

## ORDINANCE No. 172863

Grant a franchise to FTV Communications, LLC for a period of ten years. (Ordinance)

The City of Portland ordains:

### Section 1. NATURE AND TERM OF GRANT.

#### 1.1 Grant of Franchise.

(A) The City of Portland, Oregon does hereby grant to FTV Communications, a Delaware Limited Liability company qualified to do business in Oregon, and to its successors and assigns, as approved by the City under Section 15 of this Franchise, a franchise to construct, operate and maintain a Telecommunications System with all necessary Facilities, in, under, and over the surface of the City's Streets, as shown in black on a map attached hereto as Exhibit A, which is incorporated by reference. Grantee may seek to amend, alter or add to its Telecommunications System by filing a map showing such proposed changes with the City's Office of Cable Communications and Franchise Management and with the City Engineer. The City shall respond with its approval, modifications, or denial within 45 days from receiving Grantee's proposal. However, the total length of Grantee's Telecommunication System in City Streets shall not exceed 18,730 linear feet unless separately authorized by the City Council by ordinance.

(B) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City", and FTV Communications, LLC shall be referred to as the "Grantee".

1.2 Duration of Franchise. The term of this Franchise, and all rights and obligations pertaining thereto, shall be ten years from the effective date of the franchise unless terminated sooner as provided herein.

1.3 Effective Date. The effective date of this Franchise shall be 60 days after passage of the Franchise by the City Council, unless Grantee fails to file an unconditional written acceptance of this Franchise in accordance with Section 20 herein, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

1.4 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant rights, permits or franchises to other Persons or corporations, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee hereunder.

1.5 Charter and General Ordinances To Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing

contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland (1942 compilation, as revised in part by subsequent amendments) as the same now exist or hereafter are amended by the people of the City of Portland, are hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

## Section 2. DEFINITIONS.

2.1 (A) Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

(B) Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations, shall have the meanings given below unless the context indicates otherwise. 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 include the plural number. The word “shall” is always mandatory and not merely directory.

2.2 “City” means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

2.3 “City Council” means the Council of the City of Portland.

2.4 “Duct” means a single enclosed raceway for conductors, optical fiber, wire or other cable.

2.5 “Facility” means any tangible component of the Telecommunications System including but not limited to optical fiber, wire, conduits, ducts, pipes, poles and vaults.

2.6 “Franchise” means this Franchise agreement, as approved by the City Council and accepted by the Grantee pursuant to Section 20 herein.

2.7 “Indefeasible Right of User Interest” (“IRU”) means a form of acquired capital in a telecommunications system, in which the holder of the interest possesses a right to use the telecommunications system, but not the right to control, maintain, construct or revise the telecommunications system.

2.8 “Minimum Annual Franchise Fee” shall mean \$5,000 in the first year of this Franchise, and shall increase by \$1,000 annually, until reaching a minimum of \$14,000 in year ten (10) of this Franchise.

2.9 “Optical Fiber” means a filament of transparent dielectric material, usually glass or plastic, and usually circular in cross section, that guides light, and is used to convey modulated information.

2.10 “Penalties” means any and all monetary penalties provided for in this Franchise.

2.11 “Person” means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

2.12 “Streets” means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public, to the extent the City has the right to allow the Grantee to use them.

2.13 “Telecommunications Services” means:

(A) Long distance, inter-exchange and inter-LATA services, which may include MTS, WATS, 800, operator services, directory assistance and travel card services, as authorized by the Oregon Public Utility Commission, but does not include intra-exchange, intra-LATA, or exchange access services.

(B) This Franchise does not authorize the Grantee to operate as a telecommunications provider. The Grantee represents that it has applied for and received all necessary regulatory authority.

(C) Nothing in this franchise shall preclude the Grantee from entering into a contract for the use of any portion of its Telecommunications System with any Person or other entity for any services, whether specified herein or not, provided that said Person or entity is operating under a current Franchise, license, or permit issued by the City.

2.14 “Telecommunications System” means optical fiber cables of up to 18,730 feet in length, measured linearly, and associated wires, cables, ducts, conduits, vaults, poles and other necessary facilities owned or used by the Grantee for the purpose of providing Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City franchisee, licensee or permittee.

