

**ORDINANCE NO. 527**

**AN ORDINANCE GRANTING PORTLAND GENERAL DISTRIBUTION COMPANY, AN OREGON CORPORATION, A FRANCHISE TO OPERATE A COMPETITIVE TELECOMMUNICATIONS BUSINESS WITHIN THE CITY OF WILSONVILLE AND TO PLACE, ERECT, MAINTAIN, LAY AND OPERATE IN, UPON, OVER AND UNDER THE PUBLIC RIGHTS OF WAY NECESSARY WIRES AND OTHER APPURTENANCES FOR COMMUNICATIONS PURPOSES WITHIN THE CITY OF WILSONVILLE.**

WHEREAS, the City of Wilsonville wishes to enter into a franchise agreement with PORTLAND GENERAL DISTRIBUTION COMPANY to provide competitive telecommunications services within the city;

NOW, THEREFORE, THE CITY OF WILSONVILLE ORDAINS AS FOLLOWS:

Section 1: The City of Wilsonville (City), grants to PORTLAND GENERAL DISTRIBUTION COMPANY, an Oregon corporation (Grantee), a franchise to operate as a competitive telecommunications provider as defined by ORS 759.005 within the City of Wilsonville. Grantee has the right to place and maintain poles, wires and other equipment for telecommunications purposes within City streets and public rights of way as set forth herein. Such wires and other equipment must be laid underground unless the City specifically permits wires to be strung upon poles or other fixtures above ground.

Section 2: After receiving applicable City permits. Grantee may make needed excavations in any street or public right of way in the City for the purpose of placing and maintaining poles or other supports of conduits for wires and equipment or repairing or replacing the same. All work must be done in compliance with City ordinances, regulations or orders, including, but not limited to, Wilsonville Public Works Standards.

Section 3: (A) Prior to commencing any work, the Grantee shall file with the City Engineer maps and materials showing all proposed underground construction work to include the installation of additional facilities or relocation or extension of existing facilities within or adjacent to any street, alley, road or other public right of way or place within the corporate limits of the City, or without the corporate limits should the City control any such streets, alleys, roads or other public rights of way or places. The City will review the materials submitted and notify

the Grantee of any City requirements within five (5) working days of submittal. For repair work or other work not considered underground construction as stated above, the Grantee shall notify the City in writing of the location and general description of the work before beginning work unless such work is occasioned by emergency or other exigent circumstances, and in that event, notification shall occur as is practicable thereafter within thirty (30) days.

(B) Grantee shall respond to requests for information which pertain to the Grantee's operations within the City and are relevant to the franchise, to the extent that information requested does not pertain to "proprietary secrets" that the Grantee does not wish to be made available to its competitors. To the extent that information requested from the Grantee falls into the classification of "proprietary secrets" and is still deemed essential to the City, then Grantee shall make such information available to the City Engineer under a confidentiality agreement.

(C) Within thirty (30) days of completion of each segment of Grantee's network within the City, Grantee shall supply the City Engineer, without charge, a complete set of Mylar "as built" drawings and maps for that segment. After each replacement, relocation, reconstruction or removal. Grantee shall promptly notify the City Engineer of the exact change made and shall, within thirty (30) days provide the City Engineer with a new set of Mylar "as built" drawings and maps for each modified segment. Grantee shall annually supply the City Engineer, without cost, a complete set of maps for the entire network installed within the city, including the backbone transmission system and all lateral circuits, not later than the 31st day of December.

(D) If the City requests and Grantee routinely maintains, the data and mapping called for in this section in a computer format and storage medium readily compatible with the City's computer capabilities. Grantee shall provide such information including, but not limited to, CAD system mapping, and drawings. Information provided in electronic format may not be in lieu of maps required in Section 3(C) of this agreement until such time as the Oregon State Archivist approves electronic media for long term records retention purposes.

