

Franchise 0002

**NON-EXCLUSIVE FRANCHISE AGREEMENT**

**BETWEEN**

**THE CITY OF BEND, OREGON**

**AND**

**TDS BROADBAND SERVICE LLC**

**Adopted by the City of Bend, Ordinance No. 2392**

## NON-EXCLUSIVE FRANCHISE AGREEMENT

This Franchise Agreement ("Agreement") is between the City of Bend, an Oregon Municipal Corporation ("City"), and TDS Broadband Service LLC, a Delaware limited liability company with offices at 525 Junction Road, Madison, Wisconsin 53717 ("Franchisee").

### UNDERSTANDING

A. Franchisee owns and operates a Cable System serving the Franchise Area under an existing agreement (Ordinance No. NS-1465 adopted on December 2, 1987, as amended by Ordinance No. NS-1749, adopted June 7, 2000, and extended by Ordinance No. NS-2336, adopted May 15, 2019 and as further extended through December 31, 2020, by mutual agreement dated October 28, 2019). Franchisee provides other services, including telecommunications services, over its Cable System.

B. Franchisee desires to continue to operate the Cable System and to provide services to its Subscribers.

### AGREEMENT

Based on the above understanding, the City and Franchisee agree as follows:

#### 1. Definitions

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

For purposes of this Agreement, the following definitions will apply:

"Cable Act" means Title VI of the Communications Act of 1934 as amended.

"Cable Service" has the meaning set forth in 47 U.S.C. Sec. 522 as in effect on the date of adoption of this Agreement.

"Cable System" has the meaning set forth in 47 U.S.C. 522 as in effect on the date of adoption of this Agreement.

"Facilities" will mean any distribution or transmission component of a Cable System, including amplifiers, cabinets, cables, conductors, conduits, converters, drains, ducts, manholes, pedestals, poles, splice boxes, surface location markers, vaults, wires, and other property and equipment as may be necessary and appurtenant to the operation of a Cable System located within any Right-of-Way or Public Place within the City by virtue of the rights granted under this Agreement or any predecessor Agreement.

"FCC" means the Federal Communications Commission.

“Franchise Area” means the area within the boundaries of the City and will include any additions thereto by annexation or other legal means.

“Gross Revenues” means all revenues of the Franchisee received from the operation of the Cable System to provide Cable Service within the Franchise Area, adjusted for nonpayment. Gross Revenues will not include amounts collected as late fees or deposits or for services not defined as Cable Services.

“Independent and Qualified Auditor” means a person or entity that (i) is a certified public accountant and a member in good standing with the American Institute of Certified Public Accountants (“AICPA”) and the licensing authority for the jurisdiction(s) where the auditor is licensed to practice; (ii) is not, for any purpose other than the audit, an officer, employee, or agent of the City; (iii) is independent as that term is used in the Code of Professional Conduct of the AICPA, including the Principles, Rules, and Interpretations of such Code; and (iv) is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.

“Law” means any applicable state, federal and local law, ordinances and regulations.

“Public Place” means any City-owned property that is open to the public and that is not a Right-of-Way and includes public squares and parks. Public Places do not include any public squares and parks owned by Bend Parks and Recreation District.

“Rights-of-Way” means the space on, above or below the surface of the public streets, roads, highways, freeways, bridges, sidewalks, lanes, courts, ways, alleys, boulevards, and places including, without limitation, all public utility easements and public service easements now or hereafter within the City’s jurisdiction.

“Subscriber” means any person who lawfully receives Franchisee’s Cable Service.

“Unserved Household” means any single family residential home within a portion of the Franchise Area not then passed by Franchisee’s Cable System.

## **2. Grant of Franchise - Non-Exclusive Franchise**

The City grants to Franchisee a non-exclusive franchise to operate a Cable System serving the Franchise Area and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, and extend its Facilities, in, through, along, among, upon, across, above, over, under or in any manner connected with the Rights-of-way for the purpose of providing Cable Services and other communications and information services throughout the Franchise Area, subject to the terms and conditions of this Agreement and applicable law. This franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity. This Franchise is subject to prior rights, interests,

agreements, City codes, permits easements or licenses granted by the City, and to the City's and the public's right to use and administer Rights-of-way.