2.15 “Year”, “Annual”, or “Annually” means the time period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

### Section 3. COMPENSATION AND AUDITING.

3.1 Amount of compensation.

(A) As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets of the City, the Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, an amount equal to the greater of the Minimum Annual Franchise Fee or \$2.72 per linear trench foot of Grantee's Telecommunications System in the Streets. The total number of linear trench feet of Grantee's Telecommunications System located in the Streets shall be determined by the as-built maps submitted by the Grantee, and approved by the City Engineer, as provided in Section 6.1(B).

(B) (1) The amount of the franchise fee specified herein shall increase annually by a percentage equal to the change in the Consumer Price Index (CPI) for urban age earners and clerical workers for the Portland, Oregon metropolitan region for the prior year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of labor and as published in such Bureau of Labor Statistics' Detailed Report during the time period immediately prior to the due date of the franchise fee payment.

(2) As an example of the calculation of the CPI adjustment, for 1997 the calculation would have been as follows:

Percentage change in CPI from 1996 to 1997	3.5%
multiplied by the initial linear foot fee	x <u>\$2.63</u>
Annual adjustment	<u>\$.09</u>
Add Annual Adjustment to the Linear foot fee:	\$2.63
	+ <u>\$.09</u>
CPI Revised linear foot fee	\$2.72
CPI Revised linear foot fee	\$2.72
Multiplied by the total linear feet	x <u>18,730 feet</u>
Adjusted linear foot franchise fee	<u>\$50,946</u>

3.2 As additional compensation to the amounts set forth in Subsection 3.1(A):

(1) In the event Grantee sells any portion of its Telecommunications System, Grantee shall pay a one-time Franchise fee to the City of one percent (1%) of the sales price; and,

(2) In the event Grantee leases any portion of its Telecommunications System, Grantee shall pay a Franchise fee to the City of one percent (1%) of the lease revenues annually.

(3) The calculation of the one percent franchise fee on sale and lease revenues shall be based on the sale or lease price of the Portland, Oregon portion of the Telecommunications System or a minimum fee of \$5,000.

3.3 City Use of Telecommunications Services and/or Telecommunications System. If the City requests Telecommunications Services from the Grantee and the Grantee agrees, Grantee may deduct the charges for such services from its franchise fee payments under Section 3.1 (A). Grantee shall charge the City Grantee's most favorable rate offered at the time of the request charged to a similar user within Oregon for a similar volume of service, subject to any of

Grantee's tariffs and regulations on file with the Oregon Public Utility Commission. Other terms and conditions of such services may be specified in a separate agreement between the City and Grantee.

#### 3.4 Franchise Fee Payments.

(A) Grantee's Minimum Annual Franchise Fee payable under Section 3.1 herein shall be paid to the City 45 days after the effective date of this Franchise. Each year thereafter, the franchise fee payment shall be made for the immediately preceding calendar year ending December 31. Each annual payment of the Grantee's Minimum Annual Franchise Fee shall be paid on or before the forty-fifth (45th) day following December 31st. Grantee shall pay any balance remaining to the City under the calculation of the linear foot fee on the first year anniversary of the effective date of the Franchise, and annually thereafter.

(B) Franchise fee payments not received by the City on or before the due date shall be assessed interest based on the average prime interest rate set by the City's bank on December 31st of the previous year, plus 300 basis points (3%). At no time shall the annual interest rate be reduced to less than 12%.

3.5 Reports. Each franchise fee payment based upon total linear feet shall be accompanied by a written report to the City, verified by an officer or other authorized representative of Grantee, containing an accurate statement of the linear feet of Grantee's Telecommunications System in the Streets, and the computation provided for under Section 3.1 hereof, and, if applicable, any revisions to the maps required under Section 6.1(B) hereof. Such reports shall be in a form satisfactory to the City.

3.6 Cost of Pre-franchising and Publication. Grantee has paid the City Five thousand Dollars (\$5,000) for its pre-franchising costs, including publication of this Franchise, as such publication is required by the City Charter.

3.7 Acceptance of Payment and Recomputation. 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 the City may have for further or additional sums payable. All amounts paid under this Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within two (2) years of the date any audited and recomputed payment is due. If no such audit is conducted within the two (2) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. The Grantee agrees to reimburse the City for:

(A) The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the Franchise Fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit; or

(B) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid more than 95% but less than 98% of the Franchise Fees owing for the period at issue.

(C) The City's confirmation costs which may be reimbursed under this subsection shall not exceed Five Thousand Dollars (\$5,000.00) per audit.