(E) All work shall be done in a reasonably safe manner, taking into account City-standard traffic control procedures and in accordance with requirements of applicable federal laws, state laws or city ordinances, rules, regulations or orders. In emergencies, such filings shall be submitted as soon as practicable, within thirty (30) days of completion of emergency

construction work.

(F) When any excavation shall be made pursuant to the provisions of this ordinance, the Grantee shall restore the portion of the street, alley, road or public way or place to the same condition to which it was prior to the excavation. All such work shall be done in strict compliance with the ordinances, rules, regulations or orders which may be adopted from time to time during the continuance of this franchise by the City Council or City Engineer or as may be otherwise provided by law. The City shall have the right to fix a reasonable time within which such repairs and restoration shall be completed and upon failure of such repairs and restoration being made by Grantee, the City shall cause such repairs to be made at the expense of the grantee.

(G) It is expressly understood that certain streets, roads and public rights of way within the City are or may be under the jurisdiction of either the State of Oregon, Clackamas County or Washington County. This agreement does not intend to convey rights on, under or over facilities within their jurisdiction.

Section 4: (A) This license does not prevent the City from repairing, altering or improving any street or public right of way within the City, whether or not they contain poles, wires, underground conduit or other equipment of the Grantee. If possible, all such City work or improvements shall be done so as not to obstruct or prevent the free use of such equipment by Grantee. If City work or public improvements require the relocation of Grantee's equipment. Grantee must relocate the equipment at its own expense.

Whenever it shall be necessary for the City or its properly constituted agents to request the relocation of Grantee's equipment, the City shall provide reasonable written notice of said request to the Grantee and, if necessary, agree in writing to a plan and date certain for the relocation of Grantee's equipment. If the Grantee fails, neglects or refuses to do so, the City may remove the same at the expense of the Grantee. The City shall not be responsible for providing such notice in an emergency.

(B) In an emergency, the City reserves the right to relocate Grantee's equipment to the extent necessary to preserve and protect the public health, safety and welfare. If the City damages Grantee's property in the course of making emergency repairs to the public rights-of-way, an offset for the damage may be made by the Granter against the franchise fee.

Section 5: Except as it may pertain to the City, whenever it becomes necessary to temporarily rearrange, remove, lower or raise the wires, cables or other plant of Grantee for the passage of buildings, machinery or other objects, grantee shall temporarily rearrange, remove, lower or raise its wires, cables or other plant as the necessities of the case require; provided, however, that the person or persons desiring to move any such buildings, machines or other objects shall pay the entire actual cost to grantee of changing altering, moving, removing or replacing its wires, cables or other plan so as to permit such passage and shall deposit in advance with Grantee a sum equal to such cost as estimated by Grantee and shall pay all damages and claims of any kind whatsoever, direct or consequential, caused directly or indirectly by changing, altering, moving, removing or replacing of said wires, cables or other plant, except as may be occasioned through the sole negligence of Grantee, Grantee shall be given not less than ninety-six (96) hours written notice by the party desiring to move such building or other objects. Said notice shall detail the route of movement of such building or other objects over and along the streets, alleys, avenues, thoroughfares and public highways and shall bear the approval of the City. Such moving shall be with as much haste as possible and shall not be necessarily delayed or cause Grantee unnecessary expense or waste of time.

Section 6: The franchise granted is subject to the following conditions:

(A) The Grantee shall make connections to its fiber optic or other cable links available to all city buildings as those buildings are passed by said links. Such connections shall be completed to these buildings at no charge to the City as such time that the City requests service from the Grantee.

