

ORDINANCE NO. 1147

AN ORDINANCE GRANTING A NONEXCLUSIVE FRANCHISE TO BEND CABLE COMMUNICATIONS, LLC, DBA BEND BROADBAND TO OPERATE AND MAINTAIN FIBER OPTIC FACILITIES IN THE CITY OF PRINEVILLE.

Section 1. **Short Title.** This ordinance shall be known as the Bend Broadband Fiber Optic Facilities Ordinance

Section 2 **Definitions.** For the purposes of this ordinance, the following terms shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular and words in the singular include the plural. The word "shall" is always mandatory and not merely directory.

- (1) "City" is the City of Prineville, Oregon.
- (2) "Company" is Bend Cable Communications, LLC, dba Bend Broadband, the grantee of rights under this franchise, including its successors or assigns.
- (3) "Council" is the City Council of the City of Prineville.
- (4) "FCC" means Federal Communications Commission.
- (5) "Fiber Optic Facilities" means the fiber optic lines and related facilities installed by Company within the public rights of way within the City.
- (6) "Person" is any person, firm, partnership, association, corporation, company or organization of any kind.
- (7) "System Services" shall mean cable modem services, data transport, and other high speed internet services provided by Company over its Fiber Optic Facilities in the City.

Section 3. **Grant of Authority.** City grants to Company the right and privilege to construct, erect, operate and maintain, in, upon, along, across, above, over and under the streets, alleys, public ways and public places now laid out or dedicated, and all extensions thereof, and addition thereto, in City; Fiber Optic Facilities wires, cables, conduits and other technical facilities necessary for the construction, maintenance and operation in City of a commercial data transport system for the sale and distribution of System Services. This franchise is not exclusive, and City reserves the right to grant a similar use of streets, alleys, public ways and places to any other person at any time during the period of this franchise. This Ordinance does not grant Company any rights to provide circuit switched telephone service or cable service, as defined by federal law, over the Fiber Optic Facilities.

Section 4. **Compliance with Laws, Rules and Regulations.** At all times during the term of this franchise, Company shall comply with all applicable laws, rules and regulations of the United States of America, the State of Oregon and the City of Prineville; including all agencies and subdivisions thereof,

Company shall be subject to the lawful exercise of the police power of City and to such reasonable regulations as City may from time to time hereafter by resolution or ordinance provide.

Section 5. Company Liability, Indemnification of City and Insurance.

(1) Company 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) Company shall pay, save harmless and indemnify City from any loss or claim against City on account of or in connection with any activity of Company in the construction, operation or maintenance of its Fiber Optic Facilities and System Services.

(3) This franchise shall not be effective until Company secures, and shall at all times be conditioned upon Company maintaining, a comprehensive liability insurance policy which shall contain the following provisions:

- (a) Bodily injury policy limits of \$500,000 for each person and \$500,000 for each occurrence.
- (b) Property damage policy limits of \$500,000.
- (c) An endorsement for completed operations coverage.
- (d) A designation of City, its officers, and employees, as additional insurance insured for liability arising from or in connection with this franchise.
- (e) A certificate evidencing insurance as described in this ordinance shall be deposited with City.
- (f) In the event that the City's tort liability limits are raised by the Oregon Legislature to exceed the limits described in this section, Company shall obtain and maintain insurance in the amount of the City's tort liability limits.

Section 6. Company Rules. Company shall have authority to promulgate such reasonable rules, regulations or general terms of service governing the conduct of its business as shall be reasonably necessary to enable Company to exercise its rights and perform its obligations under this franchise. Company rules and regulations shall be subject to the provisions of this ordinance and any other governmental regulations. Upon reasonable request, City may inspect at Company's office a copy of any rules, regulations, or general terms of service.

Section 7. Conditions on Street Occupancy. Company agrees to comply with the following conditions:

(1) Use. All Fiber Optic Facilities erected by Company within rights of way in the City shall be so located 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 of any street or alley, Company agrees to restore said area, to the condition it was prior to the disturbance. If Company fails to make restoration as required, City shall cause the repairs to be made at the expense of Company.