### **3. Term and Effective Date**

A. This Agreement shall become effective January 1, 2021, or the date on which Franchisee has accepted this Franchise, whichever comes later (the "Effective Date").

B. The term of this Agreement will be for a period of ten (10) years from the Effective Date, and shall automatically renew for an additional ten-year term, unless sooner terminated as provided in this Agreement.

### **4. Renewal**

This Agreement may be renewed in accordance with the renewal provisions of the Cable Act.

### **5. Compliance with Laws, Rules and Regulations**

To the extent consistent with and not preempted by federal law, Franchisee shall comply with all City laws and regulations (including Bend Code Title 3, other provisions or revisions of the Bend Code, and City ordinances, regulations, and standards and specifications and as directed by the City Engineer in accordance with the Bend Code) in constructing, installing, maintaining, repairing, replacing, upgrading and operating its Facilities in the Right-of-Way and in Public Places for which Franchise is granted permission to occupy under this Franchise. Permits must be obtained prior to installation or construction of Facilities in Public Places. Where protection of the public health or safety or outage restoration requires emergency work to be performed, Franchisee may undertake work immediately to repair a break or restore service without a permit but must inform the City as soon as practical after the work is commenced, and, at the request of City, Franchise shall submit documentation and/or a permit application in such form as is reasonably satisfactory to City describing the emergency work so performed. All Facilities shall be installed and at all times maintained by Franchisee in accordance with the National Electrical Safety Code, ANSI Standards and any applicable utility industry standards. The precise location of lines shall be determined through the permitting process.

### **6. Franchise Fee**

A. **Percent of Gross Revenues.** During the term of this Agreement and any extension, Franchisee will pay to the City an annual franchise fee in an amount equal to five percent (5%) of Gross Revenues computed in accordance with Generally Accepted Accounting Principles.

B. **Quarterly Payments.** The franchise fee will be paid quarterly. Franchisee will pay the franchise fee to the City within forty-five (45) days of the last day of the calendar quarter for which a fee payment is due. With each payment, Franchisee will provide the City with a financial report indicating the Gross Revenues for that period. With respect to

any amount or portion thereof due hereunder that is not disputed in good faith by Franchisee, City shall have the right to charge interest at the rate of five percent (5%) per annum. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this Agreement.

**C. Reasonable Access to Records.** Franchisee will provide the City with reasonable access to Franchisee's records documenting the Gross Revenues as defined in this Agreement not more than once annually upon reasonable notice. Franchisee will comply with all reasonable requests for information directly related to the calculation for Gross Revenues in the performance of any audit. The City will agree to appropriate protection for access to confidential or proprietary information.

## **7. Franchisee Records and Report**

**A.** Franchisee must retain accurate records of the financial accounts necessary to confirm the correctness of the franchise fee payments made pursuant to Section 6 for forty-two (42) months following the last day of each year of the Franchise term. Franchisee must produce all books and records directly concerning its Gross Revenue in the City, and other financial and other information reasonably requested by City, upon no less than ten (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.

**B.** City has the right during the term of this Agreement, or within one-hundred and eighty (180) days thereafter, to conduct audits of Franchisee's financial records for the three (3) years prior to the audit related solely to Franchisee's operations of its Facilities in the City. Such audit will be undertaken by an Independent and Qualified Auditor 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 five percent (5%) 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 nine percent (9%) per annum interest from the date such payment should have been made to the date the payment is actually made.

**C.** 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.

## **8. 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.

## **9. Public, Educational, and Governmental Channel**

Franchisee will provide one cable channel for public, educational and governmental use ("Public Access Channel"). City will have primary scheduling authority and shall determine the programming on the Public Access Channel. At a minimum, unless otherwise provided by City in writing, Franchisee shall air live all City Council meetings and any other meetings held by City, for which City provides a video feed to Franchisee. City and Franchisee may agree, through separate written agreement, for Franchisee to provide video recording services for City. City may also arrange for or consent to use of the Public Access Channel by other public, education, and governmental users (including, but not limited to: Deschutes County, Central Oregon Intergovernmental Council, Bend LaPine School District, Bend Parks and Recreation District, Central Oregon Community College, and Oregon State University). Franchisee shall not preempt City's programming without the written consent of City. Franchisee shall insure access to said channel to public, educational and governmental users. Company may use the Public Access Channel for its purposes when City has not provided notice of its own or other public, educational, or governmental users' programming requirements.

