

Ordinance No. 186236

*Grant a temporary, revocable permit to Oregon Health and Sciences University to use City streets for telecommunications services and establish terms and conditions. (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. City of Portland, Oregon, (the City), and Oregon Health and Sciences University (OHSU) have reached final agreement on the terms and conditions of a ten-year franchise for OHSU to use the City streets to provide telecommunications services.
2. The City Council will soon undertake the process of considering the proposed OHSU franchise, following the Portland City Charter formal procedures of public notice and hearings. This process will begin with the publication of a notice of proposed franchise, together with the publication of the entire proposed agreement in the City's official newspaper. The process mandated by the Portland City Charter for adopting a proposed franchise may take over four months from the date of initial publication of the franchise.
3. OHSU has asked the City in writing if the City would issue a temporary, revocable permit allowing OHSU to immediately begin to construction of facilities in the City's streets to provide telecommunications services. A copy of OHSU's written request is attached to this Ordinance as Exhibit A. OHSU's letter acknowledges that the parties have otherwise reached final agreement on proposed franchise terms and conditions, and identifies an immediate need to begin construction of its facilities in the streets. OHSU's letter further acknowledges that its rights under the temporary, revocable permit will terminate upon the permit's expiration, if not otherwise superseded by the proposed franchise.
4. The temporary, revocable permit to be issued under this Ordinance is substantively parallel to the terms and conditions set forth in the proposed franchise agreement to be entered into between the City and OHSU.

NOW, THEREFORE, the Council directs:

a. NATURE AND TERM OF GRANT.

1. Issuance of Temporary, Revocable Permit.

A. Oregon Health and Science University (OHSU) is a public corporation and is Oregon's only academic health center, providing teaching, research and healthcare services to the communities it serves, which includes the City of Portland, Oregon. To facilitate OHSU

offering these services, OHSU is seeking a Permit to construct, operate, repair and maintain a Telecommunications System in a designated area in the City of Portland set forth on Exhibit B.

B. The City of Portland, Oregon does hereby grant to OHSU, a public corporation created by the State of Oregon in 1995 under ORS 353, and to its successors and assigns as approved by the City under Section p, a temporary, revocable permit to construct, operate, repair and maintain a Telecommunications System, with all necessary Facilities, located within the Streets, as shown in the map attached hereto as Exhibit B, which is incorporated by reference.

C. At any point during the term of this Permit, OHSU may seek to amend, alter or add to its Telecommunications System by filing a map showing such proposed changes with the City's Office for Community Technology 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 Facilities in the Streets shall not exceed 6,500 linear feet unless separately authorized by the City Council by ordinance.

D. Throughout this Permit, the City of Portland, Oregon, shall be referred to as the "City" and OHSU shall be referred to as the "Grantee."

E. Grantee may construct, operate, repair and maintain Grantee's Telecommunications System within the Streets in the manner and under the conditions set forth in this Permit.

F. This Permit does not authorize Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C. §522.

2. Duration of Permit. The term of this Permit, and all the rights and obligations pertaining thereto, shall be for either (A) a period of only one year, as measured from its effective date; or (B) until the City grants a franchise to Grantee and the franchise becomes effective, whichever event occurs sooner.

3. Effective Date. The effective date of this Permit immediately upon passage of the Permit by the City Council, unless Grantee fails to file an unconditional written acceptance of this Permit in accordance with Section t.10, in which event this Permit shall be null and void. The passage date of this Permit is set forth on the last page of the original hereof, as stamped by the Council Clerk.

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

5. Charter and General Ordinances to Apply. To the extent authorized by law, this Permit 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, are hereby incorporated by reference and made a part of this Permit. Nothing in this Permit 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.

b. DEFINITIONS.

1. Captions. Throughout this Permit, captions are intended solely to facilitate reading and reference provisions of this Permit. The captions shall not affect the meaning and interpretation of this Permit.

2. Definitions. For the purpose of this Permit, 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.

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

(B) "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.

(C) "City Council" means the Council of the City of Portland.

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

(E) "Duct" means any single enclosed raceway for power or communication lines, conductors, optical fiber, wire or other Facilities for use in connection with Grantee's Telecommunications System.

(F) "Facility" means any tangible component of Grantee's Telecommunications System.

(G) "Permit" means this ordinance granting a temporary, revocable permit, as approved by the City Council and accepted by Grantee pursuant to Section t.10.

(H) "Hazardous Substances" has the meaning given by ORS 465.200(16) (2011).

(I) "Licensee" means any Person franchised, licensed or otherwise permitted by the City to use the Streets including, if appropriate, the City itself. For the purposes of Section 1.2, Grantee shall not be construed to be a "Licensee" as defined herein.

(J) "Minimum Annual Permit Fee" shall mean \$10,000.

(K) "Person" means any natural person, and any individual, sole proprietorship, partnership, association, corporation, cooperative, municipal corporation or other form of organization authorized to do business in the State of Oregon.

