

ORDINANCE No. 187537

Issue a revocable permit allowing Wimactel, Inc. to install, maintain and operate public telephones on City streets for a period of five years. (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. The location of public pay telephones on City of Portland City Streets constitutes a public convenience, and public safety derives a benefit from the availability of such telephones. Public pay telephones can also, however, be a source of public complaint if, among other things, they create sidewalk congestion, are used for illegal purposes, or require users to pay excessive rates.
2. The City issues permits for public pay telephones on a non-exclusive basis.
3. Wimactel, Inc. manages phone booths within Portland's right of way. In 2013, Wimactel acquired the pay phone assets of FSH Communications, including its Portland pay phone assets and accounts. City Council consented to the transfer of the revocable permit from FSH Communications to Wimactel. Ordinance No. 186432.
4. After negotiating with Wimactel on a renewed permit, the Office for Community Technology recommends to the City Council that the City grant Wimactel a revocable permit to install, maintain and operate public telephones on City Streets, at locations approved by the City Engineer, under the following terms and conditions.

NOW, THEREFORE, the Council directs:

- a. Nature of Permit. The City of Portland, Oregon, ("City"), hereby grants a revocable, non-exclusive permit ("Permit") to Wimactel, Inc., a Delaware corporation qualified to do business in Oregon, ("Permittee," or "Wimactel") and to its successors and assigns, subject to the City's consent under Section 1.m herein, to install, maintain and operate public telephones at locations approved by the City Engineer, on the City Streets, subject to the terms and conditions of this Permit. This Permit applies to public telephones only to the extent specified in this Ordinance. If Permittee seeks authority to locate or relocate any public telephones on City property other than City Streets, Permittee shall seek the approval of the City Bureau or agency having ownership or control of the site.
- b. 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.

- (1) “City 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 for motor vehicles, to the extent the City has the right to allow the Permittee to use them.
 - (2) “Public telephone” means phones, associated equipment, hardware and enclosures, whether or not physically attached to real estate and whether or not Permittee uses a subcontractor for construction, installation or maintenance.
- c. Duration. This revocable permit shall be in effect until December 31, 2020.
- d. Effective Date. The effective date of this Permit shall be 30 days after passage of the Permit by the City Council, unless Permittee fails to file an unconditional written acceptance of this Permit in accordance with Section 2 of this Permit, in which event this Permit shall thereupon 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.
- e. Revocation of Permit. This Permit may be revoked by the Council, or Permittee may voluntarily discontinue operations under this Permit, after thirty (30) days written notice by certified mail to the other party. Within ninety (90) days after such notice, Permittee shall remove all public telephones on City Streets in compliance with Section 1.k of this Permit. The requirements regarding Commissions under Section h, Reports and Review of Records under Section I, and indemnification under Section q of this Permit shall survive the expiration or early termination of this Permit.
- f. Location of Public Telephones.
- (1) All installations of public telephones in the City Streets shall be subject to the approval of the City Engineer. Permittee shall submit proposed locations of public telephones in City Streets, to the City Engineer for review and approval. Permittee shall include detailed plans for the type or types of public telephones to be installed in a City Street. When installing, removing, or relocating any public telephone, Permittee shall apply for and obtain all construction permits required by the City.
 - (2) In considering whether to approve any of the locations submitted by Permittee, the City Engineer will consider, among other things, the following factors:
 - (a) The public need for, and convenience of, a public telephone at the particular site.
 - (b) Interference which a public telephone may cause with other uses of the site by the public or adjacent property owners.

