

ORDINANCE NO. 839

AN ORDINANCE GRANTING BEND CABLE COMMUNICATIONS, LLC, AN OREGON LIMITED LIABILITY COMPANY D/B/A BENDBROADBAND, THE RIGHT AND PRIVILEGE TO PROVIDE AND OPERATE A GENERAL COMMUNICATIONS BUSINESS WITHIN THE CITY OF MADRAS, AND TO PLACE, ERECT, LAY, MAINTAIN, AND OPERATE IN, UPON, OVER, AND UNDER THE PUBLIC STREETS, ALLEYS, AVENUES, THOROUGHFARES, HIGHWAYS, PLACES, AND GROUNDS WITHIN THE CITY OF MADRAS, POLES, WIRES, AND OTHER APPLIANCES AND CONDUCTORS FOR ALL TELEPHONE AND OTHER COMMUNICATION PURPOSES; AND DECLARING AN EMERGENCY.

WHEREAS, Bend Cable Communications, LLC, an Oregon limited liability company d/b/a BendBroadband ("BendBroadband"), desires to provide and operate a general communications business within the City of Madras ("City"); and

WHEREAS, by passage of this Ordinance No. 839 (this "Ordinance"), City will grant BendBroadband the right and franchise to provide and operate a general communications business within City, subject to the terms and conditions contained in this Ordinance.

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

1. GRANT OF FRANCHISE

1.1 **Grant of Franchise.** Subject to the terms and conditions contained in this Ordinance, City grants BendBroadband the right and privilege to provide and operate a general communications business within City, and to place, erect, lay, maintain, and operate the Facilities (as defined below) in, upon, over, and under the Right-of-Ways (as defined below) for all telephone and other communication purposes. BendBroadband will enter into, onto, and/or over the Right-of-Ways only for the purposes described in the immediately preceding sentence. For purposes of this Ordinance, the term "Right-of-Way(s)" means the public streets, alleys, avenues, thoroughfares, and highways located within City which are owned and/or controlled by City; "Facilities" means poles, wires, conductors, appliances, and related equipment BendBroadband requires for telephone and other communication purposes.

1.2 **Franchise Non-Exclusive.** The franchise granted by City under this Ordinance is and will be construed as a non-exclusive franchise. City reserves the right to grant franchises, licenses, permits, and/or other similar rights to other persons to use and/or place, erect, lay, maintain, and/or operate in, on, over, and/or under the Right-of-Ways for similar or different purposes allowed under this Ordinance.

2. LOCATION, RELOCATION, AND REMOVAL

2.1 **Location of Facilities.** For any new construction of Facilities concerning or impacting any new construction or development within City, Bendbroadband, with permission from City to occupy such Right-of-Way, will locate its Facilities underground.

Notwithstanding anything contained in this Ordinance to the contrary, (a) Bendbroadband will not be permitted to place, erect, lay, maintain, and/or operate its Facilities in, upon, over, and/or under any City park, trail, open space, and/or similar areas, and (b) City will have the authority to prescribe which Right-of-Ways will be used by Bendbroadband for the Facilities, and the location of the Facilities within the Right-of-Ways (whether such Facilities are newly constructed, replaced, repaired, or otherwise).

2.2 Relocation. Except in the case of an Emergency (as defined below), within thirty (30) days after City's request, BendBroadband will, at BendBroadband's cost and expense, remove, relocate, change, and/or alter the position or location of any Facilities within the Right-of-Way whenever City has determined that such removal, relocation, change, and/or alteration is necessary for any of the following reasons: (a) an Emergency; (b) the construction, repair, installation, and/or maintenance of any City or other public work or improvement; (c) the operations of City or other governmental entity in, on, and/or under the Right-of-Way requires the removal, relocation, change, and/or alteration of the Facilities; (d) the removal, relocation, change, and/or alteration is pursuant to a beautification, streetscape, and/or other City improvement project; and/or (e) public convenience and/or necessity (as reasonably determined by City). If any moving and/or relocation work is done for or at the request of a private individual, entity, developer, or development, the costs of such moving or relocation work will be borne by the requesting private individual, entity, developer, or development. Nothing contained in this Ordinance will be construed in any way to prevent City from sewerage, grading, planking, rocking, paving, repairing, altering, and/or improving any Right-of-Way in and/or on which the Facilities are or will be placed. If BendBroadband is required to complete any removal, relocation, change, and/or alteration work under this Section 2.2 due to an Emergency, BendBroadband will exercise its best efforts to complete such work promptly and without delay. City will not require BendBroadband to remove or relocate its Facilities or vacate any Right-of-Way incidental to any public housing or renewal project under ORS Chapters 456 or 457 without reserving BendBroadband's right therein or without requiring BendBroadband to be compensated for the costs thereof.

