

ORDINANCE No. 186157

Grant a franchise to Portland State University to use the right of way to provide telecommunications, electrical and district heating and cooling services 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) Portland State University, (“PSU” or “Grantee”), is located in downtown Portland. Grantee’s campus is generally within the area bounded by the intersection of SW 1st Ave. and SW Columbia St., south on SW 1st to SW Market, east on SW Market to SW Harbor Drive, south on SW Harbor Drive to SW Moody, southeast on SW Moody to SW Gibbs, west on SW Gibbs to end, across the SW Gibbs Street Pedestrian Bridge to end, continuing west on SW Gibbs to SW Kelly, north on SW Kelly to SW Arthur, west on SW Arthur to SW Caruthers/SW 3rd, then west on SW Caruthers to SW 6th, northwest on SW 6th to SW Broadway/I-405 offramp, SW Broadway/I-405 offramp to SW Lincoln, SW Lincoln to SW Park, SW Park to SW Clifton, SW Clifton and the lot line between lots 1500 and 1600 to SW Cardinel, SW Cardinel to SW College, SW College to SW 13th, SW 13th to SW Hall, SW Hall to SW 14th, SW 14th to SW Columbia, east on SW Columbia to SW 1st Ave. This area is more particularly identified in Exhibit A to this Franchise.

(B) Since 2002, Grantee has provided Shared Telecommunications Services (also known as Shared Tenant Services) under a certificate of authority issued by the Oregon Public Utility Commission. OPUC Docket CP 1066, Order No. 02-453.

(C) In June 2003, the Council granted a franchise to PSU for a period of 10 years for Telecommunications and Electrical Systems using the Streets. Ordinance No. 177529. The franchise was amended in 2008, 2009, and 2012, to accommodate the university’s growth by expanding the franchise boundaries. Ordinance Nos. 181925, 183168, and 185409. The amended franchise also granted for PSU to use the Streets to provide district heating and cooling services among and between its various buildings.

(D)(1) The City of Portland, Oregon (“the City” or “Grantor”) grants to the State of Oregon acting by and through the State Board of Higher Education on behalf of PSU, and to PSU’s successors and assigns as approved by the City under Section 15 of this Franchise, a franchise to: 1) construct, operate and maintain a Telecommunications System in the Streets; 2) construct, operate and maintain an Electrical System in, under, and over the surface of the City’s Streets; and 3) District Heating and Cooling Systems in the Streets, (collectively, the “Systems”) within an area shown on the map attached hereto as Exhibit A which is incorporated by reference.

(2) Grantee may seek to amend, alter or add to its Systems within the Streets by filing a map showing proposed changes with the City’s Office for Community Technology and

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 Systems in the Streets shall not exceed 10,000 linear trench feet unless separately authorized by the Council by ordinance.

(3) This Franchise does not grant authority regarding any satellite campuses or facilities located on property not within the Franchise boundary as described in Section 1.1(A) of this Franchise. This Franchise does not grant any authority for Grantee to provide any commercial electric power or District Heating and Cooling services. This Franchise does not authorize Grantee to provide heat, light or power to any third parties or any person other than Grantee in any manner regulated by the Oregon Public Utility Commission, nor does this Franchise authorize Grantee to provide heat, light or power as a public utility as defined in Oregon law. This Franchise does not authorize Grantee to operate as a telecommunications provider. Grantee represents that it has applied for and received all necessary regulatory authority to otherwise provide the services addressed in this Franchise.

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 revoked 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 in accordance with Section 20, 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 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 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 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.

2.2 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.

(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) "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) "Consumer Price Index" or "CPI" means the Consumer Price Index for the Urban Wage 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 and Statistics of the Department of Labor and as published in such Bureau of Labor Statistics Detailed Report.

(F) "District Heating and Cooling System" means any of Grantee's pipe line facilities, including pipes, conduits, valves, utility tunnels and vaults, installed or used for the provision of heating or cooling services and, located in, above or below the Streets.

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

(H) "Electrical System" means any tangible component of Grantee's electrical system used for the transmission and distribution of emergency backup power including wires, cables, conduits, ducts, vaults, and other necessary Facilities owned or used by Grantee for the purpose of providing backup, emergency electrical power for Grantee's facilities and operations, and located in the Streets, excluding ducts, conduits and vaults leased from another City Licensee.

(I) "Facility" means any tangible component of Grantee's Systems, including but not limited to optical fiber, wire, conduits, ducts, pipes, utility tunnels, valves, and vaults.

