

**CITY OF COOS BAY CITY COUNCIL**  
**Agenda Staff Report**

<b>MEETING DATE</b> July 5, 2017	<b>AGENDA ITEM NUMBER</b>
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TO: Mayor Benetti and City Councilors

FROM: Rodger Craddock, City Manager

ISSUE: Amendment of Ordinance 321

**SUMMARY:**

The City has had a telecommunications franchise agreement (Ordinance 321) with Tribal One Broadband Technologies, dba ORCA Communications, since 2002. The City was recently noticed that ORCA had sold its fiber and DSL broadband operations along with its customer base to Douglas Services, Inc. dba Douglas Fast Net. As such, Ordinance 321 needs to be amended. The amendment includes the change in ownership (Ord. 321, Section 1) as well as updating the insurance requirements (Ord. 321, Section 9), deletion of language referencing sovereign immunity (Ord. 321, Section 16) and an amended to Section 20 which deals with proper noticing and where notices are to be sent to.

**ACTION REQUESTED:**

If it pleases the City Council, enact the attached ordinance to amend Ordinance 321 to reflect the change in ownership of the telecommunications company now owned by Douglas Fast Net.

**BACKGROUND:**

City "home rule powers" and state law authorizes cities to grant franchises to public utilities such as gas and electric providers (ORS 221.420), vehicles for hire (ORS 221.495), telecommunication providers (ORS 221.550) and solid waste collection (ORS 458A.085). Cities are also authorized by federal law to franchise cable television providers. The franchises consist of provisions that govern how the franchisee is to operate within the boundary of the community and generally include the payment of franchise fees.

Most communities have established franchise fees as compensation for the special use of the public right of way (PROW). The PROW includes the space on, above, and under city streets, alleys, and sidewalks. Utilities make special use of the PROW by placing their equipment (e.g. power lines) above or under the right of way. This use differs from ordinary use of the PROW for travel.

There are limits on certain franchise fees. State law limits the fee for certain telecommunications companies to seven percent of a defined base. At the federal level, the Telecommunications Act of 1996 requires that compensation from telecommunications providers be on a competitively neutral basis. 47 USC 253; ORS 221.515(1). Finally, federal law limits cable television franchise fees to five percent of gross revenues. 47 USC 542.

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Broadband Technologies, dba ORCA Communications, since 2002. The City was recently noticed that ORCA had sold its fiber and DSL broadband operations along with its customer base to Douglas Services, Inc. dba Douglas Fast Net. As such Ordinance 321 needs to be amended. The amendment includes the change in ownership (Ord. 321, Section 1) as well as updating the insurance requirements (Ord. 321, Section 9), deletion of language referencing sovereign immunity (Ord. 321, Section 16) and an amended to Section 20 which deals with proper noticing and where notices are to be sent to.

**BUDGET IMPLICATIONS:**

None

**ORDINANCE NO. \*\*\***

AN ORDINANCE AMENDING ORDINANCE 321, BY REPLACING TRIBAL ONE BROADBAND TECHNOLOGIES, LLC, AS FRANCISEE, WITH DOUGLAS SERVICES, INC., AN OREGON CORPORATION, dba DOUGLAS FAST NET.

The City of Coos Bay ordains as follows:

Ordinance 321 of the City of Coos Bay is amended as follows:

1. In Section 1, "Definitions," the term "Franchisee" is replaced and amended as follows:

"Franchisee: Douglas Services, Inc., an Oregon Corporation, dba Douglas Fast Net."

2. Section 9, paragraph 2d is replaced and amended as follows:

"(2) general liability insurance with a combined single limit, or the equivalent, of not less than \$706,000,000 for each person, and \$1,412,000, for each occurrence of bodily injury and \$579,000 for property damage, which coverages shall include contractual liability coverage for the indemnity provided under this contract, and naming the City, its officials, officers, employees and agents as additional insureds with respect to Franchisee's activities pursuant to this Franchise; provided, however, that if at any time during the term of this Franchise the amounts herein provided are less than those provided under the Oregon Tort Claims Act, or any successor statute, Franchisee will increase the amounts of coverage to amounts not less than those provided under such Act or successor statute."