2.3 Moving Aerials. Notwithstanding anything contained in this Ordinance to the contrary, whenever it becomes necessary to temporarily rearrange, remove, lower, and/or raise the Facilities to permit the passage of any building, machinery, and/or other object moved over any Right-of-Way (a "Temporary Adjustment"), BendBroadband will perform the Temporary Adjustment within seventy-two (72) hours after BendBroadband's receipt of written notice from the owner or contractor-mover desiring to move such building, machinery, and/or other object (the "Move Notice"). The Move Notice will (a) bear the approval of City, (b) detail the route of movement of the building, machinery, and/or object, (c) provide that the costs incurred by BendBroadband in making the Temporary Adjustment will be borne by the contractor-mover, (d) provide that the contractor-mover will indemnify and hold BendBroadband harmless for, from, and against any and all damages, claims, or causes of action caused directly or indirectly from the Temporary Adjustment, and (e) if required by BendBroadband, will be accompanied by cash deposit or a good and sufficient bond to pay any and all such costs as estimated by BendBroadband.

3. CONSTRUCTION, INSTALLATION, AND OPERATION

3.1 Telecommunications Facilities. Facilities will not interfere with City's water mains, sewer mains, gas mains, and/or any other municipal uses of the Right-of-Way. Facilities will be erected and located so not to unreasonably interfere with the public's use of the Right-of-Way. BendBroadband will maintain, at BendBroadband's expense, all Facilities in good and safe order and condition. If BendBroadband erects poles within the Right-of-Way for the purposes of providing and operating a general communications business, to the extent technically feasible and subject to reasonable conditions relating to safety, City may attach and maintain traffic signals, wires, control boxes, and similar items or equipment to the poles without cost or expense. City will compensate BendBroadband for any make ready work needed in order to accommodate City's attachments to BendBroadband's poles.

3.2 Construction Work. Except in the case of an Emergency, not less than fifteen (15) days prior to BendBroadband commencing (or causing any person to commence) any Construction Work (as defined below) within City, BendBroadband will (a) obtain all necessary construction permits concerning the proposed Construction Work, if any, (b) file with City maps, materials, documentation, a copy of the proposed work order, any necessary construction permits, and any other information or documentation requested by City concerning the proposed Construction Work (including, without limitation, a description of the location of any Facilities), and (c) obtain City's prior written consent to the proposed Construction Work. If BendBroadband is required to perform any Construction Work due to the occurrence of an Emergency, BendBroadband will be required to comply with Section 3.2(a), (b), and (c) as soon as practicable (but in no event later than five days after the occurrence of the Emergency). BendBroadband will conduct its operations and will perform all Construction Work, including, without limitation, any excavation and/or restoration work, in accordance with the following: (w) all Construction Work will be completed in a safe manner, taking into account all applicable traffic control rules and procedures; (x) all Construction Work will be completed so as to minimize disruption and interference of the Right-of-Way; (y) all Construction Work will be completed in accordance with this Ordinance and all applicable Legal Regulations (as defined below); and (z) all Construction Work will be completed in a good workmanlike manner. City will be permitted to inspect any and all Construction Work and demand correction of any incomplete or improper Construction Work. For purposes of this Ordinance, the term "Construction Work" means any construction activity in, on, over, and/or under any Right-of-Way, including, without limitation, any excavation, maintenance, improvement, repair, extension, and/or relocation work; the term "Emergency" means a human created or natural event or circumstance that causes or threatens widespread loss of life, injury to person or property, human suffering, or significant financial loss.

3.3 Restoration of Property. If BendBroadband disturbs and/or causes another to disturb any Right-of-Way, BendBroadband will, at BendBroadband's cost and expense, replace or restore the Right-of-Way to the same condition to which the Right-of-Way existed prior to the disruption as soon as practicable and without unreasonable delay. If BendBroadband fails to timely replace or restore any Right-of-Way to the same condition to which the Right-of-Way existed prior to the disruption, City may cause the

replacement or restoration to be made at the expense of BendBroadband. BendBroadband will pay City any and all costs and expenses incurred by City to replace or restore the Right-of-Way immediately on City's demand.