(J) "Franchise" means this franchise agreement, as approved by the City Council and accepted by Grantee pursuant to Section 20 herein.

(K) "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 12.2, Grantee shall not be construed to be a "Licensee" as defined in this Section 2.2(K).

(L) "Minimum Annual Franchise Fee" means \$20,000 in the first year of this Franchise, and shall increase annually by a percentage equal to the change in the CPI during the time period immediately prior to the due date of the franchise fee payment.

(M) "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.

(N) "Streets" means the surface of, and the space 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.

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

(P) "Telecommunications Services" means the provision of Shared Tenant Services, under the certificate of authority granted by the Oregon Public Utility Commission to Grantee.

(Q) "Telecommunications System" means optical fiber, cables, wires, conduits, 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 Licensee.

(R) "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, Grantee shall pay as an annual franchise fee to the City, through the duration of this Franchise, an amount equal to the greater of the Minimum Annual Franchise Fee or, for calendar year 2013, \$3.63 per linear trench foot of Grantee's Systems in the Streets. The total number of linear trench feet of Grantee's Systems located in the Streets shall be determined by the as-built maps submitted by Grantee, as provided in Section 6.1(B). For the purposes of this calculation, the total number of linear trench feet shall be determined by separately measuring the linear trench feet of Grantee's District Heating and Cooling System, the Electrical System, and the Telecommunications System, then adding the three figures together.

(B) The amount of the linear foot franchise fee specified in this Section shall increase annually by a percentage equal to the change in CPI during the time period immediately prior to the due date of the franchise fee payment.

3.2 Franchise Fee Payments

(A) Grantee's Minimum Annual Franchise Fee payable under Section 3.1 shall be paid to the City annually on or before May 15. The payment shall be for the current year (January 1 through December 31). Grantee shall pay any balance remaining to the City under the calculation of the linear foot fee annually on or before May 15 of the following calendar year.

(B) Franchise fee payments not received by the City on or before the due date shall be assessed interest equal to one percent (1%) per month. Interest shall be compounded daily. 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.

(C) Grantee shall set up electronic fund transfer within sixty (60) days of the franchise 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.

3.3 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 Systems in the Streets, and the computation of the total figures 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.

3.4 Cost of Pre-franchising and Publication. Grantee shall pay the pre-franchising costs associated with this Franchise, including publication of this Franchise, as such publication is required by the City Charter.

3.5 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 Section 3 shall be subject to audit by the City, provided that only payments which occurred during a period of thirty-six (36) 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 reimburse the City for:

(A) Interest on any underpayment of an amount due under Section 3 that is disclosed as the result of an audit, such interest to be calculated at the interest rate specified in Section 3.2(B).

(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 3.2(B).

3.6 If Grantee disputes the City's determination of underpayment, 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.

3.7 The City and its agents and representatives shall have authority to arrange for and conduct audits or reviews, within the Portland metropolitan region, upon no less than 48 hours prior written notice, during normal business hours, of the relevant financial obligations payable hereunder. 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 three (3) years from the date payment was due. 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 three (3) 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.

3.8 Payment of franchise fees under this Franchise 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) At all times during which Grantee's Facilities are in the Streets as described in Section 1 of this Franchise, Grantee shall comply with the requirements for insurance or other forms of financial guaranty for right-of-way permits, as established by applicable Portland City Code and implementing regulations in effect as of the date of this Franchise, along with any revisions implemented by the City during the term of this Franchise. Until the time when such administrative regulations are effective, Grantee shall maintain insurance with the requirements set forth in Exhibit B attached to this Franchise.

(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 Franchise by the City.

(C) Following the adoption of SB 242 by the Oregon Legislature in the 2011 Session, ORS 351.060(11) provides Grantee with the option of purchasing insurance, operating a self-

insurance program or otherwise arranging for equivalent coverage of any nature. In light of this statutory authority, the parties agree that Grantee may comply with the requirements of Section 4.1(A) by providing the City with either proof of obtaining insurance, operating self-insurance or arranging for equivalent coverage, in at least the amounts and nature specified in Subsection 4.1(A). The adequacy of the amount and scope of coverage provided by Grantee shall be subject to the City Attorney's review and approval. So long as Grantee participates in Oregon's self-insurance program as an agency of the State, the adequacy of such self-insurance shall be presumed adequate for purposes of the City Attorney's review and approval.

