

ORDINANCE NO. 2344

AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO EXTENET SYSTEMS, INC.

Recital

A. ExteNet Systems, Inc. wishes to install small wireless facilities in City rights of way and has requested a franchise from the City to do so. The City is willing to issue a franchise.

B. A recent Federal Communications Commission (FCC) order restricts the City's ability to control its right-of-way relating to small wireless facilities. The franchise agreement authorized by this Ordinance recognizes the City's need to comply with the FCC order. The FCC order has been legally challenged, and the franchise agreement contains provisions that would govern if the FCC order ceases to be effective.

THE CITY OF BEND ORDAINS AS FOLLOWS:

Section 1. Grant of Authority. City grants to Franchisee the right and privilege, subject to all City of Bend ordinances, policies, rules and regulations, to construct, install, maintain and operate over, in, on and under the present and future City rights of way of the City of Bend, facilities necessary for the purpose of providing telecommunication services. This franchise is not exclusive, and City reserves the right to grant a similar privilege to any other person or entity at any time during the period of this franchise. This grant is further subject to all prior rights, interests, agreements, permits easements or licenses granted by the City, and to the City's right to use the rights of way for any purpose it deems fit, including the same or similar purposes allowed Franchisee.

Section 2. Terms of Franchise. This franchise is granted on the terms stated in the Franchise Agreement attached as Exhibit A.

Section 3. Authority of City Manager. The City Manager is authorized to sign the Franchise Agreement with Franchisee in substantially the form attached as Exhibit A.

Section 4. Emergency. An FCC order is now in effect that imposes immediate requirements on local governments. This ordinance is necessary for the immediate preservation of the peace, health and safety of the City and takes effect immediately upon adoption and signature.


Section 5. Effectiveness. This Ordinance shall only be effective if Franchisee signs the Franchise Agreement within 30 days of passage of this ordinance and provides a certificate of insurance and endorsement to the City covering the insurance required by the Franchise Agreement.

First Reading Date: June 5, 2019

Second Reading Date: June 19, 2019

Adopted by roll call vote on June 19, 2019


YES: Sally Russell, Mayor NO: none
Bruce Abernethy
Barb Campbell
Bill Moseley
Justin Livingston
Gena Goodman-Campbell
Chris Piper



Sally Russell, Mayor

ATTEST:


Robyn Christie, City Recorder

Approved as to form:


City Attorney's Office

NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE AGREEMENT BETWEEN THE CITY OF BEND AND EXTENET SYSTEMS, INC.

This Agreement is between the City of Bend, an Oregon municipal corporation ("City") and ExteNet Systems, Inc., a Delaware corporation ("Franchisee").

Section 1. Definitions.

Any terms defined in the Bend Code and not in this Agreement have the meaning provided by the Bend Code.

"Facilities" means the conduits, cables, optic fibers, poles, wires, vaults, fixtures, aboveground and underground lines, antennae, support mast and mounts, amplifiers, receivers, equipment cabinets, through bolts, washers, nuts, power supply cabinets, power meters, grounding or bond wires, enclosures, cabinets, battery back-up units, and other physical components and related equipment of Franchisee's Telecommunication System that are in compliance with applicable laws, rules and regulations as required by Section 3.

"Gross Revenues" means all revenues derived by Franchisee for the provision of telecommunications services within the city of Bend. Gross Revenues includes rent received for use of Franchisee's Facilities.

"Telecommunications System" means all facilities owned, operated or used by Franchisee to provide telecommunication services, including voice, data and audio and video transmission services, and located in rights-of-way administered by the City.

Section 2. Grant of Authority.

City grants to Franchisee the right to construct, install, maintain and operate Facilities over, in, on, and under present and future City rights-of-way for the purpose of providing telecommunication services on the terms stated in this Agreement.

This Franchise is not exclusive. The City reserves the right to grant a similar franchise to any other person or entity at any time during the period of this Agreement. This Agreement is subject to all prior rights, interests, agreements, permits, easements or licenses granted by the City, and to the City's right to use and administer rights-of-way for any purpose.

Section 3. Compliance with Laws, Rules and Regulations.