## **10. Customer Service Standards**

Franchisee will comply with any customer service standards promulgated by the FCC.

## **11. Discriminatory Practices Prohibited**

Franchisee will make its Cable Services available to all potential Subscribers passed by Franchisee's Cable System based on the terms of this Agreement without discrimination and will not give any person any preference or advantage not available to all persons similarly situated, provided that nothing contained herein will prevent Franchisee from implementing credit, deposit and acceptance criteria or offering

- (a) the temporary reduction or waiving of rates or charges in conjunction with valid promotional campaigns; or,
- (b) reasonable discounts to senior citizens or economically disadvantaged citizens; or,
- (c) rate discounts for Cable Service; or,
- (d) different and nondiscriminatory rates and charges and classes of service for commercial subscribers or for bulk discounts to multiple dwelling units, as allowable by federal law and regulations.

## **12. Construction, Conditions on Right-of-Way Occupancy, Operation and Maintenance of the Cable System**

A. **Use.** Except in the case of emergency work described in this Agreement, all work involving street or sidewalk cuts or protracted lane closures in the City Right-of-Way will require a permit prior to any work being started and payment of the prescribed

permit fee, which permit may not be unreasonably withheld, conditioned or delayed, and will require a traffic plan that is fully compliant with the City of Bend Design Standards and Specifications.

**B. Construction and Maps.** Franchisee's electronic mapped facility data consisting of poles, pad mount transformers, and wire located within the City limits will be provided to the City on an annual basis (one time per year), upon City's request. Attribute information will be limited to facility identifiers. Data can be provided in an ESRI compatible geodatabase with associated metadata or other mutually agreed upon format.

1. With respect to any information, including but not limited to the data, which Franchisee furnishes or otherwise discloses to the City under this section, Franchisee does not make any representations or warranties as to the accuracy, completeness or fitness for a particular purpose thereof. It is further understood and agreed that Franchisee or its representatives shall not have any liability or responsibility to the City or another party or to any other person or entity resulting from the use of any information or data so furnished or otherwise provided. Maps/Data are for general location purposes only and may not accurately identify the exact location of facilities or current construction. No attempt has been made to verify the records to reflect current site conditions and Franchisee is not responsible or liable for any injury, death or damage that may result from differing site conditions.

2. The information furnished by Franchisee under this section is provided with the understanding that the City will treat the information as confidential to the extent possible under the Oregon Public Records Act. If a public records request is made for the information, the City will provide Franchisee with notice of the request and sufficient time to seek a protective order prior to providing the documentation to any third party.

**C. Restoration.** In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Franchisee, Franchisee shall, at its own cost and expense and in compliance with the City's pavement restoration policy and standards and specifications, promptly replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley. 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 or if the restoration fails within the one year warranty period, City may, if Franchisee fails to make necessary repairs within a reasonable timeframe following written notice from City to Franchisee, 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 forty-five (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 shall comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations, as it may be changed or amended.

**E. Relocation.** City may require Franchisee to relocate its Facilities as follows:

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 may require the third party to pay in advance the estimated costs of removal or relocation, with a true-up following completion of the removal or relocation. 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. Failure to relocate as directed by the City may result in referral for citation for violation of Bend Code 3.50.010.

**F. Right-of-Way Vacation; Transfer of Property in Right-of-Way or Public Place; Relocations into Right-of-Way.**

1. City shall retain public utility easements or otherwise require the petitioner of the vacation to grant an easement or obtain an easement in such form and in a location acceptable to Franchisee if City vacates any public Right-of-Way or Public Place where Franchisee has Facilities. If Franchisee's Facilities must be relocated from a vacated public Right-of-Way, the petitioner of the vacation will bear the expense of moving the Facilities and obtaining alternate rights, permits or easements.