4.2 Faithful Performance Bond.

(A) Upon the effective date of this Franchise, Grantee shall furnish proof of the posting of a faithful performance bond or irrevocable letter of credit or other form of guaranty running to the City, with good and sufficient surety approved by the City, in the penal sum \$100,000, conditioned that Grantee shall well and truly observe, fulfill, and perform each term and condition of the Franchise. Grantee shall pay all premiums or other costs associated with maintaining any such guaranty, and shall keep the same 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 Systems installed in the Streets. The bond shall be conditioned that it shall not be terminated or otherwise allowed to expire without 30 days prior written notice first being given to the City. The bond shall be reviewed and approved as to form by the City Attorney. Any failure by Grantee to maintain or provide coverage as required under this Subsection shall be cause for revocation of this Franchise under Section 16.

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

(C) Following the adoption of SB 242 by the Oregon Legislature in the 2011 Session, ORS 351.060(11) provides Grantee with the option of purchasing insurance, operating a self-insurance program or otherwise arranging for equivalent coverage of any nature. In light of this statutory authority, the parties agree that Grantee may comply with the requirements of Subsection 4.2(A) by providing the City with either proof of posting a guaranty, operating self-insurance or arranging for equivalent coverage, in at least the amounts and nature specified in Subsection 4.2(A). The adequacy of the amount and scope of coverage provided by Grantee shall be subject to the City Attorney's review and approval. So long as Grantee participates in Oregon's self-insurance program as an agency of the State, such self-insurance shall be presumed adequate for purposes of the City Attorney's review and approval under this Subsection.

4.3 Construction Bond. At all times during which Grantee is constructing, repairing, replacing or maintaining is Facilities in the Streets, Grantee shall comply with the requirements for right-of-way permits established by applicable Portland City Code and implementing 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.

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

5.1 Indemnification – General. To the extent permitted under Article XI, Section 7 of the Oregon Constitution, and subject to the 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 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 Systems 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.

5.2 Indemnification – Relocation. To the extent permitted under Article XI, Section 7 of the Oregon Constitution, and subject to the limitations of the Oregon Tort Claims Act, Grantee also 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 Section 6.3, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

5.3 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.

Section 6. CONSTRUCTION AND RELOCATION.

6.1 (A) Subject to applicable regulations of the City, Grantee may perform all construction necessary for the operation and maintenance of its Systems. Regardless of who performs the installation and/or construction of Grantee's Systems within the Streets, all construction and maintenance of any and all Grantee's Systems the within Streets shall be and remain Grantee's sole responsibility. 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 Systems 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's Office for Community Technology 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 Systems, with a map showing the location of its installed Systems 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 an electronic map to the City's Office for Community Technology, or its successor, showing the location of Grantee's Systems 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.

6.2 Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law (ORS 757.542 to 757.562 and 757.993 (2011)), and the rules and regulations promulgated thereunder in OAR Chapter 952.

6.3 Relocation. Grantee shall relocate its Systems within the Streets when the public convenience requires such change, in compliance with the requirements of applicable Portland City Code and implementing regulations, and the expense of such relocation shall be paid by Grantee.

6.4 Additional Facilities Subject to Franchise. Within thirty (30) days of Grantee's acquisition of any Systems 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 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.

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 implementing regulations, and the expense thereof shall be paid by Grantee.

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 Grantee's Systems under this Franchise. However, if any portion of Grantee's Systems interferes with the construction or repair of any Street or public improvement, including

construction, repair or removal of a sewer or water main, Grantee's system shall be removed or replaced in the manner the City may direct Grantee to relocated as provided in applicable regulations of the City.

Section 9. CITY USE OF DUCTS.

9.1 New Construction.

(A) Grantee shall provide twenty (20) business days prior written notice to the City of any planned Duct or Conduit construction. Such notice shall include a description of any planned Duct or Conduit construction and a map showing the planned route in a form acceptable to the City Engineer. If the City desires any 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 Ducts or Conduits to the City pursuant to the process set forth in this Section 9.1.

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

(1) Grantee will confer with City prior to finalizing plans and specifications for any proposed new build, to establish City requirements for ducts, conduits, or access vaults;

(2) If the City determines a need for duct, conduit or 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 6.1(B). City will then maintain ownership of and maintenance responsibilities for the additional Ducts, Conduits 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 9.1 above.

9.2 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 12 and subject to a separate written agreement between the City and Grantee specifying the terms of such access and usage by the City.

Section 10. 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 Franchise, 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, 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 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.

Section 11. MAINTENANCE OF FACILITIES.

Grantee shall provide and put in use all Facilities and equipment necessary for the operation of its Systems 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 11 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 11. 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.