(B) If the City requests telecommunications services from Grantee, Grantee may deduct the charges for such services from franchise fee payments upon prior written approval of the City. Grantee shall charge the City at Grantee's most favorable rate charged for a similar service within two years of providing services to the City. Other terms and conditions of such services may be determined by separate agreement

(C) 1. Grantee shall pay to the City \$1,000 as an application fee to cover City costs of preparing and issuing this franchise, including staff time spent in plan review and inspection by the Community Development Department. Beginning with the effective date of this franchise until its expiration. Grantee shall pay the City a franchise fee of five (5) percent of the gross

revenues earned on telecommunications services in the City. Payments shall be made quarterly on or before forty- five (45) days after the preceding quarter commencing with the quarter ending September 30, 2000, and continuing for each quarter for the term of this franchise. Payments shall be accompanied by a statement of how the total due amount was calculated, including an explanation of gross revenue for services for which one end-point of service was located outside of the City. Payments not received by the 45th day of each quarter will be assessed interest at the rate of one percent over the existing prime rate, compound daily.

2. Nothing in this agreement shall give the Grantee any credit against any lawful business license fee, any ad valorem property tax levied against real property or personal property within the City, any local improvement assessment levied on Grantee's property, or any other charges lawfully imposed on Grantee's property or business within the City not related to facilities which are subject of this franchise. Grantee shall receive credit for franchise fees paid by it against any business tax or license fee levied against it by the City based on gross revenues.

(D) Gross revenues earned on telecommunications services means all revenues earned on services provided by Grantee including and limited to:

1. Connections between interexchange carriers or competitive carriers and any entity other than another interexchange carrier, competitive carrier or a telephone company providing local exchange services;

2. Connections between entities other than interexchange carriers, competitive carriers or telephone companies providing local exchange services;

3. Design, engineering, construction and maintenance of fiber optic cable links that are not otherwise connected to Grantee's telecommunications system; and

4. Charges, fees or lease payments made to Grantee for special vault or conduit construction in the public right of way or other charges, fees or lease payments for the purpose of placing facilities not owned or controlled by Grantee within the Grantee's conduit, and all charges, fees or lease payments for use of any portion of Grantee's network, including but not limited to, plant, facilities or capacity. Non- recurring revenues derived from charges or fees for installation services performed on a customer's premises shall not be included in the calculation of gross revenues.

5. Unrecovered bad debts charged off after diligent, unsuccessful efforts to collect are excludable from gross revenues. However, recoveries of bad debts previously written off and revenues from the sale or assignment of bad debts are included in gross revenues.

(E) Gross revenues will be calculated when:

1. Both end points are located within the City;
2. One end point is located within the City and another is located outside the City, calculated as follows:

$G(io) = R(io) \times (C/T)$ , where

$io$  = service between an address inside the City and an address outside the City or within the City if through another exchange,

$R$  = total revenues earned by Grantee for that service,

$C$  = linear feet of cable within the City carrying that service, and

$T$  = total linear feet of cable carrying that service.

(F) The City has the right to expand the subsection (D) definition of gross revenues earned on telecommunications services after 90 days written notice to Grantee if any of the following occur:

1. The City collects franchise fees or privilege taxes from any other provider of telecommunications services on revenues from services substantially similar to those offered by Grantee, but are not within the current subsection (D) definition of gross revenues
2. State law changes concerning the telecommunications services included in the revenue base for franchise fees or privilege taxes on telecommunications utilities; and
3. State law changes concerning the definition of competitive and non-competitive telecommunications services.

(G) The City shall have the right to change the percentage of gross revenues set forth above at any time during the life of this agreement provided it has made such notice in writing at least 180 days prior to the effective date of any change.

(H) The City shall have the right to conduct or cause to be conducted; an audit of

gross revenues as defined herein. Any difference of payment due either the City or Grantee through error or otherwise as agreed upon by both the City and Grantee shall be payable within thirty (30) days after discovery of such error.

(I) This franchise shall limit the Grantee to providing a network dedicated solely to the purpose of directly serving its end-user customers, other competitive telecommunications providers, local exchange carriers and interexchange carriers with audio, video, data, voice and signal communication including public, education and government cable access services and two-way data transmission services to customers within the City. Under terms of this franchise, the Grantee is prohibited from offering within the City:

1. Subscriber Cable Television Service, as defined in Section 602 of the Cable Communications Policy Act of 1984 (47 USCA 522, Supp. 1989) as amended, or recognized by the Federal Communications Commission without first obtaining a separate cable franchise from the City.