(L) "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 Grantee to use them.

(M) "Surplus Ducts or Conduits" are Ducts or Conduit other than those: (i) occupied by Grantee or any prior Licensee, (ii) unoccupied Ducts or Conduit held by Grantee as an emergency use spare, and (iii) unoccupied Ducts or Conduit that Grantee reasonably expects to use within the next eighteen (18) months.

(N) "Telecommunications Services" or "Services" means

(1) Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

(2) Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video, or data transmission;

(3) Services connecting interexchange carriers and/or competitive carriers to any entity other than another interexchange carrier, competitive carrier, or telephone company providing local exchange services, for the purpose of voice, video or data transmission.

(4) Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission; and

(5) The design, engineering, construction, and maintenance of fiber optic cable links that are not otherwise connected to the Grantee's Telecommunications System.

(6) This Permit does not authorize Grantee to operate as a telecommunications provider. Grantee represents that it has contacted the Oregon Public Utility Commission (OPUC) and determined a license from the OPUC is not necessary; and

(7) Nothing in this Permit shall preclude Grantee from entering into a contract for the use of any portion of its Telecommunications System with any Person for any services, whether specified herein or not, provided that said Person is another Licensee and has assumed responsibility for obtaining any required authority from the City.

(O) "Telecommunications System" or "System" means optical fiber, cables, wires, Conduits and Ducts, and any other necessary Facilities owned or used by Grantee for the purpose of providing Telecommunications Services and located in and under the Streets excluding Ducts, Conduits and vaults leased from another City franchisee, Licensee or permittee.

(P) "Year," "Annual," or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Permit.

c. COMPENSATION.

1. Amount of Compensation. As compensation for the benefits and privileges under this Permit, and in consideration of permission to use the Streets, Grantee shall pay to the City an annual Permit fee throughout the duration of this Permit. This Permit fee shall be the greater of either: (a) the Minimum Annual Permit Fee; or (b) \$3.63 (for calendar year 2012) per linear trench foot of Grantee's System in the Streets. The total number of linear trench feet of Grantee's System located in the Streets shall be determined by as-built maps submitted by Grantee, as provided in Section f.1(B).

2. Payment of Compensation.

(A) Grantee's first Minimum Annual Permit Fee payable under Section c.1 shall be paid to the City on or before the forty-fifth day following the effective date of this Permit. Such payment will be prorated for the remaining calendar year beginning from the Permit effective date (rounded to the nearest month) as calculated in Section a.3. Thereafter, Grantee shall pay each Minimum Annual Permit Fee by April 15 for that current calendar year (January 1 – December 31).

(B) If the linear foot based Permit fee for the calendar year exceeds the Minimum Annual Permit Fee, then Grantee shall pay the amount in excess to the City on or before May 15 of the following year.

(C) Payment not received by the City by the due date shall be assessed interest equal to one percent (1%) per month. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

(D) Grantee shall set up electronic fund transfer within sixty (60) days of the Permit effective date to submit payments to the City by Automated Clearing House (ACH) payment receipts. The City may approve any written requests from Grantee for waivers from the ACH requirement.

3. Reports. Accompanying each payment to the City under Section c.1 or Section c.2, Grantee shall file with the City a written report setting forth the total length of the trenches through the Streets occupied by Grantee's System and Facilities, measured in linear feet along the major axis, the amount per linear foot, together with its calculation of Permit fee payment, any adjustments for inflation, and the total amount due. Such reports shall be in form satisfactory to the City.

4. Acceptance of Payment and Recomputation. No acceptance of any payment pursuant to this Section c 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 c shall be subject to audit by the City, provided that only payments which occurred during a period of sixty (60) months prior to the date the City notifies Grantee of its intent to perform an audit shall be subject to such audit. Grantee agrees to pay the City for:

(A) Interest on any underpayment of an amount due under Section c that is disclosed as the result of an audit, such interest to be calculated at the interest rate specified in Section c.2(C).

(B) A penalty of five percent (5%) of the underpayment shall be assessed and due within thirty (30) days of written notice from the City, if the City's audit discloses that Grantee has paid ninety-five percent (95%) or less of the principal amount owing for the period under audit. If such payment is not received within thirty (30) days of written notice from the City, then interest shall be compounded daily from the date on which the payment was due until the date on which the City receives the payment, such interest to be calculated at the interest rate specified in Section c.2(C).

5. Escrow. If Grantee disputes the City's determination of underpayment under Section c, Grantee shall place the disputed amount in an escrow account at a financial institution acceptable to the City with instructions agreed to by the City until final resolution.