3.8 If the Grantee disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account until final resolution.

3.9 All Grantee's books, maps, and records under this Franchise, and its calculation of franchise fee payments to the City, shall be open for inspection by the proper officers or agents of the City upon no less than 48 hours prior written notice during normal business hours to determine the amount of compensation due the City under this Franchise, and shall be kept so as to accurately show the same. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

3.10 Payment of this franchise fee shall not exempt Grantee from the payment of any license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or other taxing authority, except as may otherwise be provided in the ordinance or ordinances imposing such other license fee, tax or charge.

#### Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS

##### 4.1 Insurance.

(A) The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 5. The insurance shall provide coverage at all times of not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to any changes as to maximum statutory limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this

Franchise, Grantee shall provide a replacement policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of this Franchise.

(B) The Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the reasonable approval of the City Attorney.

(C) In the alternative to providing a certificate of insurance to the City certifying liability insurance coverage as required in this Section 4.1, Grantee may provide the City with a statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for the Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon Grantee's election to provide self-insurance coverage under this subsection, any failure by the Grantee to maintain adequate self-insurance shall be cause for immediate termination of this Franchise under Section 16.

#### 4.2 Faithful Performance Bond.

(A) Upon the effective date of this Franchise, the Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of not less than \$100,000, conditioned that the Grantee shall well and truly observe, fulfill, and perform each term and condition of the Franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of the Franchise, including, if necessary, the time required for removal of all of Grantee's Telecommunications System installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without 30 days prior written notice first being given to the City Auditor. The bond shall be reviewed and approved as to form by the City Attorney.

(B) During the term of the Franchise, Grantee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under this subsection if a bona fide, good faith dispute exists between the City and the Grantee.

4.3 Construction bond. During all times when Grantee is performing any construction work in or under the Streets requiring a Street opening permit, Grantee shall post a faithful performance bond running to the City, as is required for Street opening permits, with good and sufficient surety approved by the City, in the sum of \$100,000. The bond shall be conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition under Section 6. Grantee shall pay all premiums or other costs associated with maintaining the bond, and shall keep the same in full force and effect at all times during the construction work. The bond shall provide that it may be terminated upon final approval of Grantee's construction work in or under the Streets by the City Engineer which shall not be unreasonably withheld or

delayed. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Grantee shall file with the City Auditor a copy of the bond, along with written evidence of the required premiums. The bond shall be subject to the reasonable approval of the City Attorney as to its adequacy under the requirements of this Section.

## Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

### 5.1 Indemnification.

(A) Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any direct claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Telecommunications System in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee with prompt notice of any such claim which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

(B) Grantee also hereby agrees to 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 Grantee's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

## Section 6. CONSTRUCTION AND RELOCATION.

6.1 (A) Subject to applicable regulations of the City, Grantee may perform all necessary construction to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System Facilities within Streets incident to Grantee's provision of Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City Streets. Grantee shall pay all applicable fees due for City construction permits.

(B) (1) Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When Grantee's construction in the Streets is completed, Grantee shall provide the City with the total



amount of City Streets, measured linearly, occupied by Grantee's Telecommunications System, with a map showing the location of its installed Telecommunications System in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) Maps. One year after the effective date of this Franchise, and annually thereafter in the event of any alterations, Grantee shall provide a map to the City's Office of Cable Communications and Franchise Management, or its successor, showing the location of Grantee's optical fibers in the Streets on a scale of Three thousand five hundred feet (3,500') per inch or whatever standard scale the City adopts for general use. Grantee shall also provide such maps in an electronic format acceptable to the City and the Grantee.

(C) Grantee may make excavations in City Streets for any Facility needed for the maintenance of the Grantee's Telecommunications System, subject to obtaining permits from the City. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any further franchisees, licensees or permittees of the City, or bureaus of the City or other units of government owning or maintaining facilities which may be affected by the proposed excavation, as provided in Section 6.2.

(D) In the event that emergency repairs are necessary for its Facilities in the streets, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

6.2 Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law (Sections 1 to 5 and 7, Chapter 691, Oregon Laws 1995), and the rules and regulations promulgated thereunder.

6.3 Relocation. The City shall have the right to require Grantee to change the location of its Telecommunications System within the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide the Grantee with the standard notice given under the circumstances to other franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such Facilities by the date established by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all direct, indirect and/or consequential costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its Facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its Facilities within the City's Streets.

