

ORDINANCE NO. 2, SERIES 2009

AN ORDINANCE OF THE CITY OF FLORENCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATION FRANCHISE TO OREGONFAST, INC., AND FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE.

THE CITY OF FLORENCE ORDAINS AS FOLLOWS:

Section 1: Definitions and Explanations

(1) As used in this ordinance.

- (a) "City" means the City of Florence and the areas within its boundaries, including its boundaries as extended in the future.
- (b) "Council" means the legislative body of the City.
- (c) "Data" means the information transmitted via telecommunication.
- (d) "Grantee" means the corporation referred to in Section 2 of this ordinance.
- (e) "Gross Revenue" means the revenue of the Grantee in whatever form accrued from all sources in connection with providing Telecommunication services and the operation of the Telecommunication Facilities using the right of way of the City, including but not limited to: revenues from subscribers and customers; installation fees, equipment fees and other fees related to the provided Telecommunication service; access and attachment charges paid to Grantee by other Telecommunication services and carriers; and, revenue from the sale or lease of wire, cable, facility, pole, duct, conduit or similar transmission equipment. "Gross revenues" do not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, or securities or stocks, any revenues that are exempt from franchise fees under federal or state law or any amounts received from federal, state or local governments.
- (f) "Person" includes an individual, corporation, association, firm, partnership and joint stock company.
- (g) "Public place" includes any city-owned park, place or grounds within the City that is open to the public but does not include a right of way.
- (h) "Right of way" includes a street, alley, avenue, road, boulevard, thoroughfare bridge or public highway within the City, but does not include a public place.
- (i) "Telecommunication" means the transmission of data over and through any media capable to carrying the data and includes fiber and copper media. "Telecommunication Services" does not include the one-way transmission of video or other programming to subscribers.

- (j) "Telecommunication Facility" means all wires, cables, conduits, poles, equipment, appliances and associated structures used by Grantee in conducting its Telecommunication business.
 - (k) "Transmission" means forwarding of a signal that carries data.
- (2) As used in this ordinance, the singular number may include the plural and the plural number may include the singular.

Section 2: Rights Granted

Subject to the conditions and reservations contained in this ordinance, the City hereby grants to OregonFast, Inc., an Oregon corporation, the right, privilege and franchise to:

- (1) Construct, maintain and operate only a Telecommunication Facility within the City.
- (2) Install, maintain and operate on, under and above the rights of way of the City, Telecommunication Facilities for the transmission and distribution of data to the City, its inhabitants and other customers; and
- (3) Transmit and distribute data and sell Telecommunication Services.

Section 3: Scope of Services Provided

If in the future Grantee intends to deliver services other than Telecommunications Services (telephony, video, etc.), Grantee will notify City at least 90 days in advance of delivery of such services, and a separate agreement will be negotiated. Nothing in this agreement shall restrict the City from imposing any franchise fees, license fees or related charges for services not covered by this franchise agreement.

Section 4: Use of Right of Way by Grantee

- (1) Before the Grantee may use or occupy any right of way, the Grantee shall first obtain permission from the City to do so and shall comply with any special conditions the City desires to impose on such use or occupation.
- (2) The compensation paid by the Grantee for this franchise includes all compensation for the use of rights of way located within the City as authorized. However, this subsection shall not be construed to prevent the City from requiring the grantee to pay charges as provided in Section 14 of this ordinance.

Section 5. Duration

This franchise is granted for a period of five (5) years from and after the effective date of this ordinance, unless sooner terminated as provided in this ordinance. At the end of the Franchise term, if the City and Grantee are negotiating another franchise and have not concluded their negotiations, Grantee's rights and responsibilities shall be controlled by this Franchise until the City grants a new franchise and Grantee accepts it.

Section 6. Franchise Not Exclusive

This franchise is not exclusive, and shall not be construed as a limitation on the City in:

- (1) Granting rights, privileges and authority to other persons similar to or different from those granted by this ordinance.
- (2) Constructing, installing, maintaining or operating any City-owned Telecommunications Facility.

Section 7. Public Works and Improvements Not Affected by Franchise

The City reserves the right to:

- (1) Construct, install, maintain and operate any public improvement, work or facility;
- (2) Do any work that the City may find desirable on, over or under any right of way or public place.
- (3) Vacate, alter or close any right of way or public place, provided that the City shall make available to Grantee an alternative right-of-way for the location of its facilities, if an alternative right-of-way is necessary.
- (4) Control or prevent the use of any public place by Grantee and require payment of additional compensation for use of the public place at a reasonable amount.
- (5) Whenever the City shall excavate or perform any work in any of the present and future rights of way and public places of the City, or shall contract, for such excavation or work where such excavation or work may disturb Grantee's Telecommunication Facilities, the City shall, in writing, notify Grantee sufficiently in advance of such contemplated excavation or work to enable Grantee to take such measures as may be deemed necessary to protect such Telecommunication Facilities from damage and possible inconvenience or injury to the public. In any such case, the Grantee, upon request, 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 excavation or other work.
- (6) Whenever the City shall vacate any right of way or public place for the convenience or benefit of any person or governmental agency or instrumentality Grantee's right under this franchise shall be preserved as to any of its facilities then existing in such right of way or public place.

