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ORDINANCE NO. 256

AN ORDINANCE GRANTING TO WTECHLINK INCORPORATED, d.b.a. PENDLETON FIBER COMPANY, AN OREGON CORPORATION, A FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF ADAMS, OREGON.

THE CITY OF ADAMS ORDAINS AS FOLLOWS:

Section 1: Definitions.

City: The City of Adams, Oregon, and all of the territory within its corporate boundaries, as such may change from time to time.

Franchise: The non-exclusive authorization for the construction, operation, and maintenance of a Telecommunications Network as set described in Section 2 below.

Franchise Area: All portions of the City including any areas annexed to the City.

Franchisee: Wtechlink Incorporated, dba Pendleton Fiber Company, an Oregon Corporation.

Gross Revenues: Revenues received by Franchisee from the use of its Telecommunications network within the City limits for the provision of Telecommunication Service, less net un-collectibles.

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 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. The City Maintenance and Utility Operator may grant Franchisee the right to use other city property, not to exceed 10 feet by 10 feet in any single location, to locate equipment erect, construct, operate, repair and maintain its lines, poles, anchors, wires, cables, conduits, laterals and other necessary and convenient fixtures and equipment.

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 Franchisee files with the City Recorder an unconditional acceptance of all provisions of this Franchise. If Franchisee fails to file such written acceptance within the thirty days after the date Franchise is enacted, then this Franchise shall be of no further force or effect. If accepted by Franchisee, the right, privilege, authority and franchise herein granted shall continue for a period of ten (10) years from the date of such acceptance. Thereafter, this Franchise shall continue in full force and effect on a year-to-year basis until validly canceled or terminated as provided herein.
- (b) This Franchise shall continue for a period of not more than 20 years following the effective date of this ordinance. Upon termination or expiration of the Franchise or subsequent franchises, Franchisee shall, within one hundred and eighty days, remove all its facilities from the City's rights-of-way. During such period, Franchisee shall remit to the City any payments due under this Franchise, as if this Franchise were in full force and effect. Should Franchisee fail to remove its facilities within such one-hundred-and-eighty-day period, the City may do so, and Franchisee shall immediately remit to the City the costs of such removal. Upon final expiration of this Franchise Agreement, if Franchisee desires to renew the Franchise Agreement, the parties shall discuss renewal in good faith.

Section 5: No Limitation of City Authority.

- (a) Except as expressly 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 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 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) If required by the City, the Franchisee shall file with the City maps showing the location of any construction, extension or relocation of any of the Telecommunications Network and shall obtain from the City approval of the location and plans prior to commencement of work. The City may require the Franchisee to obtain a permit before commencing construction, extension or relocation of any of its Telecommunications Network.
- (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 Maintenance and Utility Operator 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.
- (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.

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. 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 \$500,000 for each person, and \$1,500,000, 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) 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 Franchisee, either by act of Franchisee or by operation of law, without the consent of the City, expressed in writing, such consent not to be unreasonably withheld. If Franchisee wishes to transfer this Franchise, Franchisee shall give City written notice of the proposed transfer, and shall request consent of the transfer by the City.

Any transfer of ownership effected without the written consent of the City shall render this Franchise subject to revocation. The City shall have 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 60 days, the request shall be deemed granted unless Franchisee and the City agree to an extension of time.

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.

The requirements of this section shall not be deemed to prohibit the use of Franchisee's property as collateral for security in financing the construction or acquisition of all or part of a telecommunications system of Franchisee or any affiliate of 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.

- (b) **Change of Control.** The requirements of this section shall not be deemed to prohibit the sale of tangible assets of Franchisee in the ordinary conduct of 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 Franchisee, a parent of Franchisee, or an affiliate, a majority of whose beneficial ownership is held by a parent of Franchisee.

Section 10: Indemnification.

Subject to the limitations of the Oregon Tort Claims Act, the Oregon Constitution and the Charter of the City of Adams, Oregon, 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 use of 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 Franchise shall pay to City during the term of this Franchise an amount equal to seven percent (7%) of the Franchisee's Gross Revenues generated within the City of Adams ("Franchise Fee"), in the event collection of such Franchise Fee is allowed under both State and Federal law.
- (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 possible 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 allowed 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, which is to be signed under penalties of perjury by an officer of the Franchisee, in a form satisfactory to the City, 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 the lesser of nine percent (9%) per annum or the highest amount allowable under applicable law 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 verification by City.

Section 12 Right to Inspect Records.

(a) 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 Telecommunication Services provided by Franchisee via its Telecommunications network; the character and extent of the Telecommunications Services 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 Franchise 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 and is limited to one audit or professional review per time period. 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. City will review all documents in Franchisee's office and will not remove any documents, records or CD's from a local Franchisee offices or City may request certified documents if Franchisee office is too far outside local commuting distance. Any such audit or review shall be conducted during normal business hours and shall be conducted only after 30 days advance written notice to Franchisee.

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 10-year 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 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 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 Franchisee. Notwithstanding the other provisions of this Section, Franchisee, by written notice to the City, may elect to abandon underground cable in place, in which event Franchisee shall have no further obligation hereunder as to the abandoned cable; except that the City may nevertheless, by written notice, require 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 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 immunity, the City hereby expressly grants, in favor of Franchisee, 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.
- (b) Venue for any proceeding brought to enforce any term or condition of this Franchise shall be the Circuit Court for Umatilla 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 of Oregon in Portland, Oregon, with the parties stipulating to trial in Pendleton, 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.

Section 17: Limitation of Liability.

The City and 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 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 646.705-646.885, or the Oregon Unlawful Trade Practices Act, ORS 646.605-646.656. 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, 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) Franchisee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt;
 - (3) Franchisee is found to have engaged in fraud or deceit upon the City or any other persons;
 - (4) 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 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) 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 60 days written notice, the City shall conduct a hearing upon the proposed forfeiture. 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 Franchisee believes that the City has improperly declared a forfeiture, 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 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 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: i) 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 ii) 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:

Donna Grimes, City Recorder
City of Adams
PO Box 20
Adams, OR 97810
Phone: (541) 566-9380
Facsimile: (541) 566-2077

Byron Wysocki
Pendleton Fiber Company
c/o Wtechlink, Inc.
404 SE Dorion Ave., Suite 205
Pendleton, OR 97801
Phone: (541) 276-2887
Facsimile: (541)

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.

Passed by the Adams City Council and approved this 13th day of July, 2020



Approved-Mayor

7-13-2020

Date

Attest-Recorder Wtechlink

Date