2. In the event City conveys, assigns or transfers title to any property within any Right-of-Way or Public Place in which Franchisee has Facilities, as part of said conveyance, City shall either (i) secure from such transferee an easement or other rights allowing for such Facilities to remain in place in a form acceptable to Franchisee or, (ii) if such Facilities are to be relocated, (x) City shall obtain an easement or other rights in such form and in such location as are acceptable to Franchisee, and (y) the expense of relocating the Facilities and obtaining the such easement or other rights shall be borne by City.

3. In the event Franchisee has Facilities located on any private property that is condemned or otherwise acquired by City for the purpose of expanding any existing Right-of-Way or Public Place or creating any new Right-of-Way or Public Place, expenses related to relocation, including the expense of relocating the Facilities and acquiring a new easement or other rights in such form and location as is acceptable to Franchisee, shall be borne by City. In addition, in the event said Facilities remain in place or are relocated within the existing or expanded Right-of-Way or Public Place, notwithstanding the terms of Section 12.E.2 of this Agreement, City shall be responsible for all related relocation costs, including expense of relocating the Facilities and



acquiring a new easement or other rights in such form and location as is acceptable to Franchisee for each subsequent City requested relocation of said Facilities.

**G. Underground Conversion.** With respect to those portions of the Franchise Area served by Franchisee where City has provided written notice that all of the transmission or distribution facilities of all public utilities shall be moved underground, Franchisee shall remove and replace overhead Facilities with underground Facilities at the request of the City. Cost responsibility shall be allocated in accordance with all applicable Oregon Administrative Rules and a schedule agreed upon by the City and Franchisee. The City shall require that each Subscriber served from the existing overhead Facilities shall make all facility changes to the Subscriber's premises in accordance with Franchisee's policies and standards necessary to receive service from the underground Facilities as soon as they become available.

**H. Trees.** Franchisee will have the authority to trim trees upon and overhanging the Rights-of-Way so as to prevent the branches of such trees from coming in contact with Franchisee's Facilities.

**I. Overhead Wires.** Franchisee will temporarily raise or lower its wires to permit the moving of buildings at the request of any person holding a building-moving permit issued by the City. The permit holder will pay the expense of such temporary raising or lowering of wires and the Franchisee will have the authority to require such payment in advance. The permit holder will provide Franchisee with not less than one (1) weeks' advance notice, or such other notice period as may be required by the Bend Code, to arrange for such wire changes.

**J. Maintenance and Operations.** In maintaining and operating the Cable System, Franchisee will schedule any planned interruptions of service, including testing and maintenance interruptions, for the shortest time possible and when there will be a minimum number of Subscribers inconvenienced.

**K. System Extensions.** Franchisee shall comply with all applicable federal and state laws and regulations and Franchisee policies regarding extension of service to Unserved Households. Any extension of the Cable System will be subject to the Franchisee's ability to obtain the necessary easements or Rights-of-Way permits.

### **13. City Rights and Obligations in Franchise**

**A. City Supervision and Inspection.** City shall have the right to inspect all construction and installation of Franchisee's Facilities to insure compliance with governing laws, ordinances, rules and regulations as they relate to the City approved permit.

**B. Termination or Abandonment of Franchise.** Upon any termination of this Franchise, if City and Franchisee are not engaged in efforts to renew or renegotiate this Franchise, (i) all above ground Facilities installed or used by Franchisee shall be removed by Franchisee at Franchisee's expense or de-energized and abandoned in place with approval of the City and the property on which the Facilities were used restored by

Franchisee to the condition it was in before installation; (ii) all underground Facilities installed or used by Franchisee shall be de-energized and abandoned in place.

**C. City's Work in Right-of-Way.** Whenever City shall perform or cause or permit to be performed any work in any Right-of-Way or Public Place where such work may disturb or interfere with Franchisee's Facilities, City shall, or shall require its permittee, to notify, in writing, Franchisee sufficiently in advance of the contemplated work to enable Franchisee to take such measures as may be necessary to protect its Facilities.

**D. City Ordinances and Police Power.** To the extent not inconsistent with applicable Law, the City may adopt and enforce and Franchisee will be subject to City's generally applicable, non-discriminatory, and competitively neutral local ordinances and regulations as may be determined by the City to be in the interest of public health, safety, welfare, convenience or necessity.

