

ORDINANCE NO. NS-2355

**AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS
FRANCHISE TO VERIZON WIRELESS (VAW) LLC D/B/A VERIZON WIRELESS**

Recital

- A. The City of Bend ("City") requires utilities to obtain a franchise to place utility facilities in City rights-of-way.
- B. Verizon Wireless (VAW) LLC d/b/a Verizon Wireless ("Franchisee") has applied for a franchise to place small cell wireless telecommunications facilities in City rights-of-way.
- C. 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.

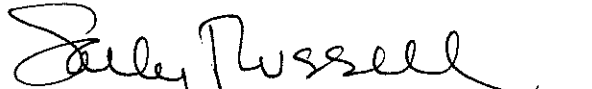
THE CITY OF BEND ORDAINS AS FOLLOWS:

- 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. 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: November 6, 2019

Second Reading and adopted by roll call vote on November 20, 2019.

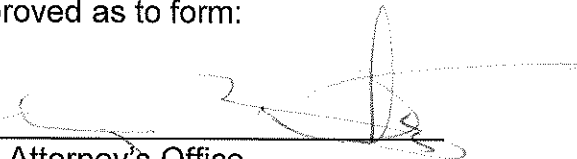
YES: Sally Russell, Mayor NO: none
Barb Campbell
Bill Moseley
Justin Livingston
Gena Goodman-Campbell


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 VERIZON WIRELESS (VAW) LLC d/b/a
VERIZON WIRELESS**

This Non-Exclusive Telecommunications Franchise Agreement ("Agreement") is between the City of Bend, an Oregon municipal corporation ("City"), and Verizon Wireless (VAW) LLC d/b/a Verizon Wireless ("Franchisee").

Section 1. Definitions.

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

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

"Small Wireless Facility" or "SWF" means low-power Facilities used to increase capacity to wireless communication demand areas or provide infill coverage in areas of weak reception, including a separate transmitting and receiving equipment necessary for operation of the facility, or that which is considered a small wireless facility under Federal law.

"SWF Telecommunications System" means all SWFs owned, operated or used by Franchisee within the City 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, restore, replace, and operate Facilities over, in, on, and under present and future City rights-of-way for the purpose of providing telecommunication services over SWF on the terms stated in this Agreement and subject to applicable law.

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.

This Franchise shall be effective when signed by both parties and Franchisee has provided the required certificates of insurance.

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 or public easements). Franchisee must obtain all required 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 and specifications, 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 are caused by or arise out of damage or injury, including death, to persons or property caused by or resulting from any negligent, grossly negligent, willful wanton, or intentionally wrongful 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 maintain, at Franchisee's expense during the Term of this Agreement, commercial general liability with a limit of \$2,000,000 per occurrence for bodily injury and property damage, and \$4,000,000 general aggregate, and commercial automobile insurance in an amount of \$2,000,000 combined single limit, each accident for bodily injury and property damage. 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 employees in performance of this Agreement.

Commercial general liability coverage must include, by blanket additional insured endorsement, the City, its officers, and employees as additional insureds as their interest may appear under this Agreement, with respect to Franchisee's work or services conducted under this Agreement. Upon receipt of notice from its insurer(s), Franchisee shall give the City 30 days' written notice of any cancellation of insurance coverage that is not replaced. Any failure to comply with this provision will not affect the insurance coverage provided to City.

Franchisee must obtain and maintain workers' compensation insurance in compliance

with the statutory requirements of ORS Chapter 656. Franchisee will require any contractors or subcontractors to obtain and maintain substantially the same coverage with substantially the same limits as required of Franchisee, including the City as an additional insured as their interests may appear, and providing the City with a certificate of insurance evidencing such coverage.

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 blanket additional insured endorsement from the carrier(s). This Agreement will not be in effect until the required certificate and blanket additional insured endorsements have been received and approved by City, which reasonable approval may not be withheld or delayed. Renewal certificates will be provided to City upon receipt by Franchisee. The City may terminate this Agreement for failure to maintain the required insurance. Franchisee will provide thirty (30) days' notice of any cancellation of coverage required hereunder that is not replaced. In the event Franchisee changes insurance providers, Franchisee shall provide the City with new certificate of insurance and blanket additional insured endorsement from the carrier(s) upon receipt by Franchisee.

C. Waiver of Subrogation. Franchisee grants a waiver of subrogation to the City, its officers, and employees for any claims arising out of Franchisee's work or service hereunder. 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 in accordance with industry standards and 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 obtain all necessary land use approvals and permits. When construction is complete, Franchisee must provide the City Engineer as-built drawings with a map showing the location of installed Facilities in City rights-of-way as required by City codes, standards and specifications, and building requirements. The City Engineer may require additional information on the as-built drawings to ensure the drawings comply with such City codes, standards, and specifications.