6. Authority to Audit. The City and its agents and representatives shall have authority to arrange for and conduct audits or reviews of the relevant financial obligations payable under Section c.5. The City may determine the scope of audit or review in each instance. All amounts paid by Grantee shall be subject to audit or review by the City, provided that such audit or review be completed within five (5) years from the date payment was due. City requests for audits or reviews shall be in writing. If Grantee has not provided copies of all information reasonably within the scope of the audit or review to the City within 30 days from the date of the written request, Grantee shall provide access within the Portland metropolitan region, upon no less than 48 hours prior written notice, and during normal business hours. If the City requests in writing that Grantee provide, or cause to be provided, copies of any information reasonably within the scope of the audit or review, and Grantee fails within 30 days of receipt of the request to provide, or cause to be provided, such information, then the five (5) year period shall be extended by one day for each day or part thereof beyond 30 days that Grantee fails to provide, or fails to cause to be provided, such requested information.

7. No Credit Against Other City Charges. Payment of the compensation owed pursuant to Section c 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.

d. GENERAL FINANCIAL AND INSURANCE PROVISIONS.

1. Insurance.

(A) At all times during which Grantee's Facilities are in the Streets as described in Section a of this Agreement, Grantee shall comply with the requirements for insurance and other applicable forms of financial guaranty for right-of-way permits, as established by applicable Portland City Code and administrative regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement. Until the time when such administrative regulations are effective, Grantee shall maintain insurance with the requirements as set forth in Exhibit C.

(B) Grantee shall maintain on file with the City a certificate of insurance certifying the coverage required above. The certificate of insurance shall be subject to the review and approval as to form by the City Attorney's Office. Failure to maintain liability insurance shall be cause for revocation of this Permit by the City.

(C) Grantee's insurance shall not be canceled or materially altered without thirty (30) days' prior written notice first being giving to the City. For purposes of this Agreement, "materially altered" means that such insurance no longer complies with the requirements for insurance pursuant to Section d.1.

2. Faithful Performance Bond.

(A) Upon the effective date of this Permit, 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 Grantee shall well and truly observe, fulfill, and perform each term and condition of the Permit. 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 Permit, including, if necessary, the time required for removal of all of Grantee's Telecommunications System installed in the Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice first being given to the City. The bond is subject to review and approval by the City Attorney as to whether the certificate and insurance certified is consistent with the requirements of this Section d.2.

(B) During the term of the Permit, Grantee shall file with the City 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 Section d.2 if a bona fide, good faith dispute exists between the City and Grantee.

3. Construction Bond. At all times during which Grantee is constructing, repairing, replacing or maintaining its Facilities in the Streets, Grantee shall comply with the requirements for right-of-way permits established by applicable Portland City Code and administrative regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement, for providing construction bonds or other forms of financial guaranty satisfactory to the City.

e. COVENANT TO INDEMNIFY AND HOLD CITY HARMLESS.

1. Indemnification – General. To the extent permitted under Article XI, Section 7 of the Oregon Constitution, and subject to the applicable limitations of the Oregon Tort Claims Act, Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any 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 Permit, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Telecommunications System with all necessary Facilities 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.

2: Indemnification – Relocation. To the extent permitted under Article XI, Section 7 of the Oregon Constitution, and subject to the applicable limitations of the Oregon Tort Claims Act, Grantee also hereby agrees to indemnify the City, its officers, agents and employees, 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 Telecommunications System with all related Facilities in the Streets in a timely manner in accordance with Section f.3, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

3. Indemnification – Hazardous Substances. Grantee agrees to forever indemnify the City, its officers, agents and employees, from and against any claims, costs and expenses of any kind, whether direct or indirect, or pursuant to any state or federal law statute, regulation or order, for the removal or remediation of any leaks, spills, contamination or residues of Hazardous Substances, associated with, arising from or due to Grantee's Facilities in the Streets.

f. CONSTRUCTION AND RELOCATION.

1. Permits.

(A) Subject to applicable regulations of the City, Grantee may perform all construction necessary for the operation and maintenance of its Telecommunications System. All construction and maintenance of any and all Telecommunications System Facilities within the Streets 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 the Streets. Grantee shall pay all applicable fees due for City construction permits.

(B) Maps.

(1) Prior to beginning any new construction in the Streets, Grantee shall provide the City Engineer through the permitting process with an initial construction schedule for work in the Streets and the estimated total cost of such work together with its permit application. When Grantee's construction in the Streets is completed, Grantee shall provide the City with electronic maps showing the location of its installed Telecommunications System Facilities in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) One (1) year after the effective date of this Permit, and annually thereafter in the event of any alterations, Grantee shall provide an electronic map to the City Engineer and the City's Office for Community Technology, or its successor, showing the location of Grantee's Facilities in the Streets on a scale of three thousand five hundred feet (3,500') per inch or whatever scale the City and Grantee agree upon.

2. Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law, ORS Chapter 757 (2011) and the related rules and administrative regulations promulgated thereunder in OAR Chapter 952.

3. Relocation. Grantee shall relocate its Telecommunications System within the Streets when the public convenience requires such change, in compliance with the requirements of Portland City Code and administrative regulations, and the expense thereof shall be paid by Grantee.