#### **14. Insurance**

A. Franchisee will maintain in full force and effect for the term of the Franchise, at Franchisee's expense, a comprehensive liability insurance policy with the City as an additional insured, written by a company authorized to do business in the City's State, protecting the City against liability for loss, personal injury and property damage occasioned by Franchisee's operation of the Cable System. Such insurance will be maintained in an amount not less than two million dollars (\$2,000,000.00) per occurrence for bodily injury and property damage, and four million dollars (\$4,000,000.00) general aggregate, and commercial automobile insurance in an amount of two million dollars (\$2,000,000.00) combined single limit, each accident for bodily injury and property damage. This amount is subject to change every year in accordance with the Oregon Tort Claims Act, ORS 30.271 *et seq.*, and the City may provide written notice requiring additional coverage amounts when the Oregon Torts Claims Act limits exceed two million dollars (\$2,000,000). 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.

B. 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 thirty (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 the City.

C. 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.

D. 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.

E. 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 thirty (30) days written notice to the 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 the City, which reasonable approval may not be withheld or delayed. Renewal endorsements will be provided to the City upon receipt by Franchisee. The City may terminate this Agreement for failure to maintain the required insurance. Franchisee grants 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 shall 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 the insurance coverage.

#### **15. Performance Bond.**

A. Before commencing any work in any Right-of-Way administered by the City, Franchisee must provide a performance bond in the amount of one-hundred thousand dollars (\$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 one (1) year after restoration of Rights-of-Way. The bond may be withdrawn one (1) 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.

B. City may, in the event of any construction which is likely to be substantially greater than one-hundred thousand dollars (\$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 one-hundred thousand dollars (\$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 with the City of Bend. Franchisee must provide to City all necessary documentation demonstrating Franchisee's cost estimation in a format reasonably acceptable to City.

## **16. Indemnification**

The Franchisee agrees to indemnify, save and hold harmless, and defend the City, its officers, boards and employees, from and against any liability for damages and for any liability or claims resulting from property damage or bodily injury (including accidental death), which arise out of the Franchisee's construction, operation, or maintenance of its Cable System in the Franchise Area provided that the City will give the Franchisee written notice of its obligation to indemnify the City within ten (10) days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, the Franchisee will not indemnify the City for any damages, liability or claims resulting from the City's willful misconduct or negligence.

## **17. Transfer of Agreement**

The Franchisee's right, title, or interest in the Franchise will not be sold, transferred, assigned, or otherwise encumbered, other than to an entity controlling, controlled by, or under common control with the Franchisee, without written notice to the City and the City Council's prior approval, which approval shall 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. No such notice will be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Franchisee in the Franchise or Cable System in order to secure indebtedness.

## **18. Other Franchises**

**A. New Franchises.** This Agreement is non-exclusive. Franchisee acknowledges the City's rights to grant one or more competing franchises.

**B. Unfair Competition.** In the event that the City grants any other entity a cable television franchise or other right to provide service in the Franchise Area comparable to the Cable Service provided by Franchisee, the City agrees to amend this Agreement, either on the City's own motion or upon request of Franchisee, so that the terms and conditions imposed on Franchisee by this Agreement will be neither less favorable nor more burdensome than those governing any other such entity, so that one operator will not be granted an unfair competitive advantage over another.

**C. Non Discrimination.** The City agrees that any other franchise or other right to provide Cable Service or other comparable service authorized by the City will be for the City's entire territory with build-out requirements imposed to protect against discrimination consistent with federal and state law.

## 19. Changes in Law or Regulations

A. In the event any change to state or federal law occurring during the Term of this Franchise eliminates the requirement for any person desiring to construct, operate or maintain a Cable System in the City to obtain a franchise from the City for the construction, operation or maintenance of a Cable System, then, Franchisee will have the right to terminate this Franchise and operate the Cable System under the terms and conditions established in applicable law. If Franchisee chooses to terminate this Franchise pursuant to this provision, this Franchise will be deemed to have expired by its terms on the effective date of any such change in law, whether or not such law allows existing Agreements to continue until the date of expiration provided in any existing franchise. Furthermore, in the event any change to state or federal law occurring during the term of this Franchise materially alters the regime of cable franchising applicable to any entities desiring to construct, operate or maintain a Cable System in the Franchise Area in a way that reduces the regulatory or economic burdens for any such entity, then, the Parties will amend this Franchise to similarly reduce the regulatory or economic burdens on Franchisee. It is the intent of this section that, Franchisee will be subject to no more burdensome regulation or provided lesser benefits under this Franchise than any other entities that might construct, operate or maintain a Cable System in the Franchise Area.