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 the required time frame under the City's standards and specifications, 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 such actual 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 until the restoration costs are paid.

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. For any relocation required under this section, City will make a reasonable effort to provide Franchisee with a mutually agreeable alternate location for its Facilities within City rights-of-way, or allow Franchisee to temporarily remove or relocate its Facilities for the duration of the City Project and allow Franchisee the opportunity to replace its Facilities in the same or similar location after completion of such City Project, consistent with City approval for Franchisee's location of the Facility.

1. Third party relocation. If the relocation of Facilities is caused directly by an identifiable development of property or other third-party project, Franchisee may charge the all expenses of removal or relocation to the third party. Franchisee will be solely responsible for enforcing collection from the third party.

2. City relocation. If the relocation of Facilities results from City's need to provide public facilities, a City-funded project, or is made for the purpose of improving a street to City standards or other improvement for the benefit of the public (a "City Project"), Franchisee will relocate its Facilities at Franchisee's expense within a mutually agreeable timeframe after receipt of notification by City. 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 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 locate or relocate its facilities underground, except to the extent such facilities must remain above-ground to operate. In cases of capital improvement projects undertaken by City where overhead utilities are converted to underground installations, Franchisee must also convert existing overhead distribution Facilities to underground at Franchisee's expense if requested to do so by City, except for those portions of the Facilities that must be above-ground to operate. City agrees to comply with provisions of applicable law when requiring such conversion and to do so in a non-discriminatory manner.

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. Notwithstanding the foregoing, no City approval is required for any assignment, disposal, or transfer of this Franchise or the Facilities to an affiliate of Franchisee or its parent company.

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 ensure 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 within one hundred twenty (120) days after such termination, 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 and the order promulgated by the Federal Communications Commission described below, Franchisee must pay a franchise fee on an annual basis to City the sum of \$1,500 per small wireless facility (the "Franchise Fee").

B. The Federal Communications Commission issued an order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order* (September 26, 2018) (the "FCC Order") that limits the charges a local government can impose on SWF. Franchisee intends to establish an SWF Telecommunications 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, commencing as of the date of such withdrawal or invalidation, Franchisee shall pay the Franchise Fee as stated in Subsection A, above.

C. The Franchise Fee required by this section is due and payable within 60 days after the end of each calendar year. Any payment not made when due will bear interest at the rate of 9% per annum, compounded monthly, from the date due until paid. Together with each payment of the Franchise Fee, Franchisee will submit an annual report listing of the number of SWFs in City rights-of-way in the form of Exhibit A.

D. Except to the extent prohibited by Federal or State law, the Franchise Fee is in addition to any fee required to comply with the Bend Development Code and Bend Municipal Code, and subject to the application fees as permitted under the FCC Order for any and all applications for SWF. So long as there are only SWF in the Right of Way, the City will not collect from Franchisee the utility license fee authorized under Chapter 3.20 of the Bend Municipal Code.

E. 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 law. City's acceptance of any payments due under this section will not be considered a waiver by City of any breach of this Agreement.

Section 10. Franchisee Records and Reports

Franchisee must keep accurate books of financial accounts 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 SWF in the City, and other information reasonably requested 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 related solely to Franchisee's operations of SWFs in the City. If the audit reveals intentional underpayment or non-payment of the Franchise Fee, the City may expand the audit to cover up to the date on which this Agreement was approved by the Bend City Council. 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, subject to any limitation imposed by Federal or state law.

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. City will provide Franchisee a courtesy notice of such default. However, failure by the City to provide such notice shall not eliminate the default caused by Franchisee's failure to pay City when due any amounts required by this Agreement.

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, or if the nature of the default is such that more than 30 days are required, and the failure continues past any longer period agreed to by the City, Franchisee must pay City \$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), 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. The City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to the 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.

With a copy to:

Verizon Wireless (VAW) LLC
d/b/a Verizon Wireless
Attn: Pacific Market General Counsel
15505 Sand Canyon Avenue
Irvine, CA 92618

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 Agreement for the City is the John Printz, Senior Management Analyst, email: jprintz@bendoregon.gov, phone 541-323-8569, and for Franchisee _____. 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 the state or federal courts located in Deschutes County.

CITY OF BEND

VERIZON WIRELESS (VAW) LLC
d/b/a VERIZON WIRELESS

Eric King, City Manager
Date: _____

By: _____
Its: _____
Date: _____

EXHIBIT A

Reporting form for Franchise Fees (If Applicable)

Company: _____

Reporting Period: _____

Description	Revenue and Fee Calculation
Number of small cell facility sites	_____
Franchise fee rate	\$270 per site while FCC Order is in place OR \$1500 per site beginning as of the date on which the FCC Order is withdrawn or invalidated.
Total Franchise fee due to City of Bend	\$ _____

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: _____

Return to:

City of Bend Finance Department

PO Box 1024

Bend, OR 97709