Franchisee shall comply with all applicable federal, state and City laws, rules and regulations, including but not limited to Bend Development Code Title 3, other provisions or revisions of the Bend Code, and City ordinances. The locations and methods of installation and maintenance of all Franchisee's Facilities shall be subject at all times to regulation by the City (including City's ordinances, standards and specifications, and regulations on street cuts and use of rights-of-way). Franchisee must obtain right-of-way permits prior to installation or construction of Facilities. Franchisee must develop, site, construct, install, and at all times maintain and operate all Facilities

in accordance with telecommunications industry standards and City standards, including but not limited to Bend Development Code Chapter 3.7 and as directed by the City Engineer in accordance with the Bend Code.

Section 4. Franchisee Liability, Indemnification of City, and Insurance.

- A. Liability and Indemnification. Franchisee will defend, indemnify, and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as “claims”) that may be based on, or arise out of damage or injury, including death, to persons or property caused by or resulting from any act or omission sustained in connection with the performance of this Agreement or by conditions created thereby or based upon violation of any statute, ordinance or regulation. This indemnification does not apply to claims caused by the negligence or willful misconduct of the City, its officers, agents, employees and volunteers. Franchisee agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.

- B. Insurance. Franchisee must purchase and maintain, at Franchisee’s expense during the term of this Agreement, commercial general liability and commercial automobile insurance covering bodily injury and property damage in an amount of \$2 million per occurrence and \$4 million in aggregate. The insurance policies obtained by Franchisee shall be primary and non-contributory. Franchisee shall remain fully responsible for any claims resulting from negligence or intentional misconduct of Franchisee or its subcontractors and their officials, agents and employees in performance of this Agreement, even if not covered by, or in excess of insurance limits.

Commercial general liability coverage must name, by certificate and endorsement, the City, its officers, agents, employees and volunteers as additional insureds with respect to Franchisee’s work or services conducted under this Agreement. Franchisee will require that its insurance carrier give the City 30 days’ written notice of any cancellation of or reduction in insurance coverage. Any failure to comply with this provision will not affect the insurance coverage provided to City.

Franchisee must obtain and maintain workers’ compensation insurance as required by ORS Chapter 656 and meeting the minimum requirements therein. Franchisee must ensure that each contractor and subcontractor obtains and maintains workers’ compensation insurance and that the carrier notifies the state of Oregon or files a guaranty contract with the State of Oregon Workers’ Compensation Division before performing work.

Coverages provided by Franchisee must be underwritten by an insurance company authorized to do business in the state of Oregon and with a Best’s rating of A-VII or higher.

As evidence of the insurance coverage required by this Agreement, Franchisee must provide a certificate of insurance and signed endorsement from the carrier(s). The certificate and endorsement must provide that there will be no cancellation, termination, material change or reduction in limits of the insurance coverage without a minimum 30-day written notice to City. The certificate and endorsement must also state the deductible or self-insured retention level. This Agreement will not be in effect until the required certificate and signed endorsement have been received and approved by City. Renewal certificates and endorsements must be sent to City at least 10 days prior to coverage expiration. The City may terminate this Agreement for failure to maintain the required insurance.

- C. Waiver of Subrogation. Franchisee grants a waiver of subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Franchisee's work or service. Further, Franchisee agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance, recovery will be solely with its insurance carrier, and also grants to City, on behalf of any insurer providing coverage to either Franchisee or City with respect to the work or services of Franchisee, a waiver of any right to subrogation which any insurer or subcontractor may acquire against City by virtue of the payment of any loss under such insurance coverage.

Section 5. Performance Bond.

Before commencing any work in any right-of-way administered by the City, Franchisee must provide a performance bond in the amount of \$100,000, or a lesser amount as agreed to in writing by the City as being sufficient to assure proper restoration of any street, sidewalk or other surface disturbed by Franchisee. Franchisee must keep the bond in full force and effect during any activities that disturb the surface of any rights-of-way and for a period of at least one year after restoration of rights-of-way. The bond may be withdrawn one year after restoration of rights-of-way, but must be restored prior to any further action that would disturb any street, sidewalk, or other surface. The bond must be issued by surety authorized to do business in the state of Oregon and with a Best's rating of A- VII or higher.

City may, in the event of any construction which is likely to be substantially greater than \$100,000, or in the event the City's cost to complete or repair the construction upon Franchisee's failure to perform the same would be greater than \$100,000, as reasonably determined by the City, require the amount of the performance bond to be increased. The performance bond is subject to increase each time Franchisee applies for permits to perform work within the city of Bend. Franchisee must provide to City all necessary documentation demonstrating Franchisee's cost estimation in a format reasonably acceptable to City.

Section 6. Construction and Conditions on Right-of-Way Occupancy.

