

ORDINANCE NO. 799

AN ORDINANCE GRANTING TO QUANTUM COMMUNICATIONS, AN OREGON CORPORATION, A NON-EXCLUSIVE FRANCHISE AND RIGHT TO CONSTRUCT, OPERATE AND MAINTAIN A DATA COMMUNICATIONS SERVICE FACILITY AND PROVIDE TELECOMMUNICATION SERVICES IN THE CITY OF MADRAS, OREGON, AND DECLARING AN EMERGENCY.

The City of Madras ordains as follows:

Section 1. Definitions - as used in this ordinance:

1. "City" means City of Madras, Oregon.
2. "Company" means Quantum Communications, LLC, the grantee of rights under this franchise, including its successors or assigns.
3. "Council" means the City Council of the City of Madras, Oregon.
4. "Gross revenues" defined in Section 9.
5. "Person" means any person, firm, partnership, association, corporation, limited liability company or organization of any kind.
6. "Telecommunications service providers" means any entity that pays a franchise or permit fee to City for the use of Company's facilities.
7. "Ultimate consumer" means any entity that does not pay a franchise or permit fee to City for the use of Company's facilities.

Section 2. Grant of Authority. City grants to Company the right and privilege to construct, install, maintain and operate over, in, on and under the present and future City rights of way of the City of Madras, conduits, cables and other technical facilities necessary for the purpose of providing telecommunication services. This franchise is not exclusive, and City reserves the right to grant a similar privilege to any other Person at any time during the period of this franchise.

Section 3. Compliance with Laws, Rules and Regulations. At all times during the term of this franchise, Company shall comply with all applicable laws, rules and regulations

of the United States of America, the State of Oregon, and the City of Madras; including all agencies and subdivisions thereof. Company shall be subject to the lawful exercise of the police power of City and to such reasonable regulations as City may from time to time hereafter by resolutions or ordinance provide.

Section 4. Company Liability, Indemnification of City and Insurance.

1. Company shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or City.
2. Company shall pay, save harmless and indemnify City from any loss or claim against City on account of or in connection with any activity of Company in the construction, operation or maintenance of its facilities.
3. This franchise shall not be effective until Company secures, and shall at all times be conditioned upon Company maintaining, a comprehensive liability insurance policy which shall contain the following provisions:
 - a. Company shall obtain, at Company's expense, and keep in effect during the term of this franchise, comprehensive general liability insurance covering bodily injury and property damage on an "occurrence" form (1996 ISO or equivalent). This coverage shall include contractual liability insurance for the indemnity provided under this franchise. The following limits of insurance will be carried:

<u>Coverage</u>	<u>Limit</u>
General Aggregate	\$1,000,000*
Products - Completed Operations Aggregate	2,000,000*
Personal & Advertising Injury	1,000,000
Each Occurrence	1,000,000
Fire Damage (Any one Fire)	50,000
Medical Expense (Any one Person)	5,000
Employers Liability	500,000

* Aggregate limits must apply on a per location or per project basis.

- b. Company shall also obtain, at Company's expense, and keep in effect during the term of this franchise, "Symbol 1" commercial automobile liability coverage including coverage for all owned, hired, and non-owned vehicles. The combined single limit per occurrence shall not be less than \$1,000,000.
 - c. Company, its subcontractors, if any, and all employers providing work, labor or materials under this franchise are either subject employers under the Oregon Worker's Compensation Law and shall comply with ORS 656.017 which requires them to provide workers' compensation coverage that satisfies Oregon Law for all their subject workers or employers that are exempt under ORS 656.126. Out-of-state employers must provide Oregon workers' compensation coverage for their workers who work at a single location within Oregon for more than 30 days in a calendar year. Contractors who perform work without the assistance or labor of any employee need not obtain such coverage. This shall include employer's liability insurance with coverage limits of not less than \$500,000 each accident.
 - d. City, its officers, directors, and employees shall be added as additional insured with respect to all policies. All commercial general liability insurance policies will be endorsed to show this additional coverage.
 - e. There shall be no cancellation, material change, exhaustion of aggregate limits, or intent not to renew insurance coverage without 30 days written notice to City. Any failure to comply with this provision will not affect the insurance coverage provided to City. The 30 days notice of cancellation provision shall be physically endorsed on the policy.
 - f. Coverages provided by Company must be underwritten by an insurance company deemed acceptable by City. City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.
 - g. As evidence of the insurance coverage required by this franchise, Company shall furnish a Certificate of Insurance to City. This franchise shall not be in effect until the required certificates have been received and approved by City. The Certificate will specify and document all provisions within this franchise. A renewal certificate will be sent to City 10 days prior to coverage expiration.
4. In the event that City's tort liability limits are raised by the Oregon Legislature to exceed the limits described in this section, Company shall obtain and maintain insurance in the amount of City's tort liability limits.