2. The retransmission to customers of any broadcast television channel signals authorized by the Federal Communication Commission.

3. Television services generally provided solely for entertainment purposes on a one-way, non-interactive basis including, but not limited to, broadcast channels, pay channels and pay-per-view programming.

4. Local exchange telecommunications service as defined in ORS 759.005 (2)(c).

(J) At such time as federal, state or local laws permit grantee to provide services included in Section 6(I), the parties may enter a separate agreement, franchise or otherwise, to provide for additional access to the City's rights-of-way.

Section 7: This franchise takes effect upon the filing by the Grantee of a written acceptance of this ordinance with the City Recorder. Such acceptance must accept all terms, conditions and restrictions contained in this ordinance and be accompanied by the franchise application fee. The failure of PORTLAND GENERAL DISTRIBUTION COMPANY to file this acceptance within thirty (30) days of the adoption of this ordinance shall render this agreement null and void.

Section 8: (A) This franchise will be in force for ten (10) years, unless the City or Grantee

terminates the franchise in accordance with Sections 12 and 13.

(B) The City maintains the right to amend this franchise ordinance if the City determines that Grantee has entered into a franchise agreement with any other Oregon city with a population of between 10,000 and 75,000 that contains a franchise fee greater than that set forth in this ordinance. Grantee agrees to notify the City within thirty (30) days of entering such a franchise agreement with such other Oregon city. Grantee shall agree to any ordinance amending this agreement in order to make it consistent with the provisions of the more favorable franchise. If Grantee fails to do so, the franchise granted by this ordinance may be terminated.

(C) The City agrees not to enter into a franchise agreement with another competitive telecommunications provider after the effective date of this ordinance which provides a lesser franchise fee or terms or conditions more favorable to the operations of such provider as- than those contained herein.

Section 9: The Grantee shall defend, indemnify and hold harmless the City, its officers, agents and employees from any claim or injury, damage, loss, liability, cost or expense and attorneys fees, arising from any act or omission under this franchise by Grantee, its agents or employees, except to the extent such damages, costs and expenses are caused by negligent acts or omissions by the City. Grantee shall consult and cooperate with the City while taking any action in defense of the City.

Section 10: (A) During the period of this franchise, the Grantee must maintain public liability and property damage insurance that names the Grantee and the City, its officers, agents and employees from all claims referred to in Section 9. The coverage must be at least \$1,000,000 for injury to each person, \$3,000,000 personal injury for each occurrence, and \$3,000,000 for each occurrence involving property damages plus cost of defense, or a single limit policy of not less than \$3,000,000 for all claims per occurrence, plus cost of defense. Grantee must maintain Workers' Compensation insurance and comprehensive automobile insurance consistent with statutory requirements. Proof of insurance shall be filed with the City recorder at the time of filing of Grantee's acceptance of this franchise, as required by Section 7 herein and annually on that date or the annual renewal date of such policies.

(B) The City reserves the right to review the insurance requirements contained in subsection (A) of this section during the effective period of the franchise agreement and any



extension or renewal thereof, and to adjust insurance coverages and their limits when deemed necessary and prudent based on changes in statutory law, court decisions or the claims history of the industry, as well as the Grantee. Any such adjustment shall be binding on Grantee ninety (90) days after written notice of the change has been delivered to Grantee.