(3) Relocations. City may require Company to change the location of or to remove any pole, conduit, structure or facility within the public right of way in case of public works projects or emergencies require such change or removal and the expense thereof shall be paid by Company. Except in case of emergency, City shall give Company reasonable notice of any changes required, and Company shall have a reasonable time within which to make the requested change. In case of emergency, City shall give Company as much notice as reasonably possible under the circumstances. If the Company refuses to make the change required by the City or does not make the change within a reasonable time after the request of City, the City may make the change and bill Company for the cost of making said change.

(4) Placement of Fiber Optic Facilities. Company shall not place its Fiber Optic Facilities where they will unreasonably interfere with any existing gas, electric or telephone fixture or sewer or water facility. All facilities placed in the street shall be placed in accordance with this Ordinance, applicable City ordinances and permits.

(5) Temporary Rearrangement of Facilities. Company shall, upon receipt of 30 days written notice from anyone desiring to move a building or other object according to City ordinances regulating the moving of buildings, arrange to temporarily raise, lower or otherwise move its fiber Optic 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 Company for its expenses in rearranging its Fiber Optic Facilities. Company may require payment in advance or other security for payment. Nothing contained in this section shall preclude the City from requiring Company to move its facilities at its own expense when public convenience requires the move, as described in subsection 3 of this section.

(6) Tree Trimming. Company may trim trees upon or overhanging streets, alleys, sidewalks and public places of City so as to prevent the branches from coming into contact with Fiber Optic Facilities, all trimming to be done under the supervision of City or its designee and at the expense of Company.

Section 8 **Transfer of Franchise.** Company shall not sell, assign, dispose of or transfer in any manner whatsoever any interest in this franchise or in the Fiber Optic Facilities, nor transfer or permit transfer of controlling interest in Company without prior written approval of Counsel. Such approval shall be based upon the following criteria: Company shall be required to demonstrate to the satisfaction of the Counsel that Company's proposed purchaser, assignee or transferee has such financial and managerial resources as are sufficient to maintain the then current quality of service and to comply fully with the terms of this franchise prior to the Counsel granting such approval. Such approval, based upon the above criteria, shall not be unreasonably withheld by the Counsel, and shall occur within 90 days of Company's application.

Section 9. **City Rights of Franchise.**

(1) City Supervision and Inspection. City shall have the right to supervise all construction or installation of Fiber Optic Facilities to the provisions of this ordinance and to make such inspections as it shall find necessary to ensure compliance with governing laws, rules and regulations.

(2) Termination or Abandonment of Franchise. Upon any termination of this franchise, whether before the expiration of the franchise or upon expiration, or by any abandonment of the franchise by Company, all Fiber Optic Facilities installed or used by Company shall be removed by Company at Company's expense and the property upon which the Fiber Optic Facilities were used restored by Company to the condition it was in before installation.

Section 10. **Consideration.** As compensation for the franchise granted by this ordinance and use of right-of-way, Company shall extend Fiber Optic Facilities to an agreed upon demarcation point at each City building set forth in Exhibit A. City shall pay Company for aid to construction as per Exhibit B. For the term of this Ordinance, upon request by City, Company shall provide one pair of fiber optic cables to the City buildings in Exhibit A for data connectivity with lease maintenance fees of \$110/mo. In addition, Company shall provide City access to the Internet at the most favorable terms offered to commercial or institutional customers in Prineville. All Internet and fiber connectivity shall be for City's direct use only and not for resale or use by others.

Section 11. **System Data.** Company shall maintain, at its central office, all current maps and other operational data relating to Fiber Optic Facilities and System Services in the City of Prineville. City may inspect these maps and data at any time during normal business hours.