4. FRANCHISE FEES

4.1 Payment of Franchise Fees. In consideration of the rights, privileges, and franchise granted by City to BendBroadband under this Ordinance, BendBroadband will pay City a franchise fee equal to a percentage of Bendbroadband's Gross Revenues (as defined below) during a particular period in accordance with the following schedule (the "Franchise Fee"):

| <u>Period</u> | <u>Franchise Fee Amount</u> |
|--------------------------------|-----------------------------|
| Effective Date – June 30, 2016 | 2% of Gross Revenues |
| July 1, 2016 – June 30, 2017 | 3% of Gross Revenues |
| July 1, 2017 – June 30, 2018 | 4% of Gross Revenues |
| July 1, 2018 – June 30, 2019 | 5% of Gross Revenues |
| July 1, 2019 – June 30, 2020 | 6% of Gross Revenues |
| July 1, 2020 – June 30, 2021 | 7% of Gross Revenues |

BendBroadband will pay the Franchise Fee in quarterly installments, which quarterly installments will be due on or before the last day of the month immediately following the end of each calendar year quarter. The first quarterly payment of the Franchise Fee is due on or before October 31, 2011. Contemporaneously with each quarterly payment, BendBroadband will file with City a sworn statement describing the total Gross Revenues BendBroadband received during the immediately preceding quarter (the "Accounting Statement"). City's acceptance of any payments under this Section 4.1 will not constitute a waiver by City of any BendBroadband breach under this Ordinance. For purposes of this Section 4.1, the term "Gross Revenues" means any and all revenues BendBroadband receives directly or indirectly from BendBroadband's operations and/or delivery of services within City, less net uncollectibles, including, without limitation, revenues from the use, rental, and/or lease of the Facilities. If Bendbroadband sells any services subject to this Ordinance to a Wholesale Customer (as defined below) and such Wholesale Customer pays all or any portion of the Franchise Fee to Bendbroadband in connection with the purchase of services from Bendbroadband, the Wholesale Customer will receive a "credit" against the franchise fee payable by the Wholesale Customer to City under the franchise agreement between the Wholesale Customer and City. The amount of credit the Wholesale Customer will receive will be equal to the amount of the Franchise Fee paid by the Wholesale Customer to Bendbroadband. City will provide the credit to the Wholesale Customer only after the Wholesale Customer provides City sufficient proof and documentation (as reasonably determined by City) of the amount and payment of the Franchise Fee. For purposes of this Ordinance, the term "Wholesale Customer" means a communications services provider that is not the end user of the communications services, who re-sells the communications services to third-parties within City's corporate limits, and who is subject to a current franchise agreement with City.

4.2 Inspection of Books and Records. On ten (10) days' advance written notice to BendBroadband, City may review such BendBroadband books, records, documentation, and/or information City reasonably determines necessary or appropriate to audit an Accounting Statement and/or ascertain BendBroadband's compliance with this Ordinance. BendBroadband will cooperate with City in conducting any inspection and/or audit and will correct any discrepancies affecting City's interest in a prompt and efficient manner. City will bear the cost of any audit provided no irregularities are found (if City discovers any irregularities, BendBroadband will bear the cost of City's audit). BendBroadband will keep all its books, records, documentation, and/or information at its Bend, Oregon office.

5. INSURANCE AND INDEMNIFICATION

5.1 Insurance. BendBroadband, at its cost and expense, will obtain and keep in full force and effect during the term of this Ordinance the following insurance coverage and their respective minimum limits: (a) workers' compensation insurance within statutory limits; (b) employer's liability insurance with limits of not less than \$1,000,000 per occurrence, \$2,000,000 in the aggregate; (c) comprehensive general liability insurance with limits of not less than \$2,000,000 for bodily injury or death to each person, \$2,000,000 for property damage resulting from any one accident, and \$2,000,000 for all other types of liability; and (d) automobile liability insurance for all owned, non-owned, and hired vehicles that are or may be used by BendBroadband and its employees with limits of \$1,000,000 for each person, \$2,000,000 for each accident. Each liability insurance policy BendBroadband is required to obtain and maintain under this Section 5.1 will name City as an additional insured and will provide that no cancellation, expiration, modification, or reduction in amount or scope of insurance coverage is permitted without providing City thirty (30) days' prior written notice. All insurance BendBroadband is required to obtain and maintain under this Section 5.1 will be issued only by insurance companies licensed in Oregon. Prior to City's execution and acceptance of this Ordinance, and at any other time thereafter within ten (10) days after City's written request, BendBroadband will provide City with certificates of insurance and endorsements evidencing BendBroadband's compliance with this Section 5.1.