4. Additional Facilities Subject to Permit. Within thirty (30) days of 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, Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by franchise, license, permit or any other similar form of right granted by the City, 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 Permit, with a reasonable period of time provided to Grantee to bring such acquired Facilities into compliance with this Permit, including payment of appropriate permit fees as determined by the City in accordance with Section c.

g. RESTORATION OF STREETS.

Grantee shall, after construction, maintenance or repair of Facilities, leave the Streets in as good or better condition in all respects as it was before the commencement of such construction, maintenance or repairs, excepting normal wear and tear in strict compliance with the requirements for right-of-way permits established by applicable Portland City Code and administrative regulations, and the expense thereof shall be paid by Grantee.

h. RESERVATION OF CITY STREET RIGHTS.

Nothing in this Permit shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street; 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 Grantee's Telecommunications System under this Permit. However, if any portion of 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 City may direct Grantee to relocate as provided in applicable regulations of the City.

i. USE OF GRANTEE'S FACILITIES BY CITY.

1. New Construction.

(A) Grantee shall provide twenty (20) business days prior written notice to the City of any planned Conduit or Duct construction. Such notice shall include a description of any planned Conduit or Duct construction and a map showing the planned route in a form acceptable to the City Engineer. If the City desires Ducts or Conduits along Grantee's planned route, then within ten (10) business days of receiving the written notice, the City shall provide a written request to Grantee and Grantee shall provide such Conduits or Ducts to the City pursuant to the process set forth in this Section i.1.

(B) For new Grantee Conduit or Duct installation, Grantee will provide additional Conduit(s) or Duct(s) as needed by the City:

(1) Grantee will confer with City prior to finalizing plans and specs for any proposed new build, to establish City requirements for Conduit, Duct and access vaults;

(2) If the City determines a need for Conduit, Duct and access vaults, City will pay Grantee the direct incremental costs for this work, consisting of material, labor, and design and engineering costs associated with modifications to the plans and specifications for the segments defined and necessary facilities;

(3) Grantee will provide suitable documentation of ownership and include location in map submitted per Section f.1(B). City will then maintain ownership of and maintenance responsibilities for the additional Conduits, Ducts, or access vaults.

(C) Grantee will provide separate access vaults for the City, at City's cost, at locations to be determined by the City during the process noted in Section i.1(A)(1) above.

2. City Use of Surplus Ducts or Conduits. As needed and specified by the City, City will be allowed to access and use Grantee's Surplus Ducts or Conduits without use fees, subject to the same process and other terms applicable to Licensees under Section l and subject to a separate written agreement between the City and Grantee specifying the terms of such access and usage by the City.

j. STREET VACATION.

Upon receipt of any request for vacation of any Street or portion thereof used by Grantee, the City shall provide Grantee with the standard notice provided for street vacations. If any Street or

portion thereof used by Grantee is vacated by the City during the term of this Permit, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street area or Grantee secures such right from the third party that will have title to the area in which Grantee has its Facilities, Grantee shall, without expense to the City, remove its Facilities from such Street, 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 worse than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty (30) 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 shall make reasonable efforts to assist Grantee in identifying potential available alternative locations within the Streets, or, if requested by Grantee, will cooperate with Grantee's efforts to secure an alternate location in the vacated Street area from the third party that shall have ownership after vacation.

k. FACILITY MAINTENANCE.

Grantee shall provide and put in use all Facilities and equipment necessary for the operation of its Telecommunications System in a manner that will not cause injury to the City's property or to any property within the City belonging to any Person. Notwithstanding the foregoing, it shall not be a breach of Section k if such injury is not reasonably foreseeable by Grantee. Grantee, at no expense to the City, shall repair, renew, change and improve said Facilities and equipment from time to time as may be necessary to meet the requirement of Section k. Grantee shall not install any Facilities in the Streets to provide services to any third-parties. The System constructed, owned or controlled by Grantee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

l. COMMON USERS.

1. Use of Surplus Facilities by Third-parties. Grantee acknowledges that the Streets have a finite capacity for containing conduits, ducts and other facilities. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to permit construction of an underground conduit or duct system by any other Person which may at the time have authority from the City to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such Person the right as a Licensee to use Grantee's Surplus Ducts or Conduits in common with Grantee, unless safety or engineering concerns cannot reasonably be mitigated or eliminated. This right of use shall be subject to Section 1.2, to the terms and conditions of an agreement for use of Surplus Ducts or Conduits entered into by Grantee and the Licensee, and to the safety and reliability of Grantee's Telecommunications System and maintenance requirements. Any agreement governing the terms and conditions of use of Surplus Ducts or Conduits may, at Grantee's discretion, require use of Grantee's employees or contractors in any work occurring in Grantee's vaults. If Grantee and the Licensee are unable to mutually agree upon the terms and conditions of the use of Surplus Ducts or Conduits, the parties shall submit the matter to final and binding arbitration to establish such terms and conditions as

the arbitrator may determine to be fair and equitable. Such arbitration shall be conducted according to the procedures set forth under the Uniform Arbitration Act, ORS 36.600 through 36.740 (2011). The cost of the arbitration, including the costs of witnesses and compensation of the arbitrators, shall be taxed against the losing party. However, each party shall separately bear its own cost of attorney's fees.

