

AN ORDINANCE GRANTING TO WINDWAVE TECHNOLOGIES INC, DBA WINDWAVE COMMUNICATIONS, A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, OPERATE & MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF COVE, OREGON

WHEREAS: WINDWAVE TECHNOLOGIES INC, (hereinafter "Franchisee") provides Telecommunications Services within the City of Cove, Oregon (hereinafter the "City");

WHEREAS: Pursuant to Federal law, State statutes, and City Charter and local ordinances, the City is authorized to grant non-exclusive franchises to occupy Rights of Way in order to erect, construct, operate, repair and maintain a Telecommunications Network within the municipal boundaries of the City of Cove ("Franchise Area"); and

WHEREAS: Franchisee has applied to the City for a Telecommunications Franchise, and the City agrees to grant a franchise subject to the terms and conditions stated herein:

NOW THEREFORE, THE CITY OF COVE ORDAINS AS FOLLOWS:

Section 1: Definitions.

Applicable Law: any provision of federal, state, or local law, including, without limitation, statutes, regulations, ordinances, and judicial or administrative orders that is directly applicable to Franchisee's use of the Rights-of-Way, Franchisee's provision of Telecommunications Services in the Franchise Area, or any other action authorized or required to be undertaken by Franchisee pursuant to the terms of this Franchise.

Gross Revenues: any and all revenue derived from Telecommunications Services, of any kind, nature, or form, without deduction for expense in the City and is further defined in Section 10. All such revenue remains subject to applicable FCC rules and regulations which exclude revenues from internet access services while prohibited by law.

Hazardous Substances: any substance, chemical, or waste identified as hazardous, toxic, or dangerous under any applicable federal or state law or regulation.

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, provided they are held and administered by the City and located within the Franchise Area.

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. For the purposes of this franchise, telecommunications shall not include small wireless facilities.

Telecommunications Network: infrastructure owned, operated, or used 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 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' used.

Section 2: Grant of Franchise. Subject to the terms and conditions provided in this 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, under, upon, along, across 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 the right to use and access the Rights-of-Way for the same or different purposes at any time during the term of this Franchise. This Franchise is subject to all prior rights, licenses, permits, agreements, or other interests granted by the City, and is subject to the City's right to use the Rights-of-Way for any lawful purpose.

Section 4: Term and Termination. The term of this Franchise shall be two (2), five (5) year terms, commencing with the effective date of this Ordinance. Thereafter, this Franchise shall continue in full force and effect for an additional two (2), five (5) year terms, unless notice is given by either party at least ninety (90) days before expiration of the then-current term of its intention to terminate the Franchise. By request of either Party, this Franchise may be renegotiated before any term by providing ninety (90) days' written notice to the other Party of the request to amend the Franchise. Amendments must be mutually agreed upon in writing to take effect. Upon termination or expiration of the Franchise for any reason, Franchisee shall, within one hundred and eighty (180) days, remove all of its facilities and restore the Rights-of-Way to at least as good as the condition it was in prior to removal and subject to all then-current applicable design standards, laws, and regulations regarding Rights-of-Ways and improvements, at Franchisee's sole its own cost and expense and subject to the City's acceptance of the work. Should the Grantee fail to timely remove its facilities within the one hundred and eighty day (180) period, the City may remove the Franchisee facilities and charge Franchisee the actual cost thereof.

Section 5: No Limitation of City Authority.

(a) 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 by the city, and at Franchisee's 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. Relocations required by a third party (including other franchisees of the City's Rights of Way) shall be paid by such party requesting the relocation.

(c) Where the Franchisee had paid for the relocation costs of the same facilities at the request of the City within the past five (5) years, the Franchisee's share of the cost of relocation will be paid by the City if it requested the subsequent relocation.

(d) 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: Construction, Maintenance and Repair of Infrastructure.

(a) Franchisee shall register all of its facilities with the Oregon Utility Notification Center/One-Call Center and, upon request by the City, provide such location information as the City may reasonably require to properly manage its Rights of Way.

(b) 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 Right-of-way 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 to be evaluated by the standards applied to the construction of other similar Telecommunications systems and Rights-of-Way work within the City. Franchisee's activities in the Rights-of-Way shall not interfere with the City's operations or public facilities. 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 the Rights-of-Way or subject matter of this Franchise. Prior to commencing excavation or construction, Franchisee shall give appropriate notice at least thirty days in advance of the commencement of work, to the City, and to all other franchisees, licensees and permittees of the City owning or maintaining facilities which may be affected by the proposed excavation or construction. Franchisee shall provide the City with as-built maps of its facilities promptly upon request by the City. Franchisee shall provide the City with updated as-built maps as changes occur in the Telecommunications Network. Notwithstanding the requirement to receive City approval prior to excavation and construction, Franchisee is solely responsible for determining whether its facilities will interfere with any existing utility facilities and other franchisees within the Rights-of-Way.

(c) 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 Public Works by telephone, electronic data transmittal or other appropriate means as soon as is practicable, which may be 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.

(d) 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 or existing utilities.

(e) Upon express written permission of the City, Franchisee may trim trees or other vegetation owned by the City or encroaching upon the Right of Way to prevent branches or leaves from touching or otherwise interfering with Franchisee's facilities. All trimming or pruning requested by Franchisee shall be at the sole cost of Franchisee. The Franchisee may contract for said trimming or pruning services with any person approved by the City.

Section 7: 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. Insurance coverage required under this section must be underwritten by an insurance company authorized to do business in the State of Oregon.

(b) **Evidence Required.** Within 30 days of the adoption of this Ordinance, 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 30 calendar days prior to cancellation in coverage. If insurance coverage is canceled, Franchisee shall, prior to the effective date of such cancellation, obtain the coverage required under this section, and provide the City with documentation of such coverage. Franchisee shall be fully responsible for the costs of any damage, liability, injury, or claims resulting from the acts or omissions of

Franchisee, its subcontractors, employees, or agents, even if not covered by insurance or in excess of insurance limits. Any failure to comply with this section will not affect the insurance coverage provided to the City.

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

(1) Workers' compensation insurance for all subject workers as required by ORS Chapter 656 and meeting the minimum requirements therein; and

(2) General liability insurance with a combined single limit, or the equivalent, of not less than \$2,000,000 for each person, and \$4,000,000 for each occurrence of bodily injury and \$1,000,000 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 conducted pursuant to this Franchise.

Section 8: Transfers and Change in Control.

(a) **Transfer.** 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 prior, written, express consent of the City, such consent may be withheld by the City in its sole discretion. 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. Any transferee must agree in writing to be bound by the terms and conditions contained in this Franchise before the City may approve of a transfer. The City shall have 60 days to act upon any request for approval of a transfer.

(b) The Franchisee, upon any transfer, shall within 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.

(c) 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.

(d) 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 9: Indemnification. The Franchisee agrees to indemnify, save and hold harmless, and defend the City, its officers, agents, boards, and employees, from and against any and all third-party damages, suits, claims, or actions, and shall indemnify the City, its officers, agents, boards, and employees, from all losses, judgments, damages, liabilities, costs, and expenses of whatsoever nature, including all reasonable attorneys' fees, resulting from or arising out of the activities, errors, acts, omissions of or on behalf of the Franchisee, its officers, agents, employees, or subcontractors, in the exercise of the rights and privileges granted under this Franchise and including claims resulting from property damage or bodily injury, including accidental death, which arise out of Franchisee's construction, operation, or maintenance of its facilities. In the event such a claim arises, the City shall tender the defense thereof to the Franchisee and Franchisee shall have the right to defend, settle, or compromise such claims.

Franchisee shall consult and cooperate with the City while conducting its defense of the City, and the City shall cooperate with Franchisee for such defense.

Hazardous Substances Indemnification. Franchisee shall not negligently introduce, use, cause or permit to escape, any Hazardous Substance onto, from, or within the Rights-of-Way or any other property of the City in violation of applicable laws. Franchisee agrees to forever hold harmless and indemnify the City, its officers, agents, and employees, from and against any and all claims, damages, fines, judgments, penalties, costs, and expenses of any kind (including all sums paid for settlement of claims, attorneys' fees, consultants' fees, and experts' fees), whether direct or indirect, or pursuant to any state or federal law, statute, regulation, or order, for the removal or remediation of any release, leaks, spills, contamination, or residues of Hazardous Substances directly attributable to the Franchisee's use of the Rights-of-Way or other persons acting under Franchisee under this Franchise.

Section 10: 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 Network within the Franchise Area the Franchise shall pay to City during the term of this Franchise an amount equal to seven percent (7%) of the Franchisee's Gross Revenues ("Franchise Fee") pursuant to ORS 221.515. 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. Revenue from point to point or multi-point services is based on the pro-rata share of the revenue from those services originating or terminating in the Franchise Area.

(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 effective 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 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. If any Franchise Fee payment is not made on or before the dates specified herein, Franchisee shall pay an interest charge computed from such due date at the annual rate equal to the greater of 9% annually, or the maximum rate allowed by law.

Section 11: Extension of City Limits. Upon the annexation of any territory to the City, the rights and obligations granted herein shall extend to the annexed territory to the extent the City has such authority. All Facilities owned, maintained, or operated by Franchisee located within any public Rights-of-Ways of the annexed territory shall be subject to all of the terms and fees of this Ordinance.

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 Network; 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 therefore to them; and any other related pertinent financial information required for the exercise of any other lawful right of Franchisee under this Franchise. Subject to the City's obligations under Oregon Public Records law, any information that is provided to the City which is marked proprietary and confidential shall not be used for any purpose, other than verifying compliance with the terms of this Ordinance, and shall be returned to Franchisee. If the City believes that it must release any designated

confidential information, it shall first advise Franchisee in advance, and refrain from releasing any information within 14 days so that Franchisee may take appropriate steps, at its own expense, to protect the confidentiality of the confidential information.

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 Franchise Fees to the City by the Franchisee; provided, however, that any audit or review must be commenced not later than 3 years after the date on which Franchise Fees for any period being audited or reviewed were due. The cost of any such audit or review shall be borne by the City.

Section 14: Right to Inspect Construction. The City or its representatives shall have the right to inspect and supervise 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: Compliance with Applicable Laws. Franchisee shall comply with all Applicable Laws, 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. The Parties agree to come together to renegotiate in good faith within thirty (30) days of a notice by either Party regarding a change in Applicable Law that materially affects either Party's interests or obligations under this Franchise. If the Parties cannot reach an agreement within sixty (60) days from the first good faith meeting, either Party shall have the right to terminate the Franchise.

Section 16: 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 Administrator

Contact: Sherry Riley, City Recorder
Address: PO Box 8, Cove, OR 97824
Phone: 541-568-4566
Facsimile: 541-568-7747

Contracts Management

Windwave Technologies, Inc.
P.O Box 1390, Boardman, OR 97836
Phone: 541-676-9663
Facsimile: 541-676-9655

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 17: 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 18: Severability. If any part of this Franchise becomes or is held to be invalid for any reason, the determination will affect only the invalid portion of this Franchise. In all other respects this Franchise will stand and remain in full force and effect as if the invalid provision had not been part of this Franchise.

Section 19: 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.

Section 20: Effective Date. This Ordinance shall take effect on the thirtieth day after the date of adoption.

ADOPTED by the City Council on this ____ day of _____, 2021.

APPROVED: _____ Date: _____
Sherry Haeger, Mayor

Attest: _____
Sherry Riley, City Recorder

Windwave Technologies, Inc. Corporation

By _____
Lynn Rodriguez
Chief Financial Officer