3. Section 16 is repealed.

4. Section 20, entitled "Notice," is replaced and amended as follows:

"Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the other party or deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested; (2) sent overnight by commercial air courier; or (3) sent by facsimile transmission, provided receipt of such facsimile is confirmed, in writing, on the first business day following the date of transmission. Notice shall be sent to the following address, or such other address as each party may specify in writing:

City Manager  
City of Coos Bay  
500 Central Ave.  
Coos Bay, OR 97420  
Phone: (541) 269-8912  
Facsimile: (541) 267-5912

Manager  
Douglas Fast Net  
2350 NW Aviation Dr.  
Roseburg, OR 97470  
Phone: (541) 673-4242  
Facsimile: (541) 391-4185"

5. The rest and remainder of Ordinance 321 shall remain in force and effect and shall apply to the Franchisee identified in "1" above.

The foregoing ordinance was enacted by the City Council of the City of Coos Bay the \_\_\_\_\_ day of July 2017.

Yes:

No:

Absent:

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Joe Benetti  
Mayor of the City of Coos Bay  
Coos County, Oregon

ATTEST:

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Susanne Baker  
Recorder of the City of Coos Bay  
Coos County, Oregon



*Tribal One Broadband Technologies, LLC*

June 14, 2017

Rodger Craddock, City Manager  
City of Coos Bay  
500 Central Avenue  
Coos Bay, OR 97420

Re: ORCA Franchise Agreement, Easement, Lease

Dear Rodger:

As you are one of the most important business relationships we have in the community we hope that you will be pleased with an upcoming change with regard to your internet access and ethernet transport services.

Tribal One Broad Band Technologies, LLC dba ORCA ("ORCA"), has entered into an agreement to sell associated with its fiber and DSL broadband operations and customer base to Douglas Services, Inc. dba Douglas Fast Net (the "Purchase Agreement"). In connection with the purchase, we would like to transfer the following agreements:

- (i) Franchise Agreement pursuant to Ordinance No. 321, enacted June 18, 2002, as amended by Ordinance 396 adopted July 17, 2007 (the "Contract"). (Pursuant to Section 9a of the Contract, the City must consent to the assignment of the Franchise Agreement.)
- (ii) Easement for Communications Lines dated May 27, 2014.
- (iii) Non Exclusive Pipeline Lease dated December 1, 2102

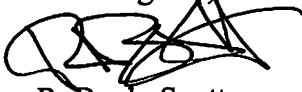
ORCA desires to assign and transfer all of its rights and obligations under each of these agreements to Douglas Fast Net and Douglas Fast Net desires to assume such agreements, effective on the closing date of the transaction contemplated by the Purchase Agreement. Currently, we anticipate the transaction will close or about June 30 of this year. Per the terms of the Purchase Agreement, Douglas Fast Net will assume all of the obligations under the agreements. To acknowledge your agreement for ORCA to assign the Franchise Agreement, as amended, and your acknowledgement of the transfer of the Easement and Lease listed above in connection with the Purchase Agreement as described above, please sign this letter in the space provided below and return a copy to me via email or regular mail at your earliest convenience.

Douglas Fast Net (DFN) has had a long and positive relationship with ORCA Communications and they are an exceptional service provider. In addition to institutional

and business data transmission, DFN will be providing residential fiber connections as well as voice services from their switch in Roseburg.

If you have any questions, please contact me.

Best Regards,



R. Brady Scott  
Chief Executive Officer  
Email: bradyscott@orcacomm.com

Acknowledged, agreed and consented to on this \_\_\_\_\_ day of \_\_\_\_\_ 2017.

City of Coos Bay

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

**ORDINANCE NO. 321**

AN ORDINANCE GRANTING TO TRIBAL ONE BROADBAND TECHNOLOGIES, LLC, dba ORCA COMMUNICATIONS, A LIMITED LIABILITY COMPANY FORMED UNDER THE LAWS OF THE COQUILLE TRIBE, A FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF COOS BAY

The City of Coos Bay ordains as follows:

**Section 1. Definitions.**

City: The City of Coos Bay.

Franchisee: Tribal One Broadband Technologies, LLC, dba Orca Communications, a limited liability company organized under the laws of the Coquille Indian Tribe, a sovereign Indian nation.

Gross Revenues: Revenues received by Franchisee from the use of its Telecommunications network within the City Limits for the provision of Telecommunications Service, less net uncollectibles, and excluding proceeds from the sale of bonds, securities or stocks, or mortgages or other evidence of indebtedness. Gross revenues shall include revenues from the use, rental, or lease of Franchisee's telecommunications network for the provision of Telecommunications Service, except when those revenues have been paid to the Franchisee by another franchisee of the City and the paid revenues are used in the calculation of the franchise fee for the operations of the other franchisee within City limits. Any *net uncollectibles*, bad debts or other accrued amounts deducted from Gross Revenues shall be included in Gross Receipts at such time as they are actually collected.

