its own expense when public convenience requires the move, as described in Subsections 3 and 4 of this section.

Section 6. Transfer of Franchise. Grantee shall not sell, assign, dispose of, lease or transfer in any manner whatsoever any interest in this franchise or in the Facilities authorized by this franchise, or any part of the Facilities, without prior written approval of City, which consent shall not be unreasonably withheld. The City may impose reasonable conditions on its approval of any transfer, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Franchise. City shall have the right to collect from Grantee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee. The foregoing requirements shall not apply to any sale, assignment or transfer to any Person that is owned or controlled by Grantee, or any Person that owns or controls the Grantee. Grantee shall notify the City thirty (30) days prior to any such sale, assignment or transfer.

Section 7. City Rights in Franchise.

1. **City Supervision and Inspection.** City shall have the right to supervise all construction or installation of Grantee's Facilities subject to the provisions of this franchise and make such inspections as it shall find necessary to insure compliance with governing laws, ordinances, rules and regulations.
2. **Termination or Abandonment of Franchise.** Upon any termination of this franchise, all Facilities installed or used by Grantee shall be removed by Grantee at Grantee's expense and the property upon which the Facilities were used restored by Grantee to the condition it was in before installation except that City or its designee shall have the following options after termination of this franchise:
 - a. City or its designee may elect to acquire the Facilities for their fair market value consistent with any applicable law; and
 - b. Value shall be determined by an appraiser who is mutually acceptable to City and Grantee. In the event that City and grantee are unable to agree on a single appraiser, then the City and Grantee shall each appoint an appraiser, and those two appraisers shall select a third appraiser. The opinion of any two appraisers shall be determinative of the value of the Facilities.
 - c. City agrees to provide Grantee with written notice of its intention to acquire Grantee's Facilities pursuant to this section within 120 days after termination of this franchise by City, or City's declaration of Facilities abandonment by Grantee, with the closing of the acquisition to occur as soon thereafter as is practicable.

3. **City Connection to Facilities.** In addition to City's other rights in this franchise, and so long as Grantee has sufficient capacity on its Facilities that is not being used by a paying customer at that time, City shall have the right to obtain services from Grantee at the Grantee's most favorable rate applicable to those services. Nothing in this subsection shall affect Grantee's obligation to pay franchise fees to the City under Section 8 of this Ordinance.

Section 8. Franchise Fee (Compensation for Use of the Rights of Way).

1. Grantee shall pay monthly to City the sum of five percent of gross revenue earned from all services, specifically including data, voice and video services, provided by Grantee through Grantee's use of the City rights of way. Grantee also may at its option deduct uncollectible accounts of customers within the corporate limits of City from these gross revenues. Gross revenues does not include taxes fee or assessments of general applicability collected by the Grantee from Ultimate consumers for pass-through to a government agency or revenue paid directly by the United States of America or any of its agencies.
2. The fee required by this section shall be due and payable within 60 days after the end of each applicable calendar month. Any payment not made when due shall bear interest at the rate of 12% per annum, compounded monthly, from the date due until paid.
3. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this franchise.
4. Grantee agrees and covenants that it will not challenge the validity of the franchise fees under this ordinance as long as they do not exceed the maximum amounts established by applicable statutes.

Section 9. Grantee Records and Reports.

1. Grantee shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this franchise. Grantee shall produce all books and records directly concerning its gross revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon no less than 10 days prior written notice, during normal working hours. City may require periodic reports from Grantee relating to its operation within City. City shall have the right during the term of this franchise or within 180 days thereafter to conduct audits of Grantee's records. Such audits shall be undertaken by a qualified person or entity selected by City. The cost of any such audit shall be borne by City, unless the results of any such audit reveal an underpayment of more than 5% of the franchise fee for the period audited. In the case of such underpayment, the full cost of such audit shall be paid by Grantee. Grantee shall immediately pay the amount of the underpayment as determined by such audit to City together with 12% per annum interest from the date such payment should have been made to the date the payment is actually made.
2. Any audit information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law, except that this obligation shall not prevent the City from introducing audit results in any forum where enforcement of the provisions of this franchise is at issue.