B. The FCC issued an order, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 (Third Report and Order), FCC 19-80, adopted August 1, 2019 (the "FCC Order") that limits the regulations and charges a local government can impose on Cable System providers. The FCC Order contained provisions prohibiting local franchising authorities from regulating the provision of any services other than Cable Services offered over the Cable Systems of incumbent cable operators, except as expressly permitted in the Cable Act (the "Mixed Use Rule"). The FCC Order also ruled that cable-related, in-kind contributions required by local franchising authorities from cable operators as a condition or requirement of a franchise agreement are franchise fees subject to the statutory five percent (5%) cap on franchise fees set forth in the Cable Act (the "In-Kind Rule").

C. While the FCC Order remains in effect, operating under this Agreement, Franchisee shall pay to the City a fee as established in Subsection 6,A. In the event that any change to state or federal law occurring during the Term of this Franchise eliminates the prohibition on local franchising authorities regulating the provision of non-cable services by a Cable Service provider over a Cable System, including the Mixed Use Rule, commencing as of the date of such withdrawal or invalidation, Franchisee shall pay to the City the maximum franchise fee allowed under applicable law to be imposed on a Cable System that provides non-cable services, but not to exceed seven percent (7%) of "gross operating revenue" as defined in Bend Code 3.20.010A, received from Franchisee's provision of telecommunications services, in addition to the five percent (5%) franchise fee on Gross Revenues received from Franchisee's provision of Cable Services, computed in accordance with Generally Accepted Accounting Principles. Payment shall be made as described in Section 6 of this Agreement.

D. In the event that any change to applicable law occurring during the Term of this Franchise eliminates the prohibition on local franchising authorities regulating the provision of non-cable services by a Cable Service provider over a Cable System, including the Mixed Use Rule, any terms of this Franchise not otherwise preempted or otherwise inconsistent with federal or state law, will become immediately applicable to all non-cable services provided by Franchisee, including any and all telecommunications services provided by Franchisee and all facilities for telecommunications services installed in the Rights-of-Way within the city limits of the City of Bend.

E. In the event that any change to applicable law occurring during the Term of this Franchise eliminates the inclusion of in-kind services in the total franchise fee subject to the statutory five percent cap on franchise fees, including the In-Kind Rule, commencing as of the date of such withdrawal or invalidation, City may require Franchisee to revert to providing the City with fiber optic internet service, on such terms and conditions as Franchisee provided I-Net services to the City under the previous franchise agreement between the parties, unless otherwise agreed by the Parties, with no deduction from the franchise fee required under this Agreement. The Parties may amend this agreement to include the terms and locations for such service.

## **20. Enforcement and Termination of Franchise**

Unless otherwise defined by City of Bend Code or current Bend Standards and Specifications, in the event that the City believes that the Franchisee has not complied with any material term of the Franchise, the City will informally discuss the matter with Franchisee. If these discussions do not lead to resolution of the problem, the City will notify the Franchisee in writing of the exact nature of such alleged noncompliance.

## **21. Default and Termination.**

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 6 and such failure continues for a period of ten (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 thirty (30) days after notice from City of such failure, or if the nature of the default is such that more than thirty (30) days are required, and the failure continues past any longer period agreed to by the City, Franchisee must pay City two-hundred dollars (\$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 thirty (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 twelve (12) month period. Franchisee may challenge a notice of termination by providing a written protest to the City Manager within ten (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.

## **22. Force Majeure**

The Franchisee will not be held in default under, or in noncompliance with, the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default (including termination, cancellation or revocation of the Franchise), where such noncompliance or alleged defaults occurred or were caused by circumstances reasonably beyond the ability of the Franchisee to anticipate and control, including but not limited to strike, war, earthquake, flood, tidal wave, unusually severe rain or snow storm, hurricane, tornado, or other catastrophic act of nature, or failure of utility service necessary to operate the Cable System, governmental, administrative or judicial order or regulation or other event that is reasonably beyond the Franchisee's ability to anticipate or control. This provision includes work delays caused by waiting for utility providers to service or monitor their utility poles to which the Franchisee's Cable System is attached.