Rights-of-way: the present and future streets, viaducts, elevated roadways, alleys, public highways and avenues in the City, including rights-of-way held in fee, or by virtue of an easement or dedication.

Telecommunications: the transmission between and among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications network: infrastructure owned by Franchisee utilizing one or more facilities located within the City's rights-of-way, including, but not limited to, lines, poles, anchors, wires, cables, conduit, laterals, and other appurtenances, necessary and convenient to the provision of access to the Internet and telecommunications service.

Telecommunications service: the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities uses.

**Section 2. Grant of Franchise.** The City hereby grants to Franchisee, its successors and assigns as authorized herein, a nonexclusive right, privilege, authority and franchise to erect, construct, operate, repair and maintain in, over, under, upon, along, and over the City's rights-of-way, its lines, poles, anchors, wires, cables, conduits, laterals and other necessary and convenient fixtures and equipment,

for the purposes of constructing, operating and maintaining a competitive telecommunications network within the City.

**Section 3. Franchise Not Exclusive.** The Franchise granted herein (the “Franchise”) is not exclusive, and shall not be construed as any limitation upon the right of the City to grant to other persons or corporations, including itself, rights, privileges or authority the same as, similar to or different from the rights, privileges or authority herein set forth, in the same or other rights-of-way, by franchise, permit or otherwise; provided, however, that any such grant shall be done in a competitively neutral and non-discriminatory manner with respect to the rights, privileges and authorities afforded Franchisee.

**Section 4. Term and Termination.**

(a) This franchise shall become effective after its enactment, upon the date the Franchisee files with the City Recorder an unconditional acceptance of all provisions of this Franchise. If the Franchisee fails to file such written acceptance within the thirty days after the date the Franchise is enacted, then this Franchise shall be of no further force or effect. If accepted by the Franchisee, the right, privilege, authority and franchise herein granted shall continue until June 30, 2007 (the “Initial Term”). Thereafter, this Franchise shall continue in full force and effect on a year-to-year basis until validly canceled or terminated as provided herein. Either party may terminate this Franchise after the expiration date of the Initial Term, or any renewal term thereof, by providing not less than ninety days notice.

(b) This Franchise shall continue for a period of not more than twenty years following the effective date of this ordinance. Upon termination or expiration of the Franchise, Grantee shall, within one hundred and eighty days, remove all its facilities from the City’s rights-of-way. During such period, Grantee shall remit to the City any payments due under this Franchise, as if this Franchise were in full force and effect. Should the Grantee fail to remove its facilities within such one hundred and eighty day period, the City may do so, and the Grantee shall immediately remit to the City the costs of such removal.

**Section 5. No Limitation of City Authority.**

(a) Except as provided in Section 6 below, nothing in this Franchise shall in any way be construed or interpreted to prevent, or in any way limit, the City from modifying or performing any work in its rights-of-way, or granting other franchises for use of rights-of-way, or of adopting general ordinances regulating use of or activities in the rights-of-way, or of otherwise abrogating or limiting any rights, privileges or property interest the City now has in its rights-of-way, whether now owned or hereinafter acquired.

(b) In the event that any portion of the Franchisee’s infrastructure interferes with any present or future use the City desires to make of its rights-of-way, Franchisee shall, upon request, and at its sole expense, promptly relocate such infrastructure, and restore the area where such relocation occurs to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.

(c) Except as otherwise provided by law, and subject to Section 6 herein, nothing in this Franchise shall be construed to give the Franchisee any credit or exemption from any nondiscriminatory, generally applicable business tax, or other tax now or hereafter levied upon Franchisee’s taxable real or personal property, or against any permit fees or inspection



fees required as a condition of construction of any improvements upon Franchisee's real property and imposed under a generally applicable ordinance or resolution.

**Section 6. Competitively Neutral Application.** The City shall impose, on a competitively neutral and nondiscriminatory basis, similar terms and conditions upon other similarly situated providers of telecommunications services operating within the City. Any requirement imposed on Franchisee that is determined not in compliance with this Section 6 shall be unenforceable against Franchisee.