Section 8: Continuous Service

The Grantee shall maintain and operate an adequate system for Telecommunication services in the City. The Grantee shall use due diligence to maintain continuous and uninterrupted 24-hour a day service which shall at all times conform at least to the standards common in the business and to the standards adopted by state authorities and to standards of the City which are not in conflict with those adopted by the state authorities. Under no circumstances shall the Grantee be liable for an interruption or failure of service caused by an act of God, unavoidable accident or other circumstances beyond the control of the Grantee through no fault of its own.

Section 9: Safety Standards and Work Specifications

- (1) The facilities of the Grantee shall at all times be maintained in a safe, substantial and workmanlike manner.
- (2) For the purpose of carrying out the provisions of this section, 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.

Section 10: Control of Construction

The Grantee shall file with the City maps showing the location of any construction, extension or relocation of its Telecommunication Facilities in the rights of way and public places of the City and shall obtain from the City approval of the location and plans prior to commencement of the work. The City may require the Grantee to obtain a permit before commencing the construction, extension or relocation of any of its Telecommunication Facilities.

Section 11: Right of Way Excavations and Restorations

- (1) Subject to the provisions of this ordinance, the Grantee may make necessary excavations for the purpose of constructing, installing, maintaining and operating its facilities. Except in emergencies, and in the performance of routine service connections and ordinary maintenance, prior to making an excavation in the traveled portion of any right of way and, when required by the City, in any untraveled portion of any right of way, the Grantee shall obtain from the City approval of the proposed excavation and of its location. Grantee shall give notice to the City by telephone, electronic data transmittal or other appropriate means prior to the commencement of service or maintenance work and as soon as is practicable after the commencement of work performed under emergency conditions.
- (2) When any excavation is made by the Grantee, the Grantee shall promptly restore the affected portion of the right of way or public place to the same condition in which it was prior to the excavation. The restoration shall be in compliance with specifications, requirements and regulations of the City in effect at the time of such restoration. If the Grantee fails to restore promptly the affected portion of a right of way or public place to the same condition in which it was prior to the excavation, upon 15 days written notice to the Grantee, the City may make the restoration, and Grantee shall be responsible for paying the cost of such restoration, including the City's cost of inspection, supervision and administration.

Section 12: Location and Relocation of Facilities

- (1) All facilities of the Grantee shall be placed so that they do not interfere unreasonably with the use by the City and the public of the rights of way and public places and in accordance with any specifications adopted by the City governing the location of facilities.
- (2) The City may require, in the public interest, the removal or relocation of facilities maintained by the Grantee in the rights of way and public places of the City, and the Grantee shall remove and relocate such facilities within a reasonable time after receiving notice so to do from the City. The City shall provide the Grantee with timely notice of any anticipated requirement to remove or relocate its

facilities. The cost of such removal or relocation of its facilities shall be paid by the Grantee. When a removal or relocation is required for the convenience or benefit of any person, governmental agency or instrumentality other than the City, Grantee may refuse to accomplish such removal or relocation unless such party agrees to pay the reasonable cost thereof.

Section 13. Emergency Repair Service

Grantee shall maintain emergency repair service available on a 24-hour a day basis.

Section 14: Compensation

- (1) As compensation for the franchise granted by this ordinance, the Grantee shall pay to the City an amount equal to five percent (5%) of the Gross Revenue collected by the Grantee from its customers for Telecommunication Services provided within the City.
- (2) Grantee shall make quarterly payments to the City on or before the 15th day of each April, July, October, and January for the immediately preceding quarter. Grantee shall pay a pro rata fee for the last annual payment to the date of termination in addition to any other sums due the City and shall make such payment within 30 days of termination.
- (3) The Grantee shall furnish to the City with each payment of compensation required by this section a sworn statement showing the amount of gross revenue of the Grantee within the City for the period covered by the payment computed on the basis set out in subsection (1) of this section. The compensation for the period covered by the statement shall be computed on the basis of the gross revenue so reported. If the Grantee fails to pay the entire amount of compensation due the City through error or otherwise, the difference due to City shall be paid by the Grantee within fifteen (15) days from discovery of the error or determination of the correct amount. If the City institutes any collection action for recovery of any payment due under this agreement or for the breach of any provision of this agreement, Owner agrees to pay all costs in connection with collection, suit, and appeal, including reasonable attorney fees. Any overpayment to the City through error or otherwise, shall be offset against the next payment due from the Grantee.
- (4) Acceptance by the City of any payment due under this section shall not be deemed to be a waiver by the City of any breach of this franchise occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due, or from collecting any balance due to the City.

