

ORDINANCE NO. 1222-06

AN ORDINANCE GRANTING A NON-EXCLUSIVE  
TELECOMMUNICATIONS FRANCHISE TO ONFIBER  
COMMUNICATIONS, INC.; REPEALING ORD. NO. 1071-01; AND  
DECLARING AN EMERGENCY

WHEREAS, the City of Tualatin previously entered into a franchise agreement with Portland General Distribution, dba Portland General Broadband, approved as Ordinance 1071-01; and

WHEREAS, the City approved the transfer of the agreement to OnFiber Communications, Inc. following the sale of the assets of Portland General Broadband to OnFiber Communications, Inc., as provided in Resolution No. 4258-04; and

WHEREAS, the franchise agreement terminated by its own terms on May 9, 2006; and

WHEREAS, OnFiber Communications, Inc. (Franchisee) wishes to enter into another franchise agreement with the City on the same terms as the original franchise agreement; and

WHEREAS, it is in the best interests of the City to approve the franchise agreement with OnFiber Communications, Inc.

**THE CITY OF TUALATIN ORDAINS AS FOLLOWS:**

Section 1. **Grant of authority.** The City grants the Franchisee a non-exclusive franchise to occupy City rights-of-way and appropriate utility easements for the construction, use, operation and maintenance of a telecommunications system for a period of five years from the effective date of this agreement (the "term") except as set forth below.

Section 2. **Authority not exclusive.** The City reserves the right to grant rights to others to use its rights-of-way during the franchise term. The City may do any work on, over or under any street, alley, utility easement or other right-of-way. The Franchisee shall respect the rights and property of the City and other authorized users of easements and rights-of-way. This agreement does not confer any right, title, or interest in any public right-of-way on Franchisee beyond that expressly conferred in this agreement. Except as otherwise required by law, disputes between Franchisee and parties other than the City over use of the easements and rights-of-way under this agreement shall be submitted to the City for resolution. The City's decision shall be final and binding.

Section 3. **Performance.** During the term of this agreement, the Franchisee agrees to meet all the terms and conditions of Chapter 10-1 of the Tualatin Municipal Code, which is incorporated into this agreement by this reference, except as follows:

- (a) City agrees that it will not remove franchisee's equipment under TMC 10-1.150 until the City and permittee negotiate a solution for relocation or retrofitting so long as permittee does not unreasonably delay entering negotiations.
- (b) City acknowledges that as Franchisee is building its system and securing customers, it may have telecommunications equipment in the right-of-way that is not activated within one year but is not abandoned as contemplated by TMC 10-1.230 and 10-1.380. Therefore, City agrees that at such time as Franchisee intends to discontinue using or to remove any telecommunications network facility or facilities within the City, including actions pursuant to a City termination order, Franchisee shall submit a specific plan for such discontinuance or removal to the City Engineer for the City Engineer's approval. The City Engineer may allow Franchisee to abandon in place any facility, may require the Franchisee to remove or modify the facilities within the public rights-of-way or other public place or property, may cause the facilities to be removed at the Franchisee's expense, or may take any combination of these actions. Franchisee shall complete such removal or modifications in accordance with a schedule set by the City Engineer. Until such time that Franchisee's property is completely removed and all restorations to the public rights-of-way or other public places or property have been completed, Franchisee shall be responsible for all necessary repairs, relocations, and maintenance of the facilities in the same manner and degree as if the facilities were in active use, and Franchisee shall retain all liability for such facilities.
- (c) Franchisee does not require the City's consent to transfer, assign, lease, merge, or consolidate with a third party except that such third party shall not succeed to Franchisee's rights hereunder unless that third party is a valid franchise holder in the City and agrees to abide by the provisions of this franchise agreement.

Section 4. **Change of law; amendment of franchise agreement.** This agreement may be amended from time to time to conform to any changes in the controlling federal or state law or other changes material to this agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This agreement may be amended or terminated by the mutual consent of the parties and their successors in interest.