2. Coordination of Licensee Usage.

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

(B) Grantee shall give Licensee and the City one hundred twenty (120) calendar days written notice of its needs to occupy any licensed Conduit or Duct and within such notice period Licensee shall take one of the following actions as directed by Grantee:

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

(2) Pay revised conduit or duct rent designed to recover the cost of new Conduit or Duct constructed to meet Grantee's space needs;

(3) Construct and maintain sufficient new Conduit or Duct to meet Grantee's space needs; or

(4) Vacate the Conduit or Duct.

(C) When two or more Licensees occupy a section of Conduit or Duct, the last Licensee to occupy the Conduit or Duct shall be the first to vacate or construct new conduit or duct as directed by Grantee; pursuant to Section 1.2(B)(4), Grantee may require all Licensees to vacate. When conduit or duct rent is revised because of retrofitting or space-saving technology or construction of new conduit or duct, all Licensees shall bear the revised cost.

(D) All 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 Grantee and the Licensee. Grantee may, at its option, correct any Attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay Grantee for any fines, fees, damages, or other reasonable costs the Licensee's Attachments cause Grantee to incur.

m. DISCONTINUED USE OF FACILITIES.

If Grantee intends to discontinue using any Facilities in the Streets, Grantee shall comply with the requirements of applicable Portland City Code and administrative regulations regarding the discontinuation of the use of Facilities.

n. HAZARDOUS SUBSTANCES.

As required by the City Code, Grantee shall comply with all applicable local, state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to its System and Facilities in the Streets. Grantee shall place utility corridor fill and use containment barriers in compliance with the requirements for right-of-way permits established by applicable Portland City Code and administrative regulations.

o. TREE TRIMMING.

1. When Permits Needed. Upon obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper utility arboricultural practices and in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Facilities. Except in emergencies or by special written permission of the City Forester, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week (seven (7) calendar days) 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. The owner or occupant shall have one week from receipt of notice to have such trees pruned by a qualified line clearance arborist at his or her own expense in accordance with Grantee's standards for reliable utility service, provided that the owner or occupant agrees to use tree pruning personnel that are qualified to work in close proximity to power lines. If the owner or occupant fails to do so in compliance with the notice, Grantee may prune such tree at its expense.

2. Blanket Permits. The City Forester may, at the City Forester's discretion, waive the notification and single tree permit process and issue a blanket tree pruning permit if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper utility arboricultural practices to the pruning of trees. Before any blanket permit may be issued, any contractor of Grantee shall be subject to the approval of the City Forester. The City Forester shall have discretion to cancel the blanket permit, notification and single tree permit process if, at any time, Grantee or its agents fail to either use proper utility arboricultural practices or to properly notify the public as specified in Section o.1.

3. Emergencies. Notwithstanding the permit and notice requirements of Section o, in the event of an emergency, Grantee may prune a tree or trees as necessary to abate the emergency. For purposes of Section o, emergencies exist when it is necessary to prune a tree or trees in order to restore services, or to protect the public from imminent danger, or to prevent the imminent destruction of property.

p. CITY'S CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

1. Council Consent. Neither this Permit, nor all or substantially all of Grantee's Telecommunications System located in the Streets by authority of this Permit, shall be sold, leased, mortgaged, assigned, merged or otherwise transferred without the prior written consent of the City as expressed by ordinance, which consent shall not be unreasonably withheld, except to entities that control, are controlled by, or are under common control with Grantee. Grantee shall give written notice to the City of any transfers to entities under such common control 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 in this Permit shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System, within or outside the City, without the City's consent, but any such mortgage, pledge or assignment with respect to Grantee's Telecommunications System shall be subject to the City's other rights contained in this Permit.

2. Review.

(A) In determining whether the City will consent to any sale, lease, mortgage, assignment, merger or transfer, the City may inquire into the technical, legal, and financial qualifications of the prospective party. Grantee shall assist the City in any such inquiry. The City may condition any sale, lease, mortgage, assignment, merger or transfer upon such conditions related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of this Permit, as it deems appropriate. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger.

(B) No sale, lease, mortgage, assignment, transfer or merger for which the City's consent by ordinance is required may occur until the successor, assignee or lessee has complied with the requirements of Section d, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the City an executed counterpart or certified copy thereof.