## **23. Entire Agreement**

This Agreement constitutes the entire agreement between the Franchisee and the City and supersedes all other prior understandings and agreements oral or written. Any amendments to this Agreement shall be mutually agreed to in writing by the parties.

## **24. Severability**

If any Section, subsection or provision of this Agreement or its application to any person or circumstances is held invalid or is preempted, such invalidity or preemption will not affect other provisions, sections, subsections or applications of this Agreement.

## **25. Reservation of Rights**

Acceptance of the terms and conditions of this Agreement will not constitute, or be deemed to constitute, a waiver, either expressly or impliedly, by Franchisee of any constitutional or legal right which it may have or may be determined to have, either by subsequent legislation or court decisions. The City acknowledges that Franchisee reserves all of its rights under applicable Federal and State Constitutions and laws.

**26. Rights and Duties of Franchisee upon Expiration of Franchise**

Upon expiration of this Agreement, whether by lapse of time, by agreement between Franchisee and the City, or by termination, Franchisee has the right to remove its Facilities within a reasonable time after such expiration or forfeiture. Any Facilities not removed within one year after the termination or expiration of this Agreement, or such further time as may be granted by the City, the Facilities shall be considered forfeited and escheat to the City.

**27. Notice to Parties**

Notices under this Agreement will be in writing and will be deemed given upon receipt by hand delivery, certified mail return receipt requested, or overnight courier to the following addresses:

To City:

City of Bend  
710 NW Wall St.  
Bend, OR 97703  
Attention: City Manager

To Franchisee:

TDS Broadband Service LLC  
525 Junction Road  
Madison, Wisconsin 53717  
Attention: Legal Department

A party may designate other addresses for providing notice by providing notice in writing of such addresses.

City of Bend

DocuSigned by:  
*Eric King*  
E252C846657E4D8

Eric King, City Manager

Date: 12/9/2020

ACCEPTED AND AGREED TO BY:

TDS Broadband Service LLC

DocuSigned by:  
*Joel Dohmeier*  
45125DD6EFBC4D0...

Joel Dohmeier, Director of Government &  
Regulatory Affairs 12/8/2020 | 12:40 PM MST

Date: \_\_\_\_\_



**CARRIER RELATIONS  
CONTRACT EXECUTION REQUEST FORM (12/07)**

<b>Contract Title:</b>	Franchise Agreement	<b>Contract Date:</b>	01/01/2021
<b>TDS Company Name:</b>	TDS Broadband Service	<b>Contract #</b>	CW2606743
<b>Other Party Name:</b>	City of Bend (OR)		
<b>CMSI Contract Type</b>	<b>Category 1</b>	<b>Category 2</b>	
Carrier Operations	Franchise Agreements		
<b>Length of contract (years or mos.):</b>	Ten (10) years		
<b>Is this Standard TDS Agreement? If changes, what steps have been taken to verify the accuracy and / or completeness of the contract that is attached?</b>	No – Approved by Legal		
<b>Is this an Industry Agreement?</b>	<b>Yes</b>	<b>No</b>	
		<b>X</b>	
<b>Is this another Party Agreement?</b>	<b>X</b>		
<b>Name of outside law firm, if any:</b>			
<b>If another Party's agreement, how do the provisions compare to the standard provisions in a TDS TELECOM agreement?</b>	<b>Remarks:</b>		
<b>What is the revenue or cost impact on a monthly, annual or per contract basis? How were the revenues or costs determined? Please be explicit and provide an attachment if necessary.</b>	<u>Annual Revenue</u> \$0	<u>Annual Expense</u> \$0	
	<u>Total Contract Value</u> \$0		
	<b>Remarks:</b>		
<b>TDS Legal Review. Please attach email ok from TDS TELECOM legal.</b>	<b>Remarks: See attached</b>		
<b>Do you recommend the Agreement be executed as attached?</b>	<b>Yes</b>	<b>No</b>	
	<b>X</b>		
<b>Is CBIT Required?</b>		<b>X</b>	
<b>Settlement/Payment Instructions:</b>			
<b>Remarks/Routing Instructions:</b>			
<b>Signature:</b>	<i>B. Bakunovich</i>	<b>Date Sent:</b>	12/01/2020