6.4 Grantee'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 other Facilities that may have been laid in the Streets by or under the City's authority. The

Telecommunications System constructed or erected by Grantee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

6.5 Upon Grantee's acquisition of any Telecommunications System Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Streets, the Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by franchise or any other form of prior right, and specifying the location of all such Facilities. At the City's sole option, as expressed by ordinance adopted by the City Council, such acquired Facilities shall be subject to the terms of this Franchise, within a reasonable period of time to bring such acquired Facilities into compliance with this Franchise and Grantee shall pay additional franchise fees as determined by the City.

## Section 7. RESTORATION OF STREETS.

7.1 Whenever Grantee disturbs the surface of any Street for any purpose, Grantee shall promptly restore the Street to at least its prior condition, to the satisfaction of the City Engineer. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer.

7.2 If Grantee excavates the surface of any Street, Grantee shall be responsible for restoration of the Street and its surface within the area affected by the excavation. The City may, after providing notice to Grantee, refill and/or repave any opening made by Grantee in the Street, and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Section shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

### 7.3 Tree Trimming.

(A) After obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Telecommunications System. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For purposes of this Section, an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of Grantee's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.

(B) The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, the Grantee or its agents, fails to use proper arboricultural practices.

Section 8. RESERVATION OF CITY STREET RIGHTS. Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to injure or prevent the unrestricted use and operation of the Telecommunications Systems of the Grantee under this Franchise. However, if any of the Grantee's Telecommunications System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, the Grantee's system shall be removed or replaced in the manner the City shall direct: provided, however, the City will cooperate with the Grantee to identify possible alternate locations within the Streets. Any and all such removal or replacement shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

Section 9. CITY USE OF DUCTS.

9.1 Ducts Provided to City in City Streets. If requested by the City after notification by the Grantee, Grantee shall install for the City two two-inch ducts to be reserved for municipal purposes as part of Grantee's construction in City Streets as shown on the map attached to this Franchise as Exhibit A. Upon completing installation and construction of the two two-inch ducts in the City Streets, Grantee shall submit to the City a deed or other form of documentation, in a form acceptable to the City Attorney, indicating City ownership of such ducts. Upon written request from the City, Grantee shall facilitate access to City's ducts at the City's expense.

9.2 City Use of Surplus Ducts.

(A) The City may install or affix and maintain wires and equipment for municipal purposes within any of Grantee's surplus ducts or conduit, as defined in Section 12.1 (E). All work to affix and/or maintain City wires and equipment shall be performed by Grantee and shall be performed at City expense. The City shall not have access to Grantee's surplus conduits or ducts without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for access.

(B) The value of the City's use of Grantee's surplus conduits or ducts may not be charged to the City, or be deducted from its franchise fee or other fees or charges payable to the City. Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of City's use of Grantee's surplus conduits or ducts.

(C) To the extent allowed under Oregon law, the City agrees and covenants to indemnify, defend and hold Grantee, its officers, agents and employees, harmless from any direct claim for injury, damage, loss, liability, cost or expense arising from any injury or damage to person or property by reason of any use or activity associated with the City, its agents or employees use of Grantee's surplus conduit or by reason of any omission of the City to keep its telecommunications equipment in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by Grantee.

9.3 For the purposes of Section 9, the term "municipal purposes" includes but is not limited to the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems. The term "municipal purposes" does not include: (1) the sale or lease of Telecommunications Services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater. City installations under this Section shall meet all local, state and federal clearance and other safety requirements, and be properly grounded and anchored.

9.4 City agrees to waive any claims to Franchise fees under Section 3.2 during the term of this Franchise, in exchange for Grantee constructing and maintaining two two-inch ducts or the ability to accommodate two 144 fiber count cables across the Steel Bridge for the City, which shall be used by the City for municipal purposes. Grantee shall submit to the City a deed or other form of documentation, in a form acceptable to the City Attorney, indicating City ownership of such ducts. Grantee shall cooperate with the City in ensuring connectivity of the City ducts provided herein with other City ducts, systems, and facilities as may be necessary for municipal purposes.

Section 10. STREET VACATION. If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street area, Grantee shall, without expense to the City, forthwith remove its Facilities from such Street, and restore, repair or reconstruct the Street area where such removal has occurred, and place the Street area in such condition as may be required by the Council which shall be no better than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty days' notice by City Council, to repair, improve or maintain such Street portions, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other

liens entered in such docket. The City will cooperate with Grantee to identify alternative locations within the Streets.