- A. Use.** Franchisee must conduct its operations under this Franchise, including installation, construction, operations, and maintenance of its Facilities, in compliance with all lawful governmental regulations and in a safe, competent, and skillful manner so as not to present a danger to the public or City. Franchisee must construct, install, maintain and operate its facilities in designated City rights-of-way to industry standards and City's commercially reasonable satisfaction, in compliance with all City ordinances, rules, standards and specifications, policies and regulations, in a manner so as to interfere as little as practicable with traffic and other use of rights of way, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the rights of way, including existing and future City services. All work in City right-of-way requires a permit and a traffic plan that is fully compliant with the City of Bend Design Standards and Specifications, prior to the start of any work.
- B. Construction.** Prior to beginning construction, Franchisee must provide the City Engineer with a construction schedule for work in City rights-of-way. When construction is complete, Franchisee must provide the City Engineer with a map showing the location of installed Facilities in City rights-of-way, as built. The City Engineer may require additional information on the as built drawings.
- C. Restoration.** In case of any disturbance of pavement, sidewalk, driveway, or other surfacing by Franchisee, Franchisee must, at its own cost and expense and in compliance with the City's standards and specifications, promptly replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley disturbed. Franchisee warrants all restoration work for a period of one year from completion of the work. If Franchisee fails to make restoration as required by this section within a reasonable timeframe following written notice from City to Franchisee or if the restoration fails within the one year warranty period, City may cause the repairs to be made at the expense of Franchisee. If Franchisee fails to reimburse the City for any costs incurred under this section within 45 days' of demand for reimbursement and such failure is not a result of a good faith dispute between City and Franchisee, City may refuse to issue additional permits.
- D. Notification.** Franchisee must comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations.
- E. Relocation.** City may require Franchisee to relocate its Facilities. If the removal or relocation of Facilities is caused directly by an identifiable development of property or other third-party project and the removal or relocation of Facilities occurs within the area to be developed, or is made for the convenience of a customer, Franchisee may charge the expense of removal or relocation to the developer or customer. Franchisee will be solely responsible for enforcing collection from the developer or customer. If the removal or relocation of Facilities results from City's need to provide public facilities, a City project, or is otherwise requested by City or is made for the purpose of improving a street to

City standards or other improvement for the benefit of the public, Franchisee will remove or relocate its Facilities at Franchisee's expense within a reasonable time frame after notification by City. City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities within City rights-of-way. In cases of capital improvement projects undertaken by City, Franchisee must convert existing overhead distribution Facilities to underground at Franchisee's expense if requested to do so by City. City agrees to comply with provisions of applicable law when requiring such conversion. In the event that City receives third party funding for a City project or improvement to a City street that covers Franchisee's expenses, City will remit payment to Franchisee from the third party funding for reimbursement for Franchisee's relocation expenses.

- F. Placement of Facilities. Franchisee will not knowingly place its Facilities where they will interfere with any existing or future City utility, gas, electric, or telephone fixture or power, sanitary sewer, storm sewer, or water facility. Franchisee must consult with City Engineer prior to placement of Facilities, and will comply with all City ordinances, policies, rules, and regulations in connection with its placement of Facilities. Whenever all existing electric utilities, cable facilities and telecommunications facilities are located underground within a public right-of-way in the city of Bend, Franchisee must also locate or relocate its facilities underground.
- G. Temporary Rearrangement of Facilities. Franchisee must, consistent with City policies, ordinances, rules, and regulations, arrange to temporarily raise, lower, or otherwise move its Facilities to permit the moving of buildings or other objects if the person or entity wishing to move the building or other object makes a reasonable arrangement to reimburse Franchisee for its expenses in rearranging its Facilities. Nothing in this section precludes City from requiring Franchisee to move its Facilities at Franchisee's expense when public convenience requires the move.

Section 7. Transfer of Franchise.

Franchisee may not sell, assign, dispose of, or transfer in any manner whatsoever any interest in this Franchise or in the Facilities authorized by this Agreement, or any part of the Facilities, without prior written approval of City, which approval will not be unreasonably withheld. The City may impose reasonable conditions on any such approval, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Agreement. City has the right to collect from Franchisee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee. Use of Franchisee's Facilities by third parties shall not constitute an assignment or transfer of privileges for purposes of this Agreement.

Section 8. City Rights in Franchise.