5.2 Bendbroadband Indemnification. BendBroadband will defend, indemnify, and hold City, and each employee, officer, agent, contractor, and representative of City, harmless for, from, and against any and all claims, actions, proceedings, damages, liabilities, losses, and expenses of every kind, including, without limitation, attorney fees and costs, resulting from or arising out of, whether directly or indirectly, the following: (a) the acts or omissions of BendBroadband and/or its affiliates, officers, members, managers, employees, agents, representatives, and/or contractors, whether such acts or omissions are authorized, allowed, or prohibited by this Ordinance; (b) damage, injury, or death to person or property caused directly or indirectly by BendBroadband and/or its affiliates, officers, members, managers, employees, agents, representatives, and/or contractors; and/or (c) BendBroadband's breach and/or failure to perform any BendBroadband representation, warranty, covenant, and/or obligation under this Ordinance. BendBroadband's indemnification obligations provided in this Section 5.2 will survive the termination of this Ordinance.

5.3 City Indemnification. City will defend, indemnify, and hold BendBroadband, and each employee, officer, agent, contractor, and representative of BendBroadband, harmless for, from, and against any and all claims, actions, proceedings, damages, liabilities, losses, and expenses of every kind, including, without limitation, attorney fees and costs, resulting from or arising out of, whether directly or indirectly, City's breach and/or failure to perform any City representation, warranty, covenant, and/or obligation under this Ordinance. City's indemnification obligations provided in this Section 5.3 will survive the termination of this Ordinance.

6. TERM OF FRANCHISE

6.1 Term of Franchise. Unless sooner terminated as provided in this Ordinance, this Ordinance (and the franchise granted hereunder) will be in full force and effect for the period commencing on July 26, 2011 and ending on June 30, 2021. Notwithstanding anything contained in this Ordinance to the contrary, the termination of this Ordinance, regardless of how it occurs, will not relieve a party of any obligations that have accrued before termination. This Ordinance may be extended for an additional term of ten (10) years upon the parties' mutual written agreement.

6.2 Termination by Mutual Agreement. This Ordinance (and the franchise granted hereunder) may be terminated at any time by the mutual written agreement of City and BendBroadband.

6.3 Termination for Cause. Notwithstanding anything contained in this Ordinance to the contrary, City may terminate this Ordinance (and the franchise granted hereunder) by notice to BendBroadband on the occurrence of any of the following events (each an "Event of Default"): (a) BendBroadband fails to comply with any applicable Legal Regulation; and/or (b) BendBroadband breaches and/or otherwise fails to perform any BendBroadband representation, warranty, covenant, and/or obligation contained in this Ordinance. Prior to City's termination of this Ordinance under this Section 6.3, City will provide BendBroadband thirty (30) days' prior written notice (the "BendBroadband Default Notice") specifying with reasonable particularity the Event of Default(s) City believes exist. Commencing from BendBroadband's receipt of the BendBroadband Default Notice, BendBroadband will have thirty (30) days to cure or remedy the Event of Default(s) (the "BendBroadband Cure Period"); provided, however, if the nature of the default is such that it cannot be completely remedied or cured within the BendBroadband Cure Period, there will not be a default by BendBroadband under this Ordinance if BendBroadband begins correction of the default within the BendBroadband Cure Period and thereafter proceeds with reasonable diligence to effect the remedy as soon as practicable. Subject to the immediately preceding sentence, if BendBroadband fails to cure or remedy the Event of Default(s) within the BendBroadband Cure Period, City may terminate this Ordinance based on such Event of Default(s) and may pursue any and all rights and remedies available to City under this Ordinance and/or applicable law. Termination of this Ordinance by City will not constitute a waiver or termination of any rights, claims, and/or causes of action City may have against BendBroadband.

6.4 City Default. No City act or omission will be considered a default under this Ordinance unless and until City has received thirty (30) days' prior written notice from BendBroadband specifying with reasonable particularity the nature of the default BendBroadband believes exist (the "City Default Notice"). Commencing from City's receipt

of the City Default Notice, City will have thirty (30) days to cure or remedy the alleged default (the "City Cure Period") before City will be deemed in default of this Ordinance; provided, however, if the nature of the default is