**Section 7. Construction, Maintenance and Repair of Infrastructure.**

(a) Franchisee may make all needful excavations in any right-of-way for the purpose of placing, erecting, laying, maintaining or repairing Franchisee's infrastructure, and shall repair, renew and replace the same as reasonably possible to the condition that existed prior to such excavation. Franchisee shall obtain all necessary permits for such excavation and construction, and pay all applicable fees. Such work shall be done only in accordance with plans or designs submitted to, and approved by, the City, such plans (1) to be evaluated by the standards applied to the construction of other similar telecommunications systems in the City, and (2) maintained by the City as confidential and exempt from public disclosure to the maximum extent allowed by law. Such work shall be performed in a good and workmanlike manner, and in compliance with all rules, regulations, or ordinances which may, during the term of this Franchise, be adopted from time to time by the City, or any other authority having jurisdiction over rights-of-way. Prior to commencing excavation or construction, Franchisee shall give appropriate notice to other franchisees, licensees or permittees of the City owning or maintaining facilities which may be affected by the proposed excavation or construction.

(b) In the event emergency repairs are necessary for Franchisee's facilities, Franchisee may immediately initiate such emergency repairs. Franchisee shall give notice to the City's Department of Community Services by telephone, electronic data transmittal or other appropriate means as soon as is practicable after commencement of work performed under emergency conditions. Franchisee shall make such repairs in compliance with applicable ordinances and regulations, and shall apply for any necessary permits no later than the business day next following the discovery of the need for such repairs.

(c) Franchisee shall construct and maintain its telecommunications system in such a manner so as to not interfere with City sewer or water systems, or other City facilities.

**Section 8. Insurance.**

(a) **General.** At all times during the term of this Franchise, Franchisee, at its own cost and expense, shall provide the insurance specified in this section.

(b) **Evidence Required.** Within thirty (30) days of the effective date of this Franchise, Franchisee shall provide the City with a certificate of insurance executed by an authorized representative of the insurer or insurers, evidencing that Franchisee's insurance complies with this section.

(c) **Notice of Cancellation, Reduction, or Material Change in Coverage.** Policies shall include a provision requiring written notice by the insurer or insurers to the City not less

than thirty (30) calendar days prior to cancellation, reduction, or material change in coverage. If insurance coverage is canceled, reduced or materially changed, Franchisee shall, prior to the effective date of such cancellation, reduction or material change, obtain the coverage required under this section, and provide the City with documentation of such coverage. Franchisee shall be responsible, to the extent not caused by the City's negligence or intentional misconduct, for the costs of any damage, liability, or injury, which are not otherwise covered by insurance or because of a failure to comply with this section.

**(d) Insurance Required.** During the term of this contract, Franchisee shall maintain in force, at its own expense, the following insurance:

(1) workers' compensation insurance for all subject workers in compliance with ORS 656.017;

(2) general liability insurance with a combined single limit, or the equivalent, of not less than \$300,000 for each person, and \$1,000,000, for each occurrence of bodily injury and \$100,000 for property damage, which coverages shall include contractual liability coverage for the indemnity provided under this contract, and naming the City, its officials, officers, employees and agents as additional insureds with respect to Franchisee's activities pursuant to this Franchise; provided, however, that if at any time during the term of this Franchise the amounts herein provided are less than those provided under the Oregon Tort Claims Act, or any successor statute, Franchisee will increase the amounts of coverage to amounts not less than those provided under such Act or successor statute.

#### **Section 9. Transfers and Change in Control.**

(a) This Franchise shall not be sold, leased, assigned or otherwise transferred, nor shall any of the rights or privileges herein granted or authorized be leased, assigned, mortgaged, sold or transferred, either in whole or in part, nor shall title hereto, either legal or equitable, or any right, interest or property herein, pass to or vest in any person, except the Franchisee, either by act of the Franchisee or by operation of law, without the consent of the City, expressed in writing, such consent not to be unreasonably withheld. If the Franchisee wishes to transfer this Franchise, the Franchisee shall give City written notice of the proposed transfer, and shall request consent of the transfer by the City. The City may withhold its consent upon the City's reasonable determination that the proposed transfer or assignment will be to an entity not subject to the limited waiver of sovereign immunity under Section 17 of this Franchise. The granting of such consent in one instance shall not render unnecessary any subsequent consent in another instance.