Section 12. COMMON USERS.

12.1 Use of Surplus Facilities by Third-parties. Grantee acknowledges that the Streets are 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 duct or 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 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 12.2, 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 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 36.300 through 36.365 (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 attorneys' fees.

12.2 Coordination of Licensee Usage.

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

(B) Grantee shall give Licensee and the City 120 calendar days written notice of its needs to occupy 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 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 based on 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.

(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 12.2(B)(4), Grantee may require all Licensees to vacate. When conduit or duct rent is revised because of retrofitting of 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.

Section 13. 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 implementing regulations regarding the discontinuation of the use of Facilities.

Section 14. 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 implementing regulations. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(16) (2011).

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

15.1 Council Consent. Neither this Franchise nor any of Grantee's Systems located in the Streets by authority of this Franchise 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 Section 15 shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Systems for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Systems, within or outside the City, 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 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 Franchise, 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 4, 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 Auditor an executed counterpart or certified copy thereof.

15.3 Leases. Grantee may lease its facilities in the Streets in Grantee's ordinary course of business, so long as the lease is with a Person operating under a current franchise, lease, permit or other grant of authority from the City Council. Grantee shall notify the City when entering into any such lease and shall notify the City if the lease expires or is terminated for any reason. For purposes of Section 15.3, "lease" includes any intergovernmental agreement that Grantee enters into with another unit of Oregon government for use of Grantee's Facilities in the Streets. During the term of any such intergovernmental agreement, the leased facilities shall continue to

be included in the calculation of the linear trench foot of Grantee's Systems as provided in Section 3.1(A) of this Franchise.

Section 16. FRANCHISE VIOLATIONS AND REMEDIES.

16.1 Remedies for Franchise Violations.

(A) In addition to any rights set out elsewhere in this Franchise, 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 Franchise, including but not limited to franchisee fees, reports, records, and maintenance of insurance or performance bonds.

(1) Impose liquidated damages as provided in Section 16.1(C);

(2) Recover specific damages from all or any part of the security provided pursuant to this Franchise, 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 Franchise, as such remedy may be available;

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

(5) Reduce the duration of the term of this Franchise 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 Franchise.

(B) (1) Grantee shall not be relieved of its obligations to comply promptly with this Franchise 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 Franchise; 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 Franchise 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 Franchise 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 material provisions of this Franchise. 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 Franchise. The parties agree that such amounts are a reasonable estimate by the parties of the actual damages (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 Franchise. City and Grantee agree that the Franchise 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 3.3 or 6.1(B);

(b) Failure to respond to audit requests as required by Section 3.7; and

(c) Failure to comply with Section 15 in connection with an assignment, transfer, merger, lease, sale or mortgage of Grantee's System or Franchise.

(2) Subject to Grantee's right to notice and the opportunity to cure as provided in Section 16.2, if the City determines that Grantee has violated any material provision of this Franchise as set forth in Section 16.1(C)(1), the City may assess liquidated damages of \$1,000. Liquidated damages will be assessed by the City based upon the number of incidents of such violations.

(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 the prior year. 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 Franchise 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 Franchise. 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 Franchise 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 Franchise or applicable law.

(D) In determining which of the remedies available under this Franchise 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 Franchise or revoke this Franchise in the manner described in Sections 16.1(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 4 of this Franchise, 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 System.

(F) In addition to its other rights and remedies as set forth in this Franchise, the City shall have the right to revoke this Franchise 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 Franchise is either rejected or assumed by Grantee, its receiver or trustee.

16.2 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 16.1, 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 16.1.

(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 16.1 or such other rights as the City may possess.

16.3 Removal of Facilities. If the City has revoked this Franchise as provided in Section 16.1, or if this Franchise 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 Franchise 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.

Section 17. RENEGOTIATION.

In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and 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. If both parties agree to renegotiations under Section 17, the parties shall proceed in good faith and in a manner that is reasonable under the circumstances.

Section 18. EXPIRATION.

Upon the expiration of this Franchise, the City shall have the right, at its election, to: (1) renew or extend Grantee's Franchise; (2) invite additional proposals and award the Franchise to another Person; (3) allow the Franchise 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 18, Grantee's rights and responsibilities within the City shall be controlled by the terms of this 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, unless the City Council determines such section, provision, or clause was material to the City's agreement to issue a franchise to Grantee. All provisions concerning indemnity shall survive the termination of this Franchise for any cause. Expiration or termination of this Franchise shall not extinguish, prejudice or limit either party's right to enforce this Franchise with respect to any default or defect in performance that has not been corrected.