3. Leases. Grantee shall not lease any portion of its permitted Telecommunications System without the City's prior consent as expressed by ordinance. However, and notwithstanding Section p.1, Grantee may lease any portion of its Telecommunications System 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 such portion of its Telecommunications System. A lessee of any portion of Grantee's Telecommunications System shall not obtain any rights under this Permit.

4. Sales.

(A) Notwithstanding Section p.1, 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:

(1) The sale is to the holder of a current existing, valid franchise, license, permit, or other similar right granted by the City;

(2) Within fourteen (14) days of the sale being executed and becoming final, Grantee shall provide written notice to the City, describing the portions of the Telecommunications System sold by Grantee, identifying the purchaser of the Facilities, the

location of the Facilities (in accordance with the requirements of Section f.1(B)(2)) and providing an executed counterpart or certified copy of the sales documents;

(3) Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its remaining Telecommunications System; and,

(4) Within fourteen (14) days of the sale being executed and becoming final, the purchaser of such Facilities shall file written notice to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased Facilities under the purchaser's current, existing valid franchise, license, permit or other similar right granted by the City. The purchaser shall not obtain any of Grantee's rights under this Permit.

q. PERMIT VIOLATIONS AND REMEDIES.

1. Remedies for Permit Violations.

(A) In addition to any rights set out elsewhere in this Permit, or such other rights as it may possess, the City reserves the right at its discretion to apply any of the following remedies, alone or in combination, in the event Grantee violates any material provision of this Permit, including but not limited to payment of permit fees, submitting timely and accurate reports, providing timely access to records, and maintaining all required insurance and performance bonds.

(1) Impose liquidated damages as provided in Section q.1(C);

(2) Recover specific damages from all or any part of the security provided pursuant to this Permit, including without limitation any performance bond, letter of credit or other security, provided, however, the assessment shall be for such amount as the City reasonably determines is necessary to remedy the violation;

(3) Commence litigation seeking recovery of monetary damages or specific performance of this Permit, as such remedy may be available;

(4) Suspend Grantee's Permit rights related to the violation, until Grantee corrects or otherwise remedies the violation;

(5) Reduce the duration of the term of this Permit on such basis as is reasonable provided that in no event shall the amount of the term remaining after the reduction be less than three (3) years; or

(6) Revoke this Permit.

(B) (1) Grantee shall not be relieved of its obligations to comply promptly with this Permit by reason of any failure of the City to enforce prompt compliance. The City's failure to enforce shall not constitute a waiver of any term, condition, or obligation imposed upon Grantee under this Permit; nor a waiver of rights by the City or acquiescence in Grantee's conduct. A specific waiver of a particular term, condition, or obligation imposed upon Grantee under this

Permit shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation. The acts or omissions of affiliates are not beyond Grantee's control, and the knowledge of affiliates shall be imputed to Grantee.

(2) Subject to applicable law, the remedies provided for in this Permit are cumulative and not exclusive; the exercise of one remedy shall not prevent the exercise of another remedy, or the exercise of any available rights of the City at law or equity.

(C) Liquidated Damages

(1) The City and Grantee recognize that delays, expense and unique difficulties would be involved in establishing actual losses suffered by the City and the public as a result of Grantee's violation of certain material provisions of this Permit. In such circumstances where proof of specific, actual damages would not be feasible, Grantee shall pay liquidated damages to the City for violating material provisions of this Permit. The parties agree that such amounts are a reasonable estimate by the parties of the harm (including increased costs of administration and other damages difficult to measure) the City and the public would suffer in the event of Grantee's breach of such provisions of this Permit. City and Grantee agree that the Permit provisions to which such liquidated damages would apply are:

(a) Failure to send reports, maps, or other requested information or data as required by Sections c.3 or f.1(B);

(b) Failure to respond to audit requests as required by Section c.7; and

(c) Failure to comply with Section p in connection with an assignment, transfer, merger, lease, sale or mortgage of Grantee's System or Permit.

(2) Subject to Grantee's right to notice and the opportunity to cure as provided in Section q.2, if the City determines that Grantee has violated any material provision of this Permit as set forth in Section q.1(C)(1), the City may assess liquidated damages of \$1,000 per violation. The City may determine that violations of this Permit are occurring on a per day or per incident basis.

(3) The liquidated damage amounts are stated in 2013 dollars and shall be adjusted each year for any increase in the amount of change in the Consumer Price Index 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 (CPI). The adjustment will be calculated by multiplying the base liquidated damages amount by the ratio of 1) the average CPI for January through June of the current Year, to 2) the average CPI for January through June of the prior Year.

(4) The assessment and recovery of liquidated damages will not constitute a waiver by the City of any other right or remedy it may have under the Permit or applicable law, including its right to recover from Grantee any additional damages, losses, costs and expenses

that are incurred by City by reason of the breach of this Permit. The assessment and recovery of liquidated damages for a particular violation will substitute for the recovery of actual damages for the period of the assessment.