- A. City Supervision and Inspection. City has the right to supervise all construction or installation of Franchisee's Facilities subject to the provisions of this Agreement and make such inspections as it finds necessary to insure compliance with governing laws, ordinances, rules, and regulations.
- B. Termination or Abandonment of Agreement. Upon any termination of this Agreement, all Facilities installed or used by Franchisee must be removed by Franchisee at Franchisee's expense and the property upon which the Facilities were used restored by Franchisee to the condition it was in before installation.
- C. Co-location. Franchisee must offer the City the opportunity to co-locate City conduit and lines in trenches dug by Franchisee in City rights-of-way and may charge City only any incremental additional costs incurred in making the trenches available for City use.

Section 9. Franchise Fee.

- A. Except to the extent prohibited or limited by federal or state law or regulation, Franchisee must pay quarterly to City the sum of 5% of Franchisee's Gross Revenues.
 - 1. The fee required by this section is due and payable within 60 days after the end of each calendar quarter. Any payment not made when due will bear interest at the rate of 9% per annum, compounded monthly, from the date due until paid.
 - 2. With each payment, Franchisee must furnish City with a written statement in the format as provided in Exhibit A, executed under oath by an officer of Franchisee, verifying the amount of Gross Revenues of Franchisee within the city of Bend for the quarterly period covered by payment.
 - 3. City's acceptance of any payments due under this section will not be considered a waiver by City of any breach of this Agreement.
 - 4. Franchisee agrees and covenants that it will not challenge the validity of the franchise fees under this Agreement as long as they do not exceed the maximum amounts established by applicable statutes.
- B. The Federal Communications Commission has issued an order that limits the charges a local government can impose on Small Wireless Facilities (SWFs). Franchisee intends to establish an SWF system. While the FCC order remains in effect, as to any SWF installed or operated under this Franchise Agreement, Franchisee shall pay to City a fee of \$270 per year for each SWF in City rights-of-way in lieu of the Franchise Fee

established in Subsection 9.A. If the FCC order is withdrawn or invalidated as to the limitation on fees, Franchisee shall pay the Franchise Fee as stated in Subsection A, or the maximum allowed by any valid federal or state law, regulation or order, whichever is less. Franchisee will submit an annual report by January 30 of each year of the number of SWFs in City rights-of-way in the form of Exhibit B. If Franchisee has both SWFs and other facilities not related to its SWF network in City rights-of-way, Franchisee shall pay the Franchise Fee required in Subsection A as to revenues attributable to its non-SWF system, as well as the per SWF fee in Subsection 2.

C. The Franchise Fee is in addition to any permit fee required to comply with Section 3.

Section 10. Franchisee Records and Reports

Franchisee must keep accurate books of financial accounts at an office within the state of Oregon throughout the term of this Agreement and for three years after the expiration or termination of this Agreement. Franchisee must produce all books and records directly concerning its Gross Revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon no less than 10 days prior written notice, during normal working hours. City may require periodic reports from Franchisee relating to its operation within the boundaries of the City of Bend. City has the right during the term of this Agreement or within 180 days thereafter to conduct audits of Franchisee's records for the three years prior to the audit. If the audit reveals intentional non-payment of the fee, the City may expand the audit to cover up to 25 years. Such audits will be undertaken by a qualified person or entity selected by City. The cost of any such audit will be borne by City, unless the results of any such audit reveal an underpayment of more than 8% of the franchise fee for the period audited. In the case of such underpayment, Franchisee must pay the full cost of such audit. Franchisee must immediately pay the amount of the underpayment as determined by such audit to City together with 12% per annum interest from the date such payment should have been made to the date the payment is actually made.

Any audit information obtained by City under these provisions will be kept confidential to the maximum extent allowed by Oregon law, except that this obligation does not prevent the City from introducing audit results in any forum where enforcement of the provisions of this Agreement is at issue.

Section 11. Permit and Inspection Fees.

Nothing in this Agreement may be construed to limit the right of City to require Franchisee to pay reasonable costs incurred by City in connection with the issuance of a license or permit, making an inspection, or performing any other service for or in connection with Franchisee or its Facilities, whether pursuant to this Agreement or any ordinance or regulation.

Section 12. Enforcement and Termination of Agreement for Violation.