(C) Grantee agrees that with respect to the above required insurance, all insurance contracts shall name the City of Wilsonville, Oregon, and its officers, employees, volunteers, elected representatives and appointed officials as additional insureds to all applicable coverage and that all provisions of the adopted franchise agreement concerning liability, duty and standard of care, including those contained in Section 9 of this agreement, shall be underwritten by contractual coverage sufficient to include such obligations within applicable policies. Such policies must contain a provision whereby the City shall receive thirty (30) days' notice for cancellation, non-renewal or material change. Grantee agrees to immediately notify the City Manager or City Attorney of any actual or potential litigation that may affect this insurance. Grantee further agrees to structure these insurance policies in such a way as to ensure that insurers shall have no right of recovery against the City, nor shall any policy clause "Other Insurance" or like term apply to the City of Wilsonville where the City is an insured on the policy, it being the intention that the insurance policies shall protect the Grantee and the City and shall be the sole and primary coverage for all losses covered by the policies. Companies issuing such insurance policies shall have no recourse against the City of Wilsonville for payment of any premiums or assessments which are all set at the sole risk of the Grantee.

Section 11: This franchise shall not be sold, leased, assigned or otherwise transferred without the prior written consent of the City. Grantee may pledge or encumber this franchise as part of a corporate reorganization, financing or refinancing activity. Grantee must notify the City not later than ten (10) business days prior to any intended transfer, and City will not unreasonably withhold any consent required.

Section 12: (A) The City reserves the right to terminate this franchise and all of Grantee's rights herein, if:

1. Grantee violates any material term of the franchise, or
2. Grantee fails to complete construction of an initial telecommunications system within 36 months of the effective date of this franchise, or

3. Grantee fails to commence operation of its network within six months after it has been constructed, or
4. Grantee fails to pay the franchise fee to the City, or
5. Grantee is found guilty of any fraud or deceit in connection with the provisions of this franchise agreement, or
6. Grantee fails to obtain or maintain any permit required by state or federal law or otherwise fails to comply with all applicable state and federal laws and City ordinances adopted heretofore or hereafter during the term of this franchise.

(B) The foregoing shall not constitute a substantial breach if the violation occurs without the fault of Grantee or occurs as a result of circumstances beyond its control. Grantee shall not be excused by mere economic hardship, nor misfeasance or malfeasance of its directors, officers or employees.

Section 13: (A) The City will give Grantee at least thirty (30) days written notice of intent to terminate this franchise stating the reasons for such action. If Grantee either cures the stated reason within the 30-day period or initiates efforts satisfactory to the City to remedy the stated reason, the City will not terminate this franchise. If Grantee fails to cure the stated reason within such 30-day period or makes efforts to remedy the stated reasons satisfactory to the City, the City may declare this franchise terminated and extinguish all rights of Grantee under the franchise.

(B) At such time that Grantee intends to discontinue using or remove, including actions pursuant to a City termination order, any telecommunications network facility within the City, Grantee shall submit a specific plan for such discontinuance or removal to and gain approval from the City Engineer. The City Engineer may allow Grantee to abandon in place any facility, may require Grantee to remove or modify the facilities within the public rights of way or other public place or property, or may require Grantee to perform a combination of modification and removal. Grantee shall complete such removal or modifications in accordance with a schedule set by the City Engineer. Until such time that Grantee's property, which is required by the City Engineer to be removed is completely removed and all restorations to the public rights of way or other public place or property have been completed, Grantee shall be responsible for

all necessary repairs, relocations and maintenance of the facility in the same manner and degree as if the facility were in active use, and Grantee shall retain all liability for such facility.

Section 14: This franchise hereby granted shall not be exclusive and shall not be construed as any limitation on the City to grant rights, privileges and authority to other persons or corporations similar to or different from those herein set forth.

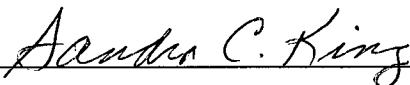
Section 15: Upon expiration of this franchise agreement, a new franchise may be granted. New terms and conditions may be required by the City for renewal if telecommunications technology and laws change after the effective date of this agreement and cause substantial effects on service types, availability, character of service, system technology or the regulatory environment. New terms, provisions or conditions may also be required by the City upon renewal to clarify the intent of this franchise agreement, which may arise from any unforeseen circumstance or interpretations of this agreement.