(5) Each violation of any material provision of this Permit shall be considered a separate violation for which separate liquidated damages may be imposed. Thereafter, if Grantee has not cured or commenced to cure the alleged breach to the satisfaction of the City, the City may pursue any other remedies available under this Permit or applicable law.

(D) In determining which of the remedies available under this Permit is appropriate, the City may consider, among other things: (1) the nature and extent of the violation; (2) whether Grantee has had a history of similar violations; (3) the Person burdened by the violation and the cost of remedying the violation; (4) the nature of the remedy required in order to prevent further such violations; and (5) such other factors as the City may deem appropriate.

(E) The City may shorten the term of this Permit or revoke this Permit in the manner described in Sections q.1(A)(5) and (6) upon the occurrence of any of the following acts or events:

(1) Any failure to comply with the requirements of Section d of this Permit, including but not limited to, any failure to provide uninterrupted insurance or performance bonds;

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

(3) Grantee fails to obtain and maintain any permit required by any federal or state regulatory body in order to own and operate the Telecommunications System.

(F) In addition to its other rights and remedies as set forth in this Permit, the City shall have the right to revoke this Permit after the appointment of a receiver or trustee to take over and conduct Grantee's business, or the initiation of receivership, reorganization, insolvency or other similar action or proceeding, unless Grantee, its receiver or trustee timely and fully perform all obligations, until such time as this Permit is either rejected or assumed by Grantee, its receiver or trustee.

2. Notice and Opportunity to Cure.

(A) The City shall give Grantee thirty (30) days prior written notice of its intent to exercise any of its rights under Section q.1, identifying the reasons for such action.

(B) If Grantee removes or otherwise cures to the satisfaction of the City the asserted violation constituting the stated reason within the thirty (30) day notice period, or if cure is not reasonably possible within the thirty (30) day period and Grantee initiates good faith efforts satisfactory to the City within the thirty (30) day period to cure the asserted violation constituting the stated reason and the efforts continue in good faith, the City shall not exercise its rights under Section q.1.

(C) If Grantee fails to remove or otherwise cure the asserted violation constituting the stated reason within the thirty (30) day notice period, or if Grantee does not undertake and continue efforts satisfactory to the City to remedy the stated reason, then the City may exercise any or all of the remedies available under Section q.1 or such other rights as the City may possess.

3. Removal of Facilities. If the City has revoked this Permit as provided in Section q.1, or if this Permit has expired without being renewed or extended, or in the event of the City's purchase, lease-purchase, condemnation, acquisition, taking over or holding of plant and equipment, all of Grantee's rights under this Permit shall immediately cease and be divested. Thereafter, except as provided in this Section, or as otherwise provided by ordinance, Grantee shall at its own expense remove its Facilities from the Streets and restore the Streets to the standards provided in applicable regulations of the City. In the event of a failure by Grantee to properly perform such work, then the City may perform the work and collect the cost thereof from Grantee. The cost thereof shall be a lien upon the system of Grantee and a set-off against any sums owed Grantee by City.

r. RENEGOTIATION.

In the event that any provision of this Permit becomes invalid or unenforceable and the City Council or Grantee expressly finds that such provision constituted a consideration material to entering into this Permit, the City and Grantee may mutually agree to renegotiate the terms of this Permit. 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 ninety (90) days to conduct and complete the renegotiation. If both parties agree to renegotiations under Section r, the parties shall proceed in good faith and in a manner that is reasonable under the circumstances.

s. EXPIRATION.

Upon the expiration of this Permit, the City shall have the right, at its election, to: (1) renew or extend Grantee's Permit; (2) invite additional proposals and award the Permit to another Person; (3) allow the Permit to expire without further action; or (4) take such further action as the City deems appropriate. Until such time as the City exercises its rights under Section s, Grantee's rights and responsibilities within the City shall be controlled by the terms of this Permit.

t. MISCELLANEOUS PROVISIONS.

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.

2. Severability. If any section, provision or clause of this Permit 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 Permit shall not be affected, unless the City Council determines such section, provision, or clause was material to the City's agreement to issue a permit to Grantee. All provisions concerning indemnity shall survive the termination of this Permit for any cause. Expiration or termination of this Permit shall not extinguish, prejudice or limit either party's right to enforce this Permit with respect to any default or defect in performance that has not been corrected.
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 Permit in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Permit 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 Permit by reason of such failure or neglect. Services furnished by Grantee under this Permit shall be rendered using the best practicable commercial methods and practices, insuring the least danger to life and property compatible with good engineering practice.
4. Force Majeure.
 - (A) For the purposes of Section t.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 Grantee is wholly or partially unable to carry out its obligations under this Permit as a result of Force Majeure, Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Permit, 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 Permit.
5. Choice of Forum. Any litigation between the City and Grantee arising under or regarding this Permit 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, Portland.
6. Choice of Law. This Permit shall be governed by and construed in accordance with the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the law of a different state.
7. Notice. Any notice provided for under this Permit 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 electronic mail addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