- (c) Detriment which a public telephone may cause to aesthetic values in a residential neighborhood, historic districts or design overlay zones.
 - (d) Hazards which a public telephone may cause at a particular site, including, but not limited to, obstructing the field of vision of motorists at intersections or crosswalks, proximity to a fire hydrant, or otherwise causing a public nuisance.
 - (e) Availability of a public telephone, or a suitable site for same, within 200 feet of the site requested by Permittee.
- g. Installation, Replacement, Repairs and Maintenance. For all public telephones installed, maintained, operated, repaired and replaced under authority of this Permit, Permittee is and shall remain the owner of the public telephones. All of Permittee's public telephones within the City Streets, regardless of who may perform any work of installation, maintenance, operation, repair or replacement, shall remain Permittee's responsibility. Permittee shall:
- (1) Install public telephones, associated equipment, hardware and enclosures only at locations approved by the City.
 - (2) Maintain, service and repair public telephones and associated equipment at Permittee's expense. Permittee shall bear the entire cost of installation, maintenance, relocation and removal of every telephone booth installed under this Permit.
 - (3) Keep all public telephones in good repair, clean and safe for public use. Each public telephone shall have a sign identifying Permittee by name, address, and telephone number as the owner/operator of the telephone.
 - (4) Collect and count revenue from each public telephone located City Streets.
 - (5) Provide and maintain alphabetical and classified directories for all public telephones subject to this Permit, where facilities permit installation.
 - (6) Provide and maintain lighting for all public telephones located on City Streets during hours of darkness.
 - (7) Post information for all public telephones subject to this Permit identifying the primary long distance, inter-exchange carrier.
 - (8) All public telephones installed by Permittee under this Permit shall comply with applicable provisions of the Americans With Disabilities Act.
 - (9) At the City's request, Permittee shall

- (a) Disable the ability of a specified public telephone to receive incoming calls.
 - (b) Disable the ability of a specified public telephone to process telephone calls made to pagers.
 - (c) Disable the total operation of a specified public telephone on a temporary basis to discourage unlawful activity.
 - (d) Relocate a specified public telephone on a temporary or permanent basis to discourage unlawful activity.
- (10) Permittee shall cooperate with the City in developing and implementing other mutually agreeable and technically feasible methods for ensuring the availability of public telephones while discouraging unlawful activity.

h. Commissions.

- (1) Amount: After this permit becomes effective, Permittee shall pay the City a commission equal to: 1) 15% of all gross revenues and/or receipts (less only long distance revenues and/or receipts and/or commissions) generated by each authorized public telephone during the previous quarter; and 2) 25% of all long distance commissions and/or revenues and/or receipts either generated by Permittee, or received by Permittee from the designated primary long distance, inter-exchange carrier(s).
- (2) Gross Revenues: Gross Revenues shall be determined without any deductions or adjustments, and shall include Permittee billed revenues on "Wimactel Commissionable Calls." Wimactel Commissionable Calls are: collect calls, calls billed to a third telephone number, calls billed to telephone calling cards or major credit card originated from authorized public pay telephones excluding all 500, 700, 900, toll-free type numbers (e.g. 800, 888, 877, etc.), Directory Assistance Calls, and calls charged to a Wimactel calling card (whether or not branded "Wimactel Communications LLC") issued to a business, and handled through Permittee's OSPS and carried on the Permittee's network.
- (3) Commission Due Dates: Commissions must be payable to the City and are due forty five (45) days after the end of each calendar quarter as follows:

For the calendar year quarter period	The commission is due no later than
January 1 through March 31	May 15
April 1 through June 30	August 14
July 1 through September 30	November 14
October 1 through December 31	February 14

- (4) Late Payment Interest: Commission payments not received by the City on or before the due date shall be assessed interest at one percent (1%) simple interest per month. Interest shall be due on the entire late payment from the date on which the payment was due until the month during which the City receives the payment.
 - (5) Late Payment Penalty: Any payment not paid when due shall be subject to a delinquency penalty charge of five percent (5%) of the unpaid amount if a review by the City discloses that Permittee has paid ninety-five (95%) or less of the principal amount owing for the period under review. Failure to make full payment and penalty charges within sixty (60) days of written notice from the City shall constitute a violation of this Permit. The City will not assess interest on the Late Payment Penalty unless the Late Payment Penalty is not paid within sixty (60) days of written notice from the City. After sixty (60) days, interest shall be calculated from the late payment due date in accordance with Section 1.h (4), above.
- i. Reports and Reviews of Records.
- (1) Permittee shall file a report of Gross Revenues with each commission payment to the Office for Community Technology. The report shall show the Gross Revenues earned and a calculation of average daily revenue, gross revenue, and commissions from each public telephone during the previous quarter. The accounting shall be verified by an officer or other authorized representative of Permittee. Such reports shall be in a form satisfactory to the City.
 - (2) Permittee shall keep and preserve for not less than five (5) years such documents and records, including state and federal income or excise tax returns, accurately supporting the commission payments.
 - (3) The City shall have authority to arrange for and conduct reviews or audits of all financial records relevant to the calculation of commission payments to the City. The City shall make all requests for review or audit in writing and may determine the scope of review or audit in each instance.
 - (4) The City may examine any books, papers, records, invoices, and other data needed to determine the accuracy of any commission due. Such records and documentation shall be open for inspection or examination by the Director or a duly authorized agent.
 - (5) If Permittee has not provided copies of all information reasonably within the scope of the review to the City within 30 days from the date of the written request, Permittee shall provide the City with access to the requested records within the Portland metropolitan region, during normal business hours, upon 48 hours prior written notice.