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. Services furnished by Grantee under this Franchise shall be rendered using the best practicable commercial methods and practices, insuring the least danger to life and property compatible with good engineering practice.

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 Grantee is wholly or partially unable to carry out its obligations under this Franchise 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 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 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 Choice of Law. This agreement 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.

19.7 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 electronic mail or 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 for Community Technology
111 SW Columbia Street, Suite 600
Portland, Oregon 97201
FAX (503) 827-5971
Email: ComTech@portlandoregon.gov

With a copy to: City Attorney's Office
Room 430, City Hall

1221 SW 4th Avenue
 Portland, Oregon 97204
 FAX (503) 823-3089

(B) If to Grantee: Director's Office
 Facilities Department
 Portland State University
 617 SW Montgomery
 2nd Floor, Room 202
 Mail Code: FAC
 Portland, Oregon 97201
 FAX: (503) 725-4329
 Phone: (503) 725-3738

With a copy to: Director
 Office of Business Affairs
 Portland State University
 Neuberger Hall
 724 SW Harrison
 Mail Code: BO-DO
 Portland, Oregon 97201
 FAX: (503) 725-5594
 Phone: (503) 725-3443

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

19.8 Public Records. Grantee is a public body subject to the Oregon Public Records Law. Grantee acknowledges that documents and records submitted by Grantee to the City may be subject to public inspection under the Oregon Public Records Law. Grantee acknowledges its responsibility for being familiar with the provisions of 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.

19.9 Franchise Amendment. The City has negotiated this Franchise in good faith, in reliance upon the information provided by Grantee regarding the scope of its authority to offer the Telecommunications Services, electrical services, and district heating and cooling services as described in Sections 1.1(D), 2.2(F), 2.2(H), and 2.2(Q). In the event that Grantee receives authority to offer services outside the scope of this Franchise, or otherwise begins offering services outside the scope of those identified in Sections 1.1(D), 2.2(F), 2.2(H), and 2.2(Q), Grantee shall immediately notify the City. Within 90 days of receiving such notice, the City may either enter into negotiations with 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.


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 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.

Passed by the Council: JUL 17 2013
 Mayor Charlie Hales
 Prepared by Li/Walters
 April 10, 2013

La Vonne Griffin-Valade
 Auditor of the City of Portland
 By 
 Deputy

2013

Agenda No. 186157
ORDINANCE NO.

Title

Grant franchise to Portland State University to use the City streets for a period of ten years.
(Ordinance) *the right of way to provide telecommunications, electrical and district heating and cooling services*

<p>INTRODUCED BY Commissioner/Auditor: Mayor Charlie Hales</p>	<p>CLERK USE: DATE FILED <u>JUN 07 2013</u></p>
<p>COMMISSIONER APPROVAL Mayor—Finance and Administration - Hales Position 1/Utilities - Fritz Position 2/Works - Fish Position 3/Affairs - Saltzman Position 4/Safety - Novick</p>	<p>LaVonne Griffin-Valade Auditor of the City of Portland</p> <p>By: <u>[Signature]</u> Deputy</p>
<p>BUREAU APPROVAL Bureau: Revenue Bureau OMF CAO: Jack D. Graham Bureau Head: Thomas W. Lannom</p>	<p>ACTION TAKEN: <u>[Signature]</u></p>
<p>Prepared by: JL/MR Date Prepared: May 1, 2013</p>	<p>JUN 12 2013 PASSED TO SECOND READING JUL 17 2013 9:30 A.M.</p>
<p>Financial Impact & Public Involvement Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/></p>	
<p>Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/></p>	
<p>City Auditor Office Approval: required for Code Ordinances</p>	
<p>City Attorney Approval: required for contract, code, easement, franchise, comp plan, charter</p>	
<p>Council Meeting Date June 12, 2013</p>	

AGENDA

TIME CERTAIN
Start time: _____

Total amount of time needed: _____
(for presentation, testimony and discussion)

CONSENT

REGULAR
Total amount of time needed: _____
(for presentation, testimony and discussion)

FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
	YEAS	NAYS
1. Fritz	<u>[Signature]</u>	<u>[Signature]</u>
2. Fish	<input checked="" type="checkbox"/>	
3. Saltzman	<input checked="" type="checkbox"/>	
4. Novick	<input checked="" type="checkbox"/>	
Hales	<input checked="" type="checkbox"/>	