Section 5. **Franchise fees.** As compensation for the benefits and privileges under its franchise and in consideration of permission to use the right-of-way of the City, the Franchisee shall pay a semi-annual franchise fee to the City during the duration of its franchise as follows:

- (a) The minimum semi-annual franchise fee shall be two thousand five hundred dollars (\$2500).
- (b) The franchise fee shall equal 5% of the Franchisee's gross revenues derived from Franchisee's provision of telecommunications facilities to retail customers and on all other gross revenues derived from Franchisee's provision of telecommunications services and telecommunications facilities to wholesale customers, including other telecommunications carriers.
- (c) The annual franchise fee collectable from a telecommunications utility shall not exceed the maximum amount under Oregon law. The City shall accept from a telecommunications utility, in full payment of the franchise fee, the maximum amount allowed under Oregon law. On request, the telecommunications utility must provide documentation to support its calculation.
- (d) Franchisee "provides" telecommunication services and/or facilities if it sells, leases, resells, or otherwise conveys such services or facilities for consideration.
- (e) Payment shall be made by January 30 and July 30 for the previous six-month period.
- (f) After the date this agreement becomes effective, if Oregon laws or regulations change the maximum franchise fee amount to be collected on telecommunications providers, the City may reopen Section 5 (b) of this agreement only for the purposes of raising the franchise fee in accordance with the revised law.

Section 6. **Reports.** Within thirty days of receipt, Franchisee shall submit copies of all decisions, correspondences, and actions by any federal, state and local courts, regulatory agencies and other government bodies substantially and materially affecting its telecommunications operation within the franchise area to the City. Upon advance written notice, Franchisee shall make available to City such other nonproprietary information or reports pertinent to enforcing the Franchise in the form and at such times as the City may request.

Section 7. **Taxes.** Nothing contained in this Agreement shall be construed to exempt the Franchisee from any license, occupation, or excise tax or assessment that is or may be lawfully imposed on all entities in the same business as the Franchisee.

Section 8. **Insurance.** Franchisee attaches and incorporates the Certificate of insurance consistent with the requirements of TMC 10-1.500.

Section 9. **Severability clause.** If any clause, sentence, or any other portion of this Agreement becomes illegal, null or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law. If any material portion of the Agreement becomes illegal, null or void so that the intent of the Agreement is frustrated, the parties agree to negotiate replacement provisions to fulfill the intent of the Agreement consistent with applicable law.

Section 10. **Remedies.**

- (a) In addition to other remedies specified in this Agreement, City may impose liquidated damages not to exceed \$1000 per day or per incident, not to exceed a total of \$50,000, if Franchisee violates a material provision of this Agreement, subject to subparagraph 10(b).
- (b) If Franchisee fails to comply with a material provision of this Agreement or violates its terms, Franchisee will forfeit all rights and privileges granted by this Agreement. That forfeiture will not occur until after:
  - (A) City notifies Franchisee clearly and in detail of the failure or violation; and
  - (B) Franchisee has ninety days after notice from City to comply with the provisions of this Agreement; or if the provision cannot be satisfied within the ninety-day period, to commence and diligently pursue compliance. If the failure or violation continues beyond the ninety-day period, or if Franchisee fails to commence and diligently pursue compliance as required in this subparagraph, City, at its sole discretion, has the right to determine that the franchise is forfeited. Forfeiture of the franchise shall not relieve Franchisee from complying with the Tualatin Municipal Code on telecommunications.
  - (C) If Franchisee corrects the violation or commences and diligently pursues compliance within the ninety-day period, then no liquidated damages or other remedy shall be imposed.
- (c) Notwithstanding the above, failure, default or violation by Franchisee shall not constitute grounds for the forfeiture of this franchise if due materially, substantially and reasonably to an act of God, fire, flood, storm or element or casualty, theft, war, disaster, strike, lock-out, boycott, prevailing war or war preparation, or bona fide legal proceedings beyond the control of Franchisee.
- (d) All remedies and penalties under this Agreement, including termination of the franchise, are cumulative and not exclusive. The recovery or enforcement by one available remedy or imposition of a penalty is not a bar to recover or enforcement by other remedy or imposition of other penalty. 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 Franchisee under this Agreement. A specific waiver of a particular breach of a term, condition or obligation imposed on Franchisee under this Agreement shall not be a waiver of any other or subsequent breach of the same or other term, condition or obligation.