Section 16: The City agrees to use its best efforts to preserve the confidentiality of information designated by the Grantee as proprietary, to the extent permitted by law.

Section 17: The City Council determines that the fee imposed by this franchise is not a tax subject to the property tax limitations of Article XI, Section I (b) of the Oregon Constitution.

Section 18. The invalidity of any section, clause, sentence or provision of this ordinance shall not affect the validity of any other provision of this ordinance, which can be given effect without reference to the invalid part or parts.

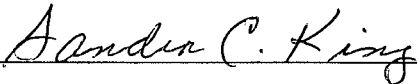
SUBMITTED to the Wilsonville City Council and read the first time at a regular meeting thereof on the 7<sup>th</sup> day of August, 2000, and scheduled for a second reading at a regular meeting of the Council on the 21<sup>st</sup> day of August, 2000, commencing at the hour of 7:00 o'clock at the Wilsonville Community Center.

  
\_\_\_\_\_  
Sandra C. King, City Recorder

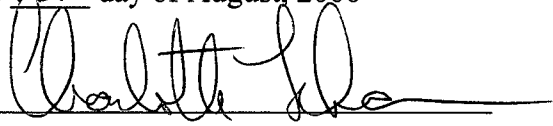
ENACTED by the Wilsonville City Council on the 21<sup>st</sup> day of August, 2000, by  
the following votes:

AYES: -5-

NAYS: -0-

  
\_\_\_\_\_  
Sandra C. King, City Recorder

DATED and signed by the Mayor this 22<sup>nd</sup> day of August, 2000

  
\_\_\_\_\_  
CHARLOTTE LEHAN, Mayor

**SUMMARY of Votes:**

Mayor Lehan	Yes
Councilor Helser	Yes
Councilor Holt	Yes
Councilor Barton	Yes
Councilor Kirk	Yes

**ACCEPTANCE OF FRANCHISE**

TO THE CITY COUNCIL OF THE CITY OF WILSONVILLE, OREGON

WHEREAS, the City of Wilsonville, Oregon, on August 21, 2000, passed Ordinance No.527, entitled:

AN ORDINANCE GRANTING PORTLAND GENERAL DISTRIBUTION COMPANY, AN OREGON CORPORATION, A FRANCHISE TO OPERATE A COMPETITIVE TELECOMMUNICATIONS BUSINESS WITHIN THE CITY OF WILSONVILLE AND TO PLACE, ERECT, MAINTAIN, LAY AND OPERATE IN, UPON, OVER AND UNDER THE PUBLIC RIGHTS OF WAY NECESSARY WIRES AND OTHER APPURTENANCES FOR COMMUNICATIONS PURPOSES WITHIN THE CITY OF WILSONVILLE.

NOW, THEREFORE, the undersigned, PORTLAND GENERAL DISTRIBUTION COMPANY, the Grantee named in said ordinance, does hereby for itself and its successors and assigns accept the terms, conditions and provisions of Ordinance No. 450 and agrees to be bound thereby and comply therewith.

ATTACHED HERETO AND MADE A PART OF THIS ACCEPTANCE ARE:

1. Payment of a \$1,000 franchise application fee as required by Section 6(C)(1) of the ordinance; and
2. Proof of workers' compensation insurance, comprehensive automobile insurance, public liability insurance and property damage insurance, containing the endorsement and additional insureds provisions called for in Section 10 of the ordinance.

IN WITNESS WHEREOF, PORTLAND GENERAL DISTRIBUTION Company, by and through its duly authorized officers executes this instrument as below subscribed this 25 day of August, 2000.

PORTLAND GENERAL DISTRIBUTION Company

By:  \_\_\_\_\_

Title: Vice President \_\_\_\_\_

Received by the City Recorder of the City of Wilsonville on the date stamped below:

CHECK #20-152187  
\$1,000.00  
Rec'd 9/5/08 sek.