Section 12. **Permit and Inspection Fees.** Nothing in this ordinance shall be construed to limit the right of City to require Company to pay reasonable costs incurred by City in connection with the issuance of a permit, making an inspection, or performing any other service for or in connection with Company or its facilities, whether pursuant to this ordinance or any other ordinance or regulation now in effect or hereafter adopted by City.

Section 13. **Enforcement and Termination of Franchise.**

(1) In the event that the City believes that the Company has not complied with the terms of this franchise, City shall notify Company of the nature of the alleged noncompliance.

(2) Company shall have thirty days from the receipt of the notice to:

(a) Respond to the notice of violation contesting the assertion of noncompliance; or

(b) To cure such default, or, in the event that, by the nature of default such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify City of the steps being taken and the projected date that they will be completed.

(3) In the event that Company fails to respond to the notice described in Section 12 (1) pursuant to the procedures set forth in Section 12 (2), or in the event that the alleged default is not remedied

within sixty days after the Company is notified of the alleged default pursuant to Section 12 (1), City shall schedule a public meeting to investigate the default. City shall notify Company of the time and place of such meeting and shall provide Company with an opportunity to be heard at that meeting

(4) In the event that City, after such meeting, determines that Company is in default of any provision of this franchise, City may:

- (a) Commence an action at law for monetary damages or seek equitable relief;
- (b) Seek specific performance of any provision, which reasonably lends itself to such remedy.
- (c) In the case of a substantial default of a material provision of this franchise, declare the franchise agreement to be revoked.

Section 14. Remedies Not Exclusive. All remedies provided by this franchise, including termination of the 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 civil and penal provisions of any ordinance, including this franchise, and also use any remedy available to City at law or in equity. Failure to enforce any provision of this ordinance shall not be constructed as a waiver of a breach of any other term, condition or obligation of this ordinance.

Section 15. Franchise Term. This franchise shall remain in effect for a term of 120 months following acceptance by Company in accordance with Section 15.

Section 16. Acceptance of Franchise. Within thirty days from the effective date of this ordinance, Company shall file with the City a written, unconditional acceptance of this franchise and all of its terms and conditions. If Company fails to do so, City may declare this ordinance void.

Section 17. Constitutionality. If any section, subsection, sentence, clause or portion of this ordinance is, for any reason, held invalid or is 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 constitutionality of the remaining portion hereof.

Approved by the City Council this _____ day of _____, 2007.

Signed by the Mayor this _____ day of _____, 2007.

Mike Wendel, Mayor

ATTEST:

Robb Corbett, City Manager/Recorder

Exhibit A

City Buildings

All pairs connecting back to City Hall (Site #1)

Site #1 (PCH) Prineville City Hall
387 NE 3rd Street

Site #2 (MLGC) Meadow Lakes Golf Course
300 SW Meadow Lakes Drive

Site #3 (MLGC - SHOP) Meadow Lakes Golf Course - Shop 300 SW Meadow Lakes Drive

Site #4 (COPR) City of Prineville Railway
187 NW 10th St.

Site #5 (NRT) Northridge Transmitter Site
203 NW 10th Street

Site #6 (PWS) Prineville Public Works
1233 NW Lamonta Road

Site #7 (SEW) Sewer Treatment Facility
2101 NW O'Neil Highway

Site #8 (FD) Prineville Freight Depot
3875 NW Lamonta Road

Exhibit B

Aid to Construction and Lease Maintenance

Aid to Construction for fiber pair from 7 sites to City Hall (8 sites total) per Exhibit A:

- \$105,779.69 aid to construction, 50% paid with construction order and balance upon completion.
- Construction must begin within 24 months of ordinance approval.
- Lease Maintenance Fees of \$110/mo for 8 sites. The Company is responsible for maintenance of leased fiber pair.
- Leased fiber pairs are dark. Provisioning, engineering and maintenance of all electronics attached to leased fiber pair is the responsibility of the City.
- Company responsibility ends at Demarcation Point at each City facility defined in Exhibit A.