(b) Any transfer of ownership effected without the written consent of the City shall render this Franchise subject to revocation. The City shall have sixty (60) days to act upon any request for approval of a transfer. If the City fails to render a final decision on the request within said sixty (60) days, the request shall be deemed granted unless the Franchisee and the City agree to an extension of time.

(c) The Franchisee, upon any transfer as heretofore described, shall within sixty (60) days thereafter file with the City a certified statement evidencing the transfer and an

acknowledgment of the transferee that it agrees to be bound by the terms and conditions contained in this Franchise.

(d) Every such transfer as heretofore described, whether voluntary or involuntary, shall be deemed void and of no effect unless Franchisee shall, within sixty (60) days after the same shall have been made, file such certified copy as is required.

(d) The requirements of this section shall not be deemed to prohibit the use of the Franchisee's property as collateral for security in financing the construction or acquisition of all or part of a telecommunications system of the Franchisee or any affiliate of the Franchisee. However, the telecommunications system franchised hereunder, including portions thereof used as collateral, shall at all times continue to be subject to the provisions of this Franchise.

(f) The requirements of this section shall not be deemed to prohibit sale of tangible assets of the Franchisee in the ordinary conduct of the Franchisee's business without the consent of the City. The requirements of this section shall not be deemed to prohibit, without the consent of the City, a transfer to a transferee whose primary business is telecommunications system operation and having a majority of its beneficial ownership held by the Franchisee, a parent of the Franchisee, or an affiliate, a majority of whose beneficial ownership is held by a parent of the Franchisee.

**Section 10. Indemnification.** Subject to the limitations of the Oregon Tort Claims Act, the Oregon Constitution and the Charter of the City of Coos Bay, each party shall indemnify, defend and hold harmless the other, and the other's officials, officers, agents and employees, against any and all claims, demands, causes of action, suits, proceedings, damages, costs, reasonable attorney's fees or liabilities (Claims) arising out of, pertaining to, or occurring through the exercise of, the rights and privileges retained by, granted to, or exercised by that party pursuant to this Franchise. Each party shall give to the other notice in writing of any such Claims within twenty (20) days of the date that party receives notice of any such Claims. Neither party shall settle, compromise or take any action prejudicial to the other's defense of or interest in such Claims without the express written consent of the other.

**Section 11. Compensation.**

(a) **Franchise Fee.** In consideration of permission to use the streets and rights-of-way of the City for the construction, operation, and maintenance of a telecommunications system within the Franchise area and to defray the costs of Franchise regulation, the Franchisee shall pay to City during the first two years of the term of this Franchise an amount equal to five percent (5%) of the Franchisee's Gross Revenues ("Franchise Fee"). Not less than ninety days prior to the expiration of the second year of this Franchise, the parties agree to meet and renegotiate the Franchise Fee. If the parties are unable to agree upon a new Franchise Fee or to a continuation of the five percent (5%) provided herein, this Franchise shall terminate.

(b) **Modification Resulting from Action by Law.** Upon thirty days notice and in the event any law or valid rule or regulation applicable to this Franchise limits the Franchise Fee below the amount provided herein, or as subsequently modified, the Franchisee agrees to and shall pay the maximum permissible amount and, if such law or valid rule or regulation is later repealed or amended to allow a higher permissible amount, then Franchisee shall pay

the higher amount commencing from the date of such repeal or amendment, up to the maximum allowable by law.

**(c) Payment of Franchise Fees.** Payments due under this provision shall be computed and paid quarterly for the preceding quarter, as of March 31, June 30, September 30, and December 31, each quarterly payment due and payable no later than forty-five (45) days after such dates. Not later than the date of each payment, the Franchisee shall file with the City a written statement, in a form satisfactory to the City and signed under penalty of perjury by an officer of the Franchisee, identifying in detail the amount of gross revenue received by the Franchisee, the computation basis and method, for the quarter for which payment is made.

**(d) Interest; No Accord.** Late franchise fee payments will be subject to late fees calculated on the basis of nine percent (9%) per annum of the amount past due. No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim City may have for further or additional sums payable under the provisions of this Franchise. All amounts paid shall be subject to audit and recomputation by City.

**(e)** The Franchise Fee includes all compensation for the use of the City's right-of-way. Franchisee may offset against the Franchise Fee the amount of any fee or charge paid to the City in connection with the Grantee's use of the right-of-way when the fee or charge is not imposed under a generally applicable ordinance or resolution. The Franchise Fee shall not be deemed to be in lieu of or a waiver of any ad valorem property tax which the City may now or hereafter be entitled to, or to participate in, or to levy upon the property of Franchisee.