Section 11. MAINTENANCE OF FACILITIES. Grantee shall provide and put in use all Facilities necessary to control and carry Grantee's Telecommunications Services so as to prevent injury to the City's property or property belonging to any person, firm, or corporation within the City. Grantee, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Telecommunications System in a manner that requires any customer, except the City, to install cables, ducts, conduits, or other Facilities, in, under or over the City's Streets or other public right of way.

Section 12. COMMON USERS.

12.1 For the purposes of this Section 12:

(A) "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

(B) "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such Facilities in the Grantee's Telecommunications System.

(C) "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

(D) "Licensee" means any Person franchised, licensed or otherwise permitted by the City to use the Streets. For the purpose of this Section 12, the Grantee shall not be construed to be a "Licensee" as defined herein.

(E) "Surplus ducts or conduits" are Conduit Facilities other than those occupied by the Grantee or any prior Licensee, one unoccupied duct held by Grantee as an emergency use spare, and other unoccupied ducts that the Grantee reasonably expects to use within the next 18 months.

12.2 Grantee acknowledges that the Streets are a finite resource, with a limited capacity for containing conduits. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to permit construction of an underground conduit system by any other person which may at the time have authority to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such person the right to use Grantee's surplus ducts or conduits as the City Engineer finds practicable in common with the Grantee, pursuant to the terms and conditions of an agreement for use of surplus conduits and ducts being entered into by the Grantee and the Licensee (the parties). If the parties fail to agree within a reasonable

time, the City Council shall establish by resolution such terms, conditions and regulations as it may determine to be fair and equitable.

12.3A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

12.4The Grantee shall give a Licensee 120 written days notice of its need to occupy licensed conduit and shall propose that the Licensee take the first feasible action listed:

(A) Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the Grantee's space needs;

(B) Pay revised conduit rent based on the cost of new conduit constructed to meet the Grantee's space needs;

(C) Vacate ducts that are no longer surplus; or,

(D) Construct and maintain sufficient new conduit to meet the Grantee's space needs.

Grantee shall provide a written copy of such notice to the City at the same time such notice is provided to the Licensee.

12.5When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the revised cost.

12.6All attachments shall meet local, state, and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between the Grantee and the Licensee. The Grantee may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the Grantee for any fines, fees, damages, or other reasonable costs the Licensee's attachments cause the Grantee to incur.

Section 13. DISCONTINUED USE OF FACILITIES. Whenever Grantee intends to discontinue use of its Telecommunications System within all or part of a particular portion of the Streets and does not intend to use said Facilities again in the future, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the facility and the date on which the Grantee intends to discontinue using the facility. Grantee may remove the facility or request that the City permit it to remain in place. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership of Facilities in the City's Streets shall transfer to the City and Grantee shall have no further obligation therefor. Notwithstanding the Grantee's request that any such Facility remain in place, the City Engineer may require the Grantee to remove the Facility from the Street area or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Grantee to perform a combination of modification and removal of the Facility. Grantee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as Grantee 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 having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance and restoration of the Street area, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.

#### Section 14. HAZARDOUS SUBSTANCES

14.1 Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to Grantee's Telecommunications System in the City Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (1997).

14.2(A) Grantee shall maintain and inspect its Telecommunications System located in the City Streets. Upon reasonable notice to Grantee and in the presence of an authorized representative of Grantee, the City may inspect Grantee's Facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System Facilities.

(B) In removing or modifying Grantee's Facilities as provided in Sections 6.3, 8 and 13 of this Franchise, Grantee shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

14.3 Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of a Telecommunications System in the Streets.

#### Section 15. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

15.1 Neither this Franchise nor any of Grantee's Telecommunications System located in the Streets by authority of this Franchise shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior written consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. 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 Grantee's Telecommunications System, within or outside the City, for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Franchise.

15.2 Grantee shall not lease any of its Facilities, or the public right-of-way in which such are contained, without the City's consent as expressed by ordinance. However, Grantee may grant Indefeasible Right of User Interests, or may lease or otherwise use its Telecommunications System, or any portion thereof, in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System. The holder of any IRU in Grantee's Telecommunications System shall not obtain any greater rights under this Franchise, or otherwise, than that held by the Grantee.