- A. Default: Time of payment and performance are of the essence in the Agreement. The following are events of default:
1. Default in Payments. The failure of Franchisee to pay City when due any amounts required by the Agreement pursuant to Section 9 and such failure continues for a period of 10 days after the due date.
 2. Default in Other Covenants. The failure of Franchisee to perform any of the covenants and conditions required by this Agreement to be kept and performed by Franchisee, and such failure continues for a period of 30 days after notice from City of such failure. Upon the occurrence of an event of default, Franchisee must pay to City the sum of \$200 per day for each day the default continues along with any additional damages suffered by City as a result of Franchisee's default.
- B. The City may terminate this Agreement for defaults that are not cured within the time allowed by providing 30 days' notice to Franchisee of its intent to terminate. Franchisee may avoid termination by completely curing the default(s), including payment of the penalty required by Subsection A.2 of this section, unless the notice of termination is the third notice of termination within a 12 month period. Franchisee may challenge a notice of termination by providing a written protest to the City Manager within 10 business days of the date of the notice of termination. The City Manager, on receipt of the protest shall either grant the protest, in which case the Agreement will remain in place, or refer the matter to the City Council for a decision. The termination will not become final until after the decision by the City Manager or City Council.

Section 13. Remedies not Exclusive; Waiver.

All remedies granted the City under this Agreement are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Remedies contained in this Agreement are not exclusive and City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to City at law or in equity. Failure to enforce any provision of this Agreement may not be construed as a waiver of a breach of any other term, condition or obligation of this Agreement.

Section 14. Franchise Term.

This Franchise is granted for a term of five years beginning the Effective Date ("Initial Term") and will automatically renew for three successive terms of five years each (each a "Renewal Term"). Franchisee and City may terminate this Agreement at the end of the Initial Term or any Renewal Term by providing notice of termination at least 60 days prior to the end of the Initial Term or relevant Renewal Term. In the event the City adopts code provisions, regulations or standards and specifications applicable to this Franchise

or if state or federal legislation or regulation affects any provision of this Franchise, the Parties, at the request of either Party, may request renegotiation of the Franchise to reflect the changes in law or regulation

Section 15. Severability.

If any section, subsection, sentence, clause or portion of this Agreement is for any reason held invalid or rendered unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity or constitutionality of the remaining portion thereof. If for any reason, the franchise fee is invalidated or amended by the act of any court or governmental agency, then the highest reasonable franchise fee allowed by such court or other governmental agency shall be the franchise fee charged by this Agreement.

Section 16. Notices.

Any notice required or permitted under this Agreement shall be deemed given when received or when deposited with the United States Postal Service, postage prepaid and sent as registered or certified mail addressed as follows:

TO CITY: City Manager
 City of Bend
 710 NW Wall Street
 Bend, OR 97701

TO FRANCHISEE: ExteNet Systems, Inc
 Attn:CFO
 3030 Warrenville Road, Suite 340
 Lisle, Illinois 60532
 With copy to General Counsel at same address

or to such other address as may be specified from time to time by either parties in writing.

The primary contact regarding administration of this franchise for the City is:

Tracy Stabler, Assistant Finance Director
tstabler@bendoregon.gov
541-693-2154

The primary contact regarding administration of this franchise for Franchisee is:

Charles Lindsay, Director, External Relations - West
2000 Crow Canyon Place
San Ramon, CA 94583
clindsay@extenetsystems.com
510-910-7787

The primary contacts may be changed at any time by a written communication, including email, without the need for formal notice.

Section 17. Interpretation / Jurisdiction.

Interpretation of the Agreement shall be governed by laws of the State of Oregon and any legal action relating to this Agreement must be brought in Deschutes County Circuit Court.

CITY OF BEND

FRANCHISEE

Eric King, City Manager
Date: _____

Executive VP & COO
Date: _____

EXHIBIT A

Reporting form for Percentage Franchise Fees (If Applicable)

Company: _____

Reporting Period: _____

| Description | Revenue and Fee Calculation |
|---|-----------------------------|
| Gross revenues | \$ _____ |
| Less: Revenues exempt from franchise fees | |
| Other adjustments to gross revenues | |
| Net revenues subject to franchise fees | \$ _____ |
| Franchise fee | 5% |
| Franchise fee remitted to City of Bend Finance Department PO Box 1024 Bend, OR 97709 | \$ _____ |

Certification by Officer or Authorized Representative:

I declare under the penalties for perjury that the information provided herein is true, complete and accurate to the best of my knowledge and belief.

Signature: _____ Date: _____

Name: _____

Title: _____

EXHIBIT B

REPORTING FORM FOR SMALL CELLS FACILITIES

Number of SWFs _____ x \$270= _____
Annual Recurring Fee Total