- (e) City preserves the right to adopt such additional regulations as it finds necessary in the exercise of its police power, provided that such regulations or ordinances are reasonable and not in conflict with the rights granted in this Agreement. At all times during the term of this Agreement, Franchisee shall be subject to all lawful exercise of the police power by the City, and to such reasonable regulations that the City may subsequently provide by resolution or ordinance. With regard to this franchise, City reserves the right to exercise all authority now or hereafter granted to the City by state statute or City charter, except where such authority may be modified or superseded by the Constitutions of the United States or the State of Oregon.
- (f) In the event of a suit, arbitration or other proceeding of any nature whatsoever, including without limitation, a proceeding under the U.S. Bankruptcy Code, is instituted to enforce any provision of this Agreement, the prevailing Party shall be entitled to recover from the losing Party its reasonable attorneys, paralegal, accountants and other expert fees, and all other fees, costs, and expenses actually incurred and reasonably necessary in connection with such proceedings, as determined by the judge or arbitrator at trial or arbitration, or on appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorneys' fees related to or with respect to proceedings in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law.

Section 11. **Assignment.** All rights and privileges granted and duties imposed by this Agreement upon Franchisee shall extend to and be binding upon Franchisee's successors, legal representatives and assigns. Franchisee shall notify City of any sale or transfer of its plant or system, or a majority control of its plant or system, within sixty days after such transfer occurs.

Section 12. **Notice.** Unless otherwise specifically provided, all notices shall be mailed, postage prepaid, to the following address:

If to Franchisee:            OnFiber Communications, Inc.  
                                         Attention: Lauren Painter  
                                         11921 N. Mopac Expressway, Suite 100  
                                         Austin, Texas 78759

If to City: City of Tualatin  
Attention: City Attorney  
18880 SW Martinazzi  
Tualatin, OR 97062

Section 13. **Governing Law.** The laws of the State of Oregon govern this Agreement and its interpretation, performance, and enforcement.

Section 14. **Effective Date.** This ordinance shall be effective retroactive to May 9, 2006. This franchise is effective for five years from the 9<sup>th</sup> day of May, 2006.

Section 15. **Emergency.** This ordinance is necessary for the immediate protection of the public peace, health, safety and welfare and shall take effect immediately upon signing.

INTRODUCED AND ADOPTED THIS 11 DAY OF SEPTEMBER, 2006.

CITY OF TUALATIN

BY \_\_\_\_\_  
Mayor

ATTEST:

BY Richard Townsend  
Interim City Recorder

**ACCEPTANCE OF FRANCHISE**

TO THE CITY COUNCIL OF THE CITY OF TUALATIN, OREGON

WHEREAS, The City of Tualatin, Oregon, on September 11, 2006, passed Ordinance No. 1222-06, entitled:

AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO ONFIBER COMMUNICATIONS, INC.; AND REPEALING ORD. NO. 1071-01

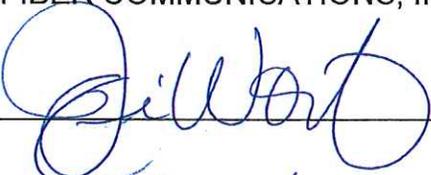
NOW, THEREFORE, the undersigned, ONFIBER COMMUNICATIONS, INC., the Franchisee named in said ordinance, does hereby for itself and its successors and assigns accept the terms, conditions and provisions of Ordinance No. 1222-06 and agrees to be bound thereby and comply therewith.

IN WITNESS WHEREOF, ONFIBER COMMUNICATIONS, INC., by and through its duly authorized officers executes this instrument as below subscribed this 11 day of September, 2006.

ONFIBER COMMUNICATIONS, INC.

By: \_\_\_\_\_

Title: \_\_\_\_\_

  
SVP-Operations - Construction