15.3 Notwithstanding Subsection 15.2, Grantee may sell portions of its Telecommunications System in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee complies with the following conditions: (i) the sale is to the holder of a current existing, valid telecommunications franchise with the City; (ii) Within fourteen days of the sale being executed and becoming final, Grantee shall provide notice to the City, describing the portions of the Telecommunications System sold by the Grantee, identifying the purchaser of the facilities, the location of the facilities (in accordance with the requirements of Subsection 6.1(B)(2)), and an executed counterpart or certified copy of the sales documents; and, (iii) Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System. The purchaser of any portion of Grantee's Telecommunications System located in the City Streets shall not obtain any greater rights under this Franchise, or otherwise, than that held by the Grantee.

15.4 Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof. No sale, lease, mortgage, assignment, transfer or merger shall be binding upon the City with regard to the rights granted by this Franchise until the successor, assignee or lessee has complied with the requirements of Section 4 of this Franchise, including but not limited to all requirements for public liability and property damage insurance, faithful performance bonds and construction bonds.



15.5 For the purpose of determining whether the City will consent to any assignment, transfer, merger, lease or mortgage, the City may inquire into the qualifications of the prospective party. The Grantee shall assist the City in any such inquiry. The City may condition any assignment, transfer, merger, lease or mortgage upon such conditions as it deems appropriate.

#### Section 16. FORFEITURE AND REMEDIES.

16.1 Forfeiture. In addition to any other rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture of the Franchise, and all of Grantee's rights arising thereunder, in the event that:

(A) The Grantee violates any material provision of the Franchise;

(1) For purposes of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:

(a) The invalidation, failure to pay or any suspension of Grantee's payments of Franchise Fees to the City for use of the Streets under this Franchise;

(b) Any failure by the Grantee to submit timely reports regarding the calculation of its Franchise Fees to the City;

(c) Any failure by Grantee to maintain the liability insurance required under this Franchise;

(d) Any failure by Grantee to maintain the performance bond required under this Franchise; or,

(e) Any failure by Grantee to otherwise fully comply with the requirements of Section 3 through Section 17 of this Franchise.

(B) The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City;

(C) There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Telecommunications System within the City;

(D) The Grantee's construction schedule is delayed for over 18 months; or,

(E) The Grantee becomes unable or unwilling to pay its debts, or is adjudged a bankrupt.

16.2 Additional Remedies. In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:

(A) Impose a financial penalty of up to \$1,000.00 per Franchise violation; or,  
(B) Suspend the Grantee's Franchise rights, until the Grantee corrects or otherwise remedies the violation.

(C) Revocation. The City Council may revoke this Franchise in the event that any provision becomes invalid or unenforceable and the City Council expressly finds that such provision constituted a consideration material to the grant of the Franchise.

16.3 In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

16.4 Notice and Opportunity to Cure. The City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if the Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if the Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and the Grantee.

Section 17. RENEGOTIATION. In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or the Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and the Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation.

Section 18. EXPIRATION.

(A) Upon the expiration of this Franchise, on application made by the Grantee for franchise renewal or additional authority to exercise the privileges, or any of them, hereby granted, the Grantee shall have the first and preferential right to take and receive such authority upon terms and conditions approved by the City. If the Grantee does not promptly apply for such renewal or additional authority, or if the Grantee rejects the terms and conditions of such authority offered by the City, the City may, after one year from the expiration of the prior franchise, grant a permit

or franchise to any other corporation, association, firm, individual or individuals. In the event of such a grant, such other corporation, association, firm, individual or individuals taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to the Grantee, at or before the time such new or additional authority takes effect, and before the Grantee shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the third party and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be submitted for a declaratory determination by the courts of the State of Oregon. Until such time as the City exercises its rights as set forth in this Section, the Grantee's rights and responsibilities within the City shall continue to be controlled by the terms and conditions of this Franchise.

(B) Upon the expiration of this Franchise, the City shall have the right, at its election, to:

(1) Renew or extend the Franchise to Grantee, in accordance with the Portland City Charter and applicable law;

(2) Invite additional proposals and award the Franchise to another grantee;

(3) Terminate the Franchise without further action; or,

(4) Take such further action as the City deems appropriate.

Until such time as the City exercises its rights under this Section the Grantee's rights and responsibilities within the City shall be controlled by the terms of the Franchise.