Section 15. Permit and Inspection Fees

Nothing in this ordinance shall be construed to limit the right of the City to require the Grantee to pay reasonable charges imposed by the City in connection with issuing a permit, making an inspection or performing any other service, including projects in public places, for or in connection with the Grantee and its facilities, whether pursuant to this ordinance or any other ordinance or resolution now in effect or adopted by the City in the future, as long as these fees apply to all persons alike.

Section 16. Compensation to be Credit Against Certain Taxes

The compensation required by Section 14 of this ordinance to be paid by the Grantee to the City shall be a credit against all license, occupation, business or excise taxes which the City may now or hereafter impose upon the Grantee for the delivery of Telecommunications Services. However, nothing contained in this franchise shall give the Grantee any credit against any ad valorem property tax now or hereafter levied against real or personal property within the City, or against any local improvement assessment or against any charges imposed upon the Grantee as provided in Section 15 of this ordinance or reimbursement or indemnity paid to the City.

Section 17: Books of Account and Reports

The Grantee shall keep accurate books of account at an office in Oregon for the purpose of determining the amounts due to the City under section 14 of this ordinance. The City may inspect the books of account at any time during business hours and may audit the books from time to time. Grantee shall reimburse City for the reasonable costs of such audit if the audit discloses that Grantee has paid 95% or less of the fee owing for the period of the audit. The Council may require periodic reports from the Grantee relating to its operations and revenues within the City.

Section 18: Supplying Maps Upon Request

(1) The Grantee shall maintain on file at an office in Oregon maps and operational data pertaining to its operations in the City. Upon reasonable notice, an authorized representative of the City may inspect the maps and data any time during business hours at an office of the Grantee.

(2) Grantee and the City may determine that the locations of certain telecommunication facilities should be confidential as the public interest may require. If they so determine, Grantee shall thereafter not be obligated to provide records of the location of such facilities to the City. If Grantee provides such records to the City, the City shall treat them as records given in confidence and:

- (a) Retain and disclose them as provided by Oregon Public Records Law and any other applicable law;
- (b) Limit employee access to any such confidential record facilities to those employees of the City required to use information in the record;
- (c) Store such records provided by Grantee under this section pursuant to the City's adopted Records Management Policy;
- (d) Use its best efforts to maintain such confidential records in a locked location and avoid making and distributing copies of such records.

Section 19: Indemnity

The Grantee shall indemnify and save harmless the City and its officers, agents and employees from any and all loss, cost and expense, including court costs and attorney fees, whether at trial or on appeal, arising from damage to property and/or injury to, or death of, persons due to any wrongful or negligent act or omission of the Grantee, its agents or employees in exercising the rights, privileges and franchise hereby granted.

Section 20: Assignment of Franchise

This franchise shall be binding upon and inure to the benefit of the successors, legal

representatives and assigns of the Grantee; but no transfer of this franchise by merger, consolidation, sale, assignment or otherwise shall be made unless the Council first consents by resolution.

Section 21. Reservation of Statutory Authority: Incorporation of Charter Provisions

The City reserves the right to exercise, with regard to this franchise and the Grantee, all authority now or hereafter granted to the City by State statutes. All rights of the City under the City charter are reserved to the City and provisions of the City charter applicable hereto are incorporated by reference and made part of the franchise.

Section 22: Termination of Franchise for Cause

The City may terminate this franchise as provided in this Section, subject to Grantee's right to a court review of the reasonableness of such action, upon the willful failure of the Grantee to perform promptly and completely each and every material term, condition or obligation imposed upon it under or pursuant to this ordinance. The City shall provide the Grantee written notice of any such failure and the Grantee shall have sixty (60) days from receipt of notice to cure such failure, or if such failure cannot reasonably be cured within sixty (60) days, to commence and diligently pursue curing such failure.

Section 23: Remedies Not Exclusive, When Requirement Waived

All remedies and penalties under this ordinance, 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 ordinance, 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 Grantee by or pursuant to this ordinance. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Grantee by or pursuant to this ordinance shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

Section 24: Acceptance

The Grantee shall, within thirty (30) days from the date this ordinance takes effect, file with the City its written unconditional acceptance of this franchise, and if the Grantee fails so to do, this ordinance shall be void.

Section 25. Effective Date

This ordinance will be effective 30 days following the date of its passage by the City Council.

Adopted by the Florence City Council this 26th Day of January, 2009

Ayes: 5 - Councilors Burns, Franzen, Roberts, Xavier Mayor Brubaker
Nays: 0
Abstain: 0
Absent: 0

Approved by the Mayor this 26th Day of January, 2009



Phil Brubaker, Mayor

ATTTEST:



Barbara Miller, City Recorder