- (6) If the City requests in writing that Permittee provide, or cause to be provided, copies of any information reasonably within the scope of the review, and Permittee fails, refuses or neglects to provide copies within 30 days of receipt of the City's written request, then the five (5) year periods under Section 1.i (2) shall be extended by one day for each day or part thereof beyond 30 days that Permittee fails to provide, or fails to cause to be provided, such requested information.
- j. Electricity. With approval of the City Traffic Engineer, Permittee may interconnect with electric service provided for City traffic signalization subject to payment of any costs incurred by the City, including but not limited to construction and operation costs.
- k. Removal of Public Telephones. The City, upon 20 days written notice, may require Permittee to remove or relocate any public telephone installed under this Permit. Permittee may otherwise remove any public telephone after 20 days written notice to the City; and may otherwise relocate any public telephones with the City's approval. When any telephone booth installed under this Permit is removed or relocated, Permittee shall restore the location site to a condition satisfactory to the City Engineer. The City shall be entitled to any commission earned prior to Permittee's removal of any telephone.
- l. Advertising. Permittee shall not use or lease space on its telephone equipment or enclosures on City Streets for the display of advertising.
- m. City's Consent for Transfer. Neither this Permit, nor any public telephones, owned or operated on the City Streets by Permittee under authority of this Permit shall be sold, leased, mortgaged, subcontracted, assigned or otherwise transferred without the prior consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with Permittee. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. This Section shall not require the consent of the City to the sale or transfer of any public telephones, associated equipment, hardware and enclosures by Permittee in the ordinary course of business, or as public telephones may be replaced or retired.
- n. Limitation of Liability. The obligation of Permittee in the event of a service interruption shall be limited to the use of reasonable diligence under the circumstances for restoration of service.
- o. Regulatory. Permittee shall comply with applicable regulations of state and federal regulatory commissions.
- p. Lawfulness. This Permit and the parties' actions under this Permit shall comply with all applicable federal, state, and local laws, rules, regulations, court orders, and governmental agency orders. If a court or a governmental agency with proper jurisdiction determines that this Permit or a provision of this Permit is unlawful, this Permit, or the unlawful provision, shall terminate. If a provision of this Permit is so terminated but the parties legally, commercially, and practicably can continue this Permit without the unlawful provision, the remainder of this Permit shall continue in effect.

- q. Indemnification. Permittee, its successors and assigns, shall forever indemnify, defend and hold harmless the City, its officers, agents and employees, from any claims, demands, actions and suits for injury, damage, loss, liability, cost, or expense, including court and appeal costs and attorney fees and expenses, arising by reason of the construction, location, installation, maintenance, operation, relocation or removal of any public telephones operated or located under the authority of this Permit, except to the extent that the claim results from the negligence or willful acts of City employees. The City shall promptly notify Permittee in writing upon receipt of any claim or demand against which the City is, or may be, held harmless by Permittee under this indemnification.
- r. Insurance. Grantee shall comply with the requirements for insurance or other form of financial guaranty, as established by Portland City Code and administrative regulations. Permittee shall maintain on file with the City a certificate of insurance certifying the coverage required under this Section, which certificate shall be subject to the approval of the City Attorney as to the adequacy of the certificate and of the insurance certified under the requirements herein. Failure to maintain adequate insurance as required under this Section shall be a cause for immediate termination of this Permit by the City.
- s. Other Authority Superseded. Upon the effectiveness of this Permit, any and all authority to operate previously granted to Permittee to install, operate and maintain any public telephones in the City Streets by the City is superseded by the Permit.
- t. Notice and Payment.
- (1) Notices, payments, and reports to be submitted to the City under this Permit shall be addressed as follows, or to such other address as the City may specify in writing:
- Manager
Office for Community Technology
111 SW Columbia Street, Suite 600
Portland, OR 97201
Telephone: (503) 823-5385
comtech@portlandoregon.gov
- and Notices, excluding payments and reports, to be submitted to the City under this Permit shall also be addressed to:
- City Attorney's Office
City of Portland
1221 SW 4th Avenue, Room 430
Portland, Oregon 97204
- (2) Notices to be submitted to Permittee under this Permit shall be addressed as follows, or to such other address as Permittee may specify in writing:

James MacKenzie
 WiMacTel, Inc.
 13515 I Circle
 Omaha, NE 68137
 Telephone: (403) 476-0912
jmackenzie@wimcte.com

- u. Choice of Law and Forum. This Permit shall be interpreted, construed and enforced in all aspects in accordance with the laws of the State of Oregon. Any litigation between the City and Permittee arising under or regarding this Permit shall occur, if in the state courts, in the Multnomah County Circuit Court, and if in the federal courts, in the United States District Court for the District of Oregon, Portland Division.
- v. Excused Performance. Neither party shall be held liable for any delay or failure in performance of any part of this Permit caused by circumstances beyond the reasonable control of the party affected, including, but not limited to, acts of the elements or natural disasters, strikes, power failures, civil or military emergencies or acts of legislative, judicial or other civil authorities.
- w. Nonwaiver. The failure of either party to enforce strict performance of any of this Permit shall not be construed as a waiver of its right to assert or rely upon such provision or any other provision of this Permit.
- x. Minority and Women-Owned Businesses. City and Permittee agree that promoting entrepreneurship by minority and women owned businesses (MBEs and WBEs) is a very high priority for the City. To further that objective, Permittee agrees that, in obtaining subcontractors to perform services under this agreement, it will make good faith efforts to use these firms wherever possible. City will assist Permittee by providing lists of MBEs and WBEs and of networks that can provide useful information and contacts, and working with those networks to promote the purposes of this Section.
- y. Severability. If any Section, provision or clause of this Agreement 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 Agreement shall not be affected, unless the City Council determines such section, provision or clause was material to the City's agreement to issue an agreement to the Permittee.

Section 2. Within thirty (30) days after this ordinance becomes effective, Permittee shall file in the Office of the Auditor of the City of Portland a written acceptance executed by an authorized representative of Permittee. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms and provisions set forth in this ordinance. The executed acceptance shall be subject to review and approval by the City Attorney as to form. Any failure on the part of Permittee to file such written acceptance within such time shall be deemed an abandonment and rejection of this Ordinance, and this Ordinance shall thereupon be null and void.

Passed by the Council: JAN 06 2016

Mary Hull Caballero

Prepared by: Mayor Hales
JLi/BWalters
October 20, 2015

Auditor of the City of Portland

By *Susan Sanson*
Deputy

Issue a revocable permit allowing Wimactel, Inc. to install, maintain and operate public telephones on City streets for a period of five years. (Ordinance)

INTRODUCED BY Commissioner/Auditor: Mayor Hales	CLERK USE: DATE FILED <u>DEC 22 2015</u>
COMMISSIONER APPROVAL Mayor—Finance and Administration - Hales <i>[Signature]</i> Position 1/Utilities - Fritz Position 2/Works - Fish Position 3/Affairs - Saltzman Position 4/Safety - Novick	Mary Hull Caballero Auditor of the City of Portland By: <u><i>[Signature]</i></u> Deputy
BUREAU APPROVAL Bureau: OMF/BRFS, Revenue <i>[Signature]</i> CAO: Fred Miller CFO, Bureau Head: Kenneth L. Rust Division Head: Thomas W. Lannom	ACTION TAKEN: DEC 30 2015 PASSED TO SECOND READING JAN 06 2016 9:30 A.M.
Prepared by: Jennifer Li Date Prepared: 10/19/2015	
Impact 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 Attorney Approval: required for contract, code easement, franchise, comp plan, charter <i>[Signature]</i>	
Council Meeting Date 12/30/2015	

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	1. Fritz	✓	
2. Fish	2. Fish	✓	
3. Saltzman	3. Saltzman	—	
4. Novick	4. Novick	✓	
Hales	Hales	✓	