## Section 19. MISCELLANEOUS PROVISIONS

### 19.1 Compliance With Laws.

(A) Both Grantee and the City shall comply with all applicable federal and state laws.

(B) Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

19.2 Severability. If any Section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Franchise shall not be affected.

19.3 Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Franchise in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure of the City to enforce prompt

compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

19.4 Force Majeure.

(A) For purposes of this Section 19.4, the term “Force Majeure” shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto.

(B) If the Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee’s obligations under this Franchise, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee’s inability, by reason of Force Majeure, to carry out its responsibility and duties under this Franchise.

19.5 Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

19.6 Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

(A) If to the City: Office of Cable Communications and Franchise Management  
City of Portland, Oregon  
1211 SW 5th Avenue, Room 1160  
Portland, Oregon 97204  
FAX (503) 823-5370

With a copy to: City Attorney’s Office  
City of Portland  
Room 430, City Hall  
1221 SW 4th Avenue  
Portland, Oregon 97204  
FAX (503) 823-3089

(B) If to the Grantee: FTV

Attn: Kevin Kohnstamm  
Assistant Secretary  
FTV Communications, LLC  
210 SW Morrison, Suite 400  
Portland, Oregon 97204  
FAX: (503) 464-2982

With a copy to: Steve McCarrell  
Legal Counsel  
FTV Communications, LLC  
210 SW Morrison, Suite 400  
Portland, Oregon 97204  
FAX: (503) 464-2982

(C) Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

19.7 Confidentiality. Grantee may identify information submitted to the City as confidential. Prior to submitting such information to the City, Grantee shall prominently mark any such information with the mark "Confidential" in letters at least one-half (2) inch in height. The City shall treat any information so marked as confidential and not subject to public disclosure, until the City receives any public records request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City may release any of the requested confidential information. Whether the Grantee submits any written response to the City, the City shall retain final discretion to determine whether to release the requested confidential information, provided that the City shall give the Grantee at least five days written notice after receipt of any response from Grantee, prior to releasing such information.

19.8 Public Records.

(A) Some information submitted by the Grantee to the City may be relevant to the Grantee's obligation to pay franchise fees. Requiring such information to be submitted to the City in order to determine fees payable or paid to the City may qualify such information as being exempt from public disclosure under ORS 192.501(5) (1997) of the Oregon Public Records Law.

(B) Some information submitted by the Grantee to the City may otherwise be used to conduct its business and known to certain individuals within the organization, with actual or

potential commercial value, and giving Grantee a business advantage over its competitors. Such information may constitute trade secrets and be exempt from public disclosure under ORS 192.501(2) (1997) of the Oregon Public Record Law.

(C) Identification of these exemptions under the Oregon Public Records Law, which may apply to information submitted by the Grantee to the City, is not an exhaustive list of those possibly applicable to such information.

19.9 Franchise Amendment. The City has negotiated this Franchise in good faith, in reliance upon the information provided by the Grantee regarding the scope of its authority to offer the Telecommunications Services described in Section 2.11 above. In the event that Grantee actually receives authority to offer telecommunications services outside the scope of this Franchise, or otherwise begins offering telecommunications services outside the scope of those identified in Section 2.11, Grantee shall immediately notify the City. Within 90 days of receiving such notice, the City may either enter into negotiations with the Grantee to revise or amend this Franchise to reflect such changed circumstances, or may proceed with early termination of this Franchise. The parties will negotiate in good faith to revise the franchise to authorize the expanded scope of services.

19.10 Mutual Reservation of Rights. Grantee and the City disagree on the legality of Section 3 of this Franchise. Nothing in this Franchise shall be deemed a waiver by Grantee or the City of the rights of Grantee or the City under applicable law. The City reserves and in no way waives any right to enforce these requirements during the term of this Franchise and Grantee agrees to such reservation and non-waiver by the City. Grantee reserves and in no way waives any right to challenge the enforcement of these requirements and the City agrees to such reservation and non-waiver by Grantee.

Section 20. **WRITTEN ACCEPTANCE**. On or before the thirtieth day after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by the Grantee, meeting the approval of the City Attorney. A failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Section 21. **OTHER AUTHORITY SUPERSEDED**. Upon effectiveness of this Franchise, any and all authority to operate previously granted to Grantee by the City shall be superseded by this Franchise.

Henry/Walters  
October 19, 1998

By Britta Olson  
Deputy