From: Ariba Administrator [no-reply@ansmtp.ariba.com]  
To: Bernadette Bakunovich [bernadette.bakunovich@tdstelecom.com]  
Subject: City of Bend Oregon (OR) CW2606743 - Bend Oregon - Franchise Agreement  
2020: Legal Approval was approved by Peter Healy.  
Sent: Tue 12/1/2020 9:44 AM GMT-08:00  
Importance: Normal

Approval Task Notification - Approved

Sent to the approval task owner if the task is approved.

Task title: Legal Approval

Task description : For HRA Only:

1. Select the Legal Approval Task and click View Task Details.
2. In the "3. Provide an initial message" field type, "Requesting permission for (Name of authorized signer) to sign this contract with a Forecasted Contract Amount of (\$xxx,xxx).
3. Click Submit.
4. Wait for legal to send notification of Approved Task.

The following notes might also be helpful to you: Approved. .

Sent by:

You are being sent this email because you are the owner of an approval task that has been approved.

\*\*\*\*\*

This email originated from the Ariba system used by Telephone and Data Systems and was originally sent to: bernadette.bakunovich@tdstelecom.com

System Reference: Click Here

<<http://tdscontracts.sourcing.ariba.com/ad/webjumper?itemID=ADGmAFLDkeTRerK&awch arset=UTF-8>> to access the system.

## ORDINANCE NO. NS- 2392

### AN ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE TO TDS BROADBAND SERVICE, LLC

#### Findings:

A. The City of Bend requires utilities, including cable operators to obtain a franchise to place utility facilities, including a cable system, in City rights-of-way.

B. TDS Broadband Service, LLC, has an existing a franchise agreement for placement and operation of a cable system (Ordinance No. NS-1465 adopted on December 2, 1987, as amended by Ordinance No. NS-1749, adopted June 7, 2000, and extended by Ordinance No. NS-2336, adopted May 15, 2019 and as further extended through December 31, 2020, by mutual agreement dated October 28, 2019), and wishes to enter into another franchise agreement for continued operation of that system.

Based on these findings, the City of Bend ordains as follows:

**Section 1. Grant of Authority.** City grants to Franchisee a non-exclusive franchise to operate a Cable System serving the Franchise Area and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, and extend its Facilities, in, through, along, among, upon, across, above, over, under or in any manner connected with the rights-of-way for the purpose of providing Cable Services and other communications and information services throughout the Franchise Area, subject to the terms and conditions of this Agreement and applicable law. This franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity. This Franchise is subject to prior rights, interests, agreements, City codes, permits easements or licenses granted by the City, and to the City's and the public's right to use and administer rights-of-way.

**Section 2. Terms of Franchise.** This franchise is granted on the terms stated in the Franchise Agreement attached as Exhibit 1.

**Section 3. Authority of City Manager.** The City Manager is authorized to sign the Franchise Agreement with Franchisee in substantially the same form attached as Exhibit 1.


**Section 4. Effectiveness.** This Ordinance shall be void at the City's option if Franchisee fails to sign the Franchise Agreement within 30 days of passage of this ordinance and provide a certificate of insurance to the City covering the insurance required by the Franchise Agreement.

First Reading: November 4, 2020

Second reading and adoption by roll call vote: November 18, 2020

YES: Sally Russell, Mayor  
Bruce Abernethy  
Barb Campbell  
Bill Moseley  
Justin Livingston  
Gena Goodman-Campbell  
Chris Piper

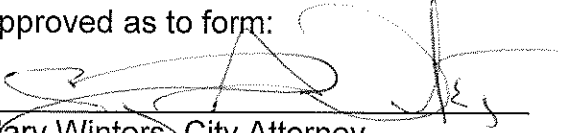
NO: none

  
\_\_\_\_\_  
Sally Russell, Mayor

ATTEST:

  
\_\_\_\_\_  
Robyn Christie, City Recorder

Approved as to form:

  
\_\_\_\_\_  
Mary Winters, City Attorney