(A) If to the City:

Office for Community Technology
City of Portland, Oregon
111 SW Columbia Street, Suite 600
Portland, Oregon 97201
Email: ComTech@portlandoregon.gov

With a copy to:

City Attorney's Office
City of Portland
1221 SW 4th Avenue, Room 430
Portland, Oregon 97204

(B) If to Grantee:

Kerry Walker
Oregon Health & Science University
3181 SW Sam Jackson Park Road, Mail Code ITG05
Portland, OR 97239

With a copy to:

Legal Department
Oregon Health & Science University
3181 SW Sam Jackson Park Road, Mail Code L585
Portland, OR 97239

(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 electronic mail transmission (or the first business day thereafter if sent by electronic mail on a Saturday, Sunday or legal holiday) but, in the case of electronic mail, only if followed by transmittal by national overnight courier or hand for delivery on the next Business Day.

8. Public Records. All information and records submitted to the City are subject to disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. If Grantee reasonably believes that any information or records it submits to the City may be exempt from disclosure under the Oregon Public Records Law, Grantee must identify such information with particularity and include the following statement:

“This data is exempt from disclosure under the Oregon Public Records Law pursuant to ORS 192, and is not to be disclosed except in accordance with the Oregon Public Records Law, ORS 192.410 through 192.505.”

If Grantee fails to identify with particularity the portions of such information that Grantee believes are exempt from disclosure, and the basis for its conclusion that the identified information is exempt from disclosure, Grantee is deemed to waive any future claim regarding non-disclosure of that information.

9. Permit Amendment. The City has negotiated this Permit in good faith, in reliance upon the information provided by Grantee regarding the scope of its authority to offer services associated with its Telecommunications System. In the event that Grantee offers or receives authority to offer services outside the scope of this Permit that utilize Grantee's Facilities in the Streets, Grantee shall immediately notify the City. Within ninety (90) days of receiving such notice, the City may elect, without limitation, to enter into negotiations with Grantee to revise or amend this Permit, or to extend separate authority to Grantee for such services to reflect such changed circumstances, or may proceed with early revocation of this Permit. The parties will negotiate in good faith to reach mutual agreement on the lawful means to provide the necessary authority for Grantee to provide such services using Streets.

10. 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 Grantee, meeting the approval of the City Attorney. Any 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.

11. Other Authority Superseded. Upon effectiveness of this Permit, any and all authority to operate previously granted to Grantee by the City is superseded by this Permit.

Section 2. The Council declares that an emergency exists because the general public welfare will be served by OHSU being authorized to immediately begin construction of its telecommunications system, to allow it to begin operation without delay and introduce further competition into the marketplace for telecommunications services; therefore, this ordinance shall be in full force and effect from and after its passage by the Council.

Passed by Council, **SEP 11 2013**
Mayor Charlie Hales
Prepared by Li/Walters
July 1, 2013

LaVonne Griffin-Valade
Auditor of the City of Portland
By *Gayla Jennings*
Deputy

Agenda No. **186236**
ORDINANCE NO.
Title

to use City streets

*Grant a temporary, revocable permit to Oregon Health and Sciences University for telecommunications services and establish terms and conditions. (Ordinance)

INTRODUCED BY Commissioner/Auditor: Mayor Charlie Hales	CLERK USE: DATE FILED <u>SEP 06 2013</u>
COMMISSIONER APPROVAL Mayor—Finance and Administration - Hales	LaVonne Griffin-Valade Auditor of the City of Portland
Position 1/Utilities - Fritz	
Position 2/Works - Fish	By: <u><i>[Signature]</i></u> Deputy
Position 3/Affairs - Saltzman	
Position 4/Safety - Novick	ACTION TAKEN:
BUREAU APPROVAL Bureau: Revenue Bureau OMF CAO: Jack D. Graham Bureau Head: Thomas W. Lannom	
Prepared by: JL/MR Date Prepared: August 9, 2013	<i>[Signature]</i>
Financial Impact & Public Involvement Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/>	
Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	City Auditor Office Approval: required for Code Ordinances
City Auditor Office Approval: required for Code Ordinances	
City Attorney Approval: required for contract, code, easement, franchise, comp plan, charter	City Attorney Approval: <i>[Signature]</i>
Council Meeting Date September 11, 2013	

AGENDA
TIME CERTAIN <input type="checkbox"/> Start time: _____ Total amount of time needed: _____ (for presentation, testimony and discussion)
CONSENT <input checked="" type="checkbox"/>
REGULAR <input type="checkbox"/> Total amount of time needed: _____ (for presentation, testimony and discussion)

FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:		
		YEAS	NAYS
1. Fritz	1. Fritz	✓	
2. Fish	2. Fish	✓	
3. Saltzman	3. Saltzman	✓	
4. Novick	4. Novick	✓	
Hales	Hales	✓	