Section 10. Permit and Inspection Fees. Nothing in this ordinance shall be construed to limit the right of City to require Grantee to pay reasonable costs incurred by City in connection with the issuance of a franchise or permit, making an inspection, or performing any other service for or in connection with Grantee or its Facilities, whether pursuant to this ordinance or any other ordinance or regulation now in effect or hereafter adopted by City.

Section 11. Enforcement and Termination of Franchise for Violation.

1. **Default:** Time of payment and performance are of the essence in the franchise. The following shall be events of default:
 - a. **Default in Payments.** The failure of Grantee to pay City when due any amounts required by the franchise and such failure continues for a period of ten (10) days after the first overdue notice.
 - b. **Default in Other Covenants.** The failure of Grantee to perform any of the covenants and conditions required herein to be kept and performed by Grantee, and such failure continues for a period of 30 days after notice from City of such failure.
2. **Termination.** Upon the occurrence of an event of default, this franchise may be terminated at the option of City by notice in writing to Grantee given within 30 days of the date of default. If this franchise is not terminated by election of City, Grantee shall pay to City the sum of \$100 per day for each day the default continues along with any additional damages suffered by City as a result of Grantee's default.

Section 12. Remedies not Exclusive; Waiver. All remedies under this ordinance, including termination of franchise, are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Remedies contained in this ordinance, including termination of the franchise, are not exclusive and City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to City at law or in equity. Failure to enforce any provision of this ordinance shall not be construed as a waiver of a breach of any other term, condition or obligation of this ordinance.

Section 13. Franchise Term. This franchise is granted for a term of five years beginning on the date on which this franchise ordinance is approved. City agrees to renegotiate in good faith a renewal of this franchise for a similar term if this franchise is not in default at its expiration.

Section 14. Acceptance of Franchise. Within 30 days from the adoption of this ordinance, Grantee shall file with the City Recorder a written unconditional acceptance of this franchise executed by its duly authorized representative and all of its terms and conditions, and if it fails to do so, this ordinance shall be void and of no effect. This Ordinance shall become effective the day after Grantee's acceptance is filed with the City.

Section 15. Severability. If any section, subsection, sentence, clause or portion of this ordinance is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity or constitutionality of the remaining portion thereof. If for any reason, the franchise fee is invalidated or amended by the act of any court or governmental agency, then the highest reasonable franchise fee allowed by such court or other governmental agency shall be the franchise fee charged by this ordinance.

Section 16. Notices. Any notice required or permitted under this franchise shall be deemed given when received or when deposited with postage prepaid in the United States Mail as registered or certified mail addressed as follows:

TO CITY:

City of Phoenix
Attn: City Manager

TO GRANTEE:

Hunter Communications
Attn: Operations Department
801 Enterprise Dr.
Central Point, OR
97502

or to such other address as may be specified from time to time by either parties in writing.

Section 17. Interpretation/Jurisdiction. This franchise shall be deemed to have been entered into in Lane County, Oregon. Jurisdiction of any dispute shall be in the circuit court of the State of Oregon, and venue shall be in Lane County, Oregon. Interpretation of the franchise shall be governed by laws of the State of Oregon.

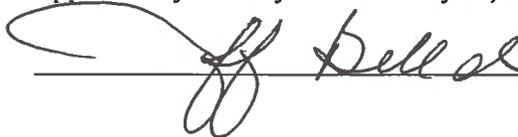
Section 18. Force Majeure. The Grantee shall not be held in default under, or in non-compliance with the provisions of this Ordinance, nor suffer any enforcement or penalty relating to noncompliance or default, where such noncompliance or alleged defaults occurred or were caused by circumstances reasonably beyond the ability of the Grantee to anticipate and control. This provision includes work delays caused by waiting for utility providers to service or monitor their utility poles to which Grantee's Facilities are attached, as well as unavailability of materials and/or qualified labor to perform the necessary work.

Passed by the Council of the City of Phoenix this 1st day of June, 2015, by the following vote:

AYES 6

NAYS 0

Approved by the Mayor this 1st day of June, 2015.



MAYOR

ATTEST:



City Recorder

Accepted:

Hunter Communications, Inc.

Date