**Section 12. Right to Inspect Records.** In order to manage the Franchisee's use of rights-of-way pursuant to this Franchise, and to determine and verify the amount of compensation due to the City under this Franchise, the Franchisee shall provide, upon request, the following information in such form as may be reasonably required by the City: maps of the Franchisee's telecommunications system; the amount collected by the Franchisee from users of Telecommunications Service provided by Franchisee via its Telecommunications network; the character and extent of the Telecommunications Service rendered therefor to them; and any other related financial information required for the exercise of any other lawful right of Franchisee under this Franchise. The information or a signed statement verifying that no such information exists, along with any further directly related data which may be required by the City to adequately understand the information, shall be furnished by the Franchisee to the City within thirty days of when the City provides notice requesting such information, at the Franchisee's cost and expense. The City agrees that such information is confidential and that the City will use such information only for the purpose of managing its rights-of-way, determining compliance with the terms of this Franchise, and verifying the adequacy of Franchisee's fee payments. The City further agrees to protect such information from disclosure to third parties to the maximum extent allowed by Oregon law.

**Section 13. Right to Perform Franchise Fee Audit or Review; Default.** In addition to all rights granted under Section 12, the City shall have the right to have performed, a formal audit or a professional review of the Franchisee's books and records by an independent private auditor, for the sole purpose of determining the Gross Receipts of the Franchisee generated through the provision of telecommunications services under this Franchise and the accuracy of amounts paid as Franchisee

fees to the City by the Franchisee; provided, however, that any audit or review must be commenced not later than three (3) years after the date on which franchise fees for any period being audited or reviewed were due. Notwithstanding any other provision contained herein, the City may not review or audit, or cause to have reviewed or audited, the books and records of the Coquille Economic Development Corporation, the Coquille Cyberwire Corporation or the Coquille Indian Tribe absent the prior consent of the Coquille Economic Development Corporation, Coquille Cyberwire Corporation or the Coquille Indian Tribe, respectively, which consent may be withheld in their sole discretion. The cost of any such audit or review shall be borne by the City, except that if it is established that the Franchisee has made underpayment of 2% or more of the total Franchise fees due during the year or years subject to the audit required by this Franchise, then the Franchisee shall, within 30 days of being requested to do so by the City, reimburse the City for the full cost of the audit or review. The City agrees to protect from disclosure to third parties, to the maximum extent allowed by Oregon law, any information obtained as a result of its rights pursuant to this Section, or any compilation or other derivative works created using information obtained pursuant to the exercise of its rights hereunder.

If such formal audit or a professional review of the Franchisee's books and records indicates that there has been a transfer of revenues from the Franchisee to any other entity such that such amounts that should have been calculated as part of the franchise fee have not been so calculate and have not been previously paid or have not been paid within 90 days after written notice of the City to the Franchisee, then an event of default under the agreement shall have occurred.

In the judicial resolution of any dispute, the City agrees that any books and records provided, in the sole discretion, by the Coquille Economic Development Corporation, the Coquille Cyberwire Corporation or the Coquille Indian Tribe shall be reviewed solely *in camera*.(i.e., in the judge's private chambers or in the courtroom with all spectators excluded).

**Section 14. Right to Inspect Construction.** The City or its representatives shall have the right to inspect all construction or installation work performed pursuant to this Franchise and to make such tests as it shall find necessary to ensure compliance with the terms of this Franchise and other pertinent provisions of law relating to management of the City's rights-of-way.

**Section 15. Right to Require Removal of Property.** At the expiration of the Initial Term for which the Franchise is granted, or the last renewal thereof, or upon forfeiture or revocation as provided for herein, the City shall have the right to require the Franchisee to remove, at Franchisee's own expense, all or any part of the telecommunications system from rights-of-way within the Franchise area. If the Franchisee fails to do so within one hundred and eighty (180) days after receipt of notice from the City, the City may perform the work and collect the cost thereof from the Franchisee. Notwithstanding the other provisions of this Section, the Franchisee, by written notice to the City, may elect to abandon underground cable in place, in which event the Franchisee shall have no further obligation hereunder as to the abandoned cable; except that the City may nevertheless, by written notice, require the Franchisee to remove cable, at Franchisee's own expense, as deemed necessary by the City to provide space for other authorized uses or to accomplish or enable the accomplishment of other public purposes.

**Section 16. Limited Waiver of Sovereign Immunity; Venue.**

(a) The City and the Franchisee may have sovereign or other immunities which might prevent or impair enforcement or enjoyment of the terms of this Franchise. Without making

a general waiver, limitation or modification of such sovereign or other immunities, the City and the Franchisee hereby expressly grant, in favor of each other, a limited, non-assignable waiver of its immunities for claims arising under this Franchise, it being the intent of the parties that the waivers herein provided shall result in the terms and conditions of this franchise being enforced in a competitively neutral manner. This limited waiver of immunities is not a consent by either party to the attachment of any judgment lien upon any property held by the Coquille Indian Tribe in its name, or in trust for the Coquille Indian Tribe by the U.S. Government, or any property owned by the City. Copies of resolutions of the parties waiving immunity hereunder are attached hereto as Exhibits A and B, and incorporated herein by reference. This Franchise shall not be effective to create any rights or duties on behalf of any parties hereto until such resolutions have been adopted by the parties' respective governing bodies.

(b) Venue for any proceeding brought to enforce any term or condition of this Franchise shall be the Circuit Court for Coos County, Oregon; provided, however, that should any proceeding be brought in a federal forum, such proceeding shall be brought in the U.S. District Court in Eugene, Oregon.

(c) Notwithstanding any applicable statute of limitations or other law, these limited waivers of sovereign immunity shall expire when all obligations under this Franchise have been fully and completely performed, or the passage of twenty-four months from the termination of this Franchise, whichever is later. Nothing herein shall be construed to waive the sovereign immunity of the Coquille Economic Development Corporation, the Coquille Cyberwire Corporation or the Coquille Indian Tribe.

(d) These waivers of immunity shall not extend to or be used for the benefit of any other person or entity of any kind or description whatsoever, including any successor or assign of the City or the Franchisee.

(e) These waivers are strictly limited to the enforcement of the provisions of this Franchise and to any dispute that may arise under or in relation to this Franchise or operations performed under this Franchise.

(f) Franchisee hereby specifically consents and pledges its stream of revenue and any other of its assets as security for any judgment entered against it by a court of competent jurisdiction.

**Section 17. Limitation of Liability.** The City and the Franchisee agree that neither shall be liable to the other for any indirect, special, or consequential damages, or any lost profits, arising out of any provision or requirement contained herein, or, in the event this Franchise, or any part hereof, is determined or declared to be invalid.

**Section 18. Compliance With Applicable Laws.** Franchisee shall comply with all applicable federal, state, and local laws, ordinances, and regulations, whether now in existence or hereinafter enacted. Nothing contained in this Franchise shall be construed as authorizing the Franchisee, its officers, employees or agents, to violate any federal, state or local law, whether now in existence or hereinafter enacted, including, by way of illustration but not of limitation, any provision of Oregon anti-trust law, ORS 646.750-646.836, or the Oregon Unlawful Trade Practices Act, ORS 646.650-646.652. Nothing contained in this section shall be construed as requiring Franchisee to comply with

any federal, state or local law that is repealed or otherwise rendered unenforceable subsequent to the adoption of this Franchise.

**Section 19. Revocation.**

**(a) General.** In addition to any rights set out elsewhere in this document, the City reserves the right to declare a forfeiture or otherwise revoke this Franchise, and all rights and privileges pertaining thereto, under the following circumstances:

- (1) Following a hearing as provided herein, the Franchisee is determined to be in violation of any material provision of this Franchise and fails to correct the violation after written notice of the violation, proposed forfeiture and reasonable opportunity thereafter to cure;
- (2) the Franchisee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt;
- (3) the Franchisee is found to have engaged in fraud or deceit upon the City or any other persons;
- (4) the Franchisee fails to obtain and maintain any permit required by any federal or state regulatory body for the construction, maintenance and operation of its telecommunications system; provided, however, that the Franchisee shall be allowed a reasonable time to cure failure to obtain any permit, and that such permit is material to the operation of Franchisee's telecommunications system or the City's management of its rights-of-way; or
- (5) the Franchisee fails to maintain the full amount of its insurance as required under the terms of this Franchise.

Upon the occurrence of one of the events set out above, and following not less than 30 days written notice, the City shall conduct a hearing upon the proposed forfeiture. The Franchisee shall be afforded due process rights as if the hearing were a contested case hearing subject to ORS Chapter 183, including the right to present evidence, to subpoena and cross-examine witnesses, to subpoena documents, and to require that all testimony be on the record. Findings from the hearing shall be written and shall stipulate the reasons for the City's decision. If the City finds that the Franchise should be forfeited, the City shall by ordinance declare a forfeiture of the Franchise. In the event that the Franchisee believes that the City has improperly declared a forfeiture, the Franchisee may file such proceeding as is appropriate in a court of competent jurisdiction to determine whether the City has properly declared a forfeiture. If a forfeiture is lawfully declared by a court of competent jurisdiction, all rights of the Franchisee shall immediately be divested without a further act upon the part of the City.

**(b) Receivership.** In addition to its other rights and remedies as set forth in this Franchise, the City shall have the right, subject to federal law, to declare a forfeiture of this Franchise one hundred and twenty (120) days after the appointment of a receiver or trustee to take over and conduct the Franchisee's business, whether in receivership, reorganization, bankruptcy or other similar action or proceeding, unless such receivership or trusteeship shall have been

vacated prior to the expiration of said one hundred and twenty (120) days, or unless: a) within one hundred and twenty (120) days after such appointment, the receiver or trustee shall have fully complied with all provisions of this Franchise and remedied any and all violations or defaults, as approved by a City Council resolution; and b) within said one hundred and twenty (120) days, such receiver or trustee shall have executed an agreement with the City, duly approved by the City and the court having competent jurisdiction, in which such receiver or trustee assumes and agrees to be bound by each and every provision of this Franchise.

**Section 20. Notice.** Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the other party or deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested; (2) sent overnight by commercial air courier; or (3) sent by facsimile transmission, provided receipt of such facsimile is confirmed, in writing, on the first business day following the date of transmission. Notice shall be sent to the following address, or such other address as each party may specify in writing:

City Manager  
City of Coos Bay  
500 Central Ave.  
Coos Bay, OR 97420  
Phone: (541) 269-8912  
Facsimile: (541) 267-5615

Senior Executive Officer C.T.O.  
Tribal One Broadband Technologies, LLC  
3201 Tremont  
North Bend, OR 97459  
Phone: (541) 756-0662  
Facsimile: (541) 756-0675

Notice shall be deemed effective upon the earliest date of actual delivery; three business days after deposit in the U.S. mail as provided herein; one business day after shipment by commercial air courier; or the same day as transmitted by facsimile, provided transmission of such facsimile is confirmed in writing as provided herein.

**Section 21. Captions.** The captions to sections of this Franchise are intended solely to facilitate reading and reference of the sections and provisions contained herein, and shall not affect the meaning or interpretation of any section or provision of this Franchise.

**Section 22. Severability.** The provisions of this Franchise are severable; if any section, subsection, sentence or clause shall be found by a court of competent jurisdiction to be invalid, unconstitutional, or is clearly and specifically preempted by federal or state laws, the remaining sections, subsections, sentences, or clauses shall remain in full force and effect, unless the effect of such invalidity, unconstitutionality or preemption effects a material alteration in the benefit of a party's bargain contained herein. Should any provision be declared invalid or unconstitutional, or be preempted, the parties shall enter into negotiations within ten days of final judgment or effective date of the law regarding any such matter, and make a good faith effort to reform or replace such provision or part thereof with a valid and enforceable provision that comes as close as possible to providing the parties the benefit of its bargain as originally expressed herein.

**Section 23. Waiver.**

(a) The City is vested with the power and authority to reasonably regulate, and manage, its rights-of-way in a competitively neutral and non-discriminatory manner, and in the public interest. Franchisee shall not be relieved of its obligations to comply with any provision of



this franchise by reason of the failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

(b) No provision of this Franchise will be deemed waived unless such waiver is in writing and signed by the party waiving its rights. However, if Franchisee gives written notice of a failure or inability to cure or comply with a provision of this Franchise, and the City fails to object within a reasonable time after receipt of such notice, such provision shall be deemed waived.

**Section 24. Emergency.** The City Council of the City of Coos Bay finds the health, safety and welfare of the City of Coos Bay requires this ordinance to have immediate effect. Therefore, the City Council hereby declares the existence of an emergency and this ordinance shall be in full force and effect from the time of its passage and approval.

Passed by the Council and approved by the Mayor June 18, 2002.