Section 5. Performance Bond.

1. Upon the effective date of this franchise, Company shall furnish proof of the posting of a performance bond running to City, with good and sufficient surety approved by City, in the penal sum of \$100,000, conditioned that Company shall well and truly observe, fulfill, and perform each term and condition of this franchise. Company shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of this franchise, including, if necessary, the time required for removal of all of Company's telecommunications system installed in City's right of way. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without 30 days prior written notice first being given to City. The bond shall be reviewed and approved as to form by the City Attorney.
2. During the term of this franchise, Company shall file with City a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall City exercise its rights against the performance bond under Section 5.1 if a bona fide, good faith dispute exists between City and Company.
3. Not sooner than March 1, 2008 City may, based upon inflation or other identifiable needs, require the amount of the performance bond and construction bond to be increased to an amount recommended by City's insurance carrier after notice to Company.

[Subsection 3 Amended by Ordinance No. 804, Passed May 13, 2008.]

Section 6. Conditions on Right of Way Occupancy.

1. Routing and Plan Approval. Routing maps and construction plans must be approved by City's department of Public Works, before any work is started.
2. Use. Company shall construct, install, maintain and operate its fiber optic cable facilities in designated City rights of way to the industry standard and City's satisfaction; and in a manner so as to cause minimum interference with the proper use of streets, alleys, and other public ways and places, and to cause minimum interference with the rights of reasonable convenience of property owners who adjoin any of the streets, alleys or other public ways or places.
3. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Company, Company shall, at its own cost and expense and in a manner approved by City, replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed. If Company fails to make restoration as required, City shall cause the repairs to be made at the expense of Company. All work within City rights of

way shall be in accordance with the City of Madras's Standards and Specifications in effect at the time.

4. Relocation. Except as provided below, if the removal or relocation of facilities is caused directly by an identifiable development of property and the removal or relocation of facilities occurs within the area to be developed, or is made for the convenience of a customer, Company may charge the expense of removal or relocation to the developer or customer. If the removal or relocation of facilities results from City required over sizing of public facilities, is a City project, or is otherwise requested by City and is made for the purpose of improving a street to City standards or other improvement for the benefit of the public, Company will remove or relocate its facilities at Company's expense within a reasonable time frame after notification by City. In cases of capital improvement projects undertaken by City, Company shall convert existing overhead distribution facilities to underground at Company's expense. City agrees to utilize the provisions of ORS 758.210-270 when requiring such conversion.
5. Placement of Fixtures. Company shall not place its facilities where they will interfere with any existing or future City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer or water facility. All facilities placed in City rights of way shall be placed as City directs.
6. Temporary Rearrangement of Facilities. Company shall upon receipt of seven days written notice from anyone desiring to move a building or other object according to City ordinances regulating the moving of buildings, arrange to temporarily raise, lower, or otherwise move its facilities to permit the moving of buildings or other objects if the Person wishing to move the building or other object makes a reasonable arrangement to reimburse Company for its expenses in rearranging its facilities. Nothing contained in this section shall preclude City from requiring Company to move its facilities at its own expense when public convenience requires the move, as described in subsection 4 of this section.

Section 7. Transfer of Franchise. Company shall not sell, assign, dispose of, or transfer in any manner whatsoever any interest in this franchise or in the facilities authorized by this franchise, without prior written approval of Council, which consent shall not be unreasonably withheld.

Section 8. City Rights in Franchise.

1. City Supervision and Inspection. City shall have the right to supervise all construction or installation of Company's facilities subject to the provisions of this franchise and

make such inspections as it shall find necessary to insure compliance with governing laws, rules and regulations.

2. Termination or Abandonment of Franchise. Upon any termination of this franchise, all facilities installed or used by Company shall be removed by Company at Company's expense and the property upon which the facilities were used restored by Company to the condition it was in before installation except that City or its designee shall have the following options after termination of this franchise:
 - a. City or its designee may elect to acquire the facilities for their fair market value as provided by law; and
 - b. Value shall be determined by an appraiser who is mutually acceptable to City and Company.
 - c. City agrees to provide Company with written notice of its intention to acquire Company's facilities pursuant to this section within 120 days after termination of this franchise by City, or City's declaration of facilities abandonment by Company, with the closing of the acquisition to occur as soon thereafter as is practicable.

Section 9. Franchise Fee.

1. Company shall pay monthly to City the sum of 3% of Company's gross revenues received from telecommunications service providers who re-sell their use of the facilities to third parties within the corporate limits of City, plus 7% of Company's gross revenues received from ultimate consumers of the facilities who do not re-sell their use of the facilities to third parties within the corporate limits of City. Company also may at its option deduct uncollectible accounts of customers within the corporate limits of City from these gross revenues. The intention of the parties in charging different fees for telecommunications service providers and ultimate consumers is to prevent any end user from paying a permit or franchise fee to City more than once for the same use of the facilities, while at the same time charging a fair amount for the use of City's rights of way.
2. The fee required by this section shall be due and payable within 60 days after the end of each applicable calendar month.
3. With each payment, Company shall furnish City with a written statement, under oath, executed by an officer of Company, verifying the amount of gross revenues of

Company within City for the monthly period covered by payment computed on the basis set out in subsection 1. of this section.

4. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this franchise.

Section 10. Company Records and Reports.

1. Company shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this franchise. Company shall produce all books and records directly concerning its gross revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon no less than 10 days prior written notice, during normal working hours. City may require periodic reports from Company relating to its operation within City. City shall have the right during the term of this franchise or within 180 days thereafter to conduct audits of Company's records. Such audits shall be undertaken by an accountant selected by Company from a list of three accountants submitted by City. Such audit shall be conclusive and binding on City and Company. The cost of any such audit shall be borne by City, unless the results of any such audit reveal an underpayment of more than 8% of the franchise fee for the period audited. In the case of such underpayment, the full cost of such audit shall be paid by Company. Company shall immediately pay the amount of the underpayment as determined by such audit to City together with 12% per annum interest from the date such payment should have been made to the date the payment is actually made.
2. Any information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law.

Section 11. Permit and Inspection Fees. Nothing in this ordinance shall be construed to limit the right of City to require Company to pay reasonable costs incurred by City in connection with the issuance of a permit, making an inspection, or performing any other service for or in connection with Company or its facilities, whether pursuant to this ordinance or any other ordinance or regulation now in effect hereafter adopted by City.

Section 12. Enforcement and Termination of Franchise for Violation.

1. Default: Time of payment and performance are of the essence in the franchise. The following shall be events of default:
 - a. Default in Payments. The failure of Company to pay City when due any amounts required by the franchise and such failure continues for a period of 10 days after the due date.

- b. Default in Other Covenants. The failure of Company to perform any of the covenants and conditions required herein; to be kept and performed by Company, and such failure continues for a period of 30 days after notice from City of such failure. If the same failure occurs within 24 months of the initial notice, City may terminate the franchise without further opportunity to cure.

2. Termination. Upon the occurrence of an event of default, this franchise may be terminated at the option of City by notice in writing to Company given within 30 days of the date of default. If this franchise is not terminated by election of City, Company shall pay to City the sum of \$200 per day for each day the default continues along with any additional damages suffered by City as a result of Company's default.

Section 13. Remedies not Exclusive; Waiver. All remedies under this ordinance, including termination of franchise, are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Remedies contained in this ordinance, including termination of the franchise, are not exclusive and City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to City at law or in equity. Failure to enforce any provision of this ordinance shall not be construed as a waiver of a breach of any other term, condition or obligation of this ordinance.

Section 14. Franchise Term. This franchise is granted for a term of five years beginning on the date on which this franchise ordinance is approved. City agrees to renegotiate in good faith a renewal of this franchise for a similar term if this franchise is not in default at its expiration.

Section 15. Acceptance of Franchise. Within 30 days from the effective date of this ordinance, Company shall file with the City Recorder a written unconditional acceptance of this franchise and all of its terms and conditions, and if they fail to do so, this ordinance shall be void and of no effect.

Section 16. Constitutionality. If any section, subsection, sentence, clause or portion of this ordinance is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect constitutionality of the remaining portion thereof. If for any reason, the franchise fee is invalidated or amended by the act of any court or governmental agency, then the highest reasonable franchise fee allowed by such court or other governmental agency shall be the franchise fee charged by this ordinance.

Section 17. Notices. Any notice required or permitted under this franchise shall be deemed given when received or when deposited with postage prepaid in the United States Mail as registered or certified mail addressed as follows:

TO CITY: City Recorder
City of Madras
71 S.E. "D" Street
Madras, OR 97741-1605

TO COMPANY: Mark Holden, General Manager
Quantum Communications, LLC
PO Box 1748
Redmond, OR 97756

or to such other address as may be specified from time to time by either parties in writing.

Section 18. Interpretation/Jurisdiction. This franchise shall be deemed to have been entered into in Deschutes County, Oregon. Jurisdiction of any dispute shall be in the circuit court of the State of Oregon, and venue shall be in Deschutes County, Oregon. Interpretation of the franchise shall be governed by laws of the State of Oregon.

Section 19. Emergency Clause. It is hereby determined and declared that existing conditions are such that it is necessary for the immediate preservation of the peace, health, general welfare and safety of the citizens of Madras that an emergency be declared to exist and this ordinance shall be in full force and effect immediately upon and after its passage by the Council and approval by the Mayor of the City of Madras, Oregon.

PASSED by the City Council and **APPROVED** by the Mayor March 11, 2008.

ACCEPTED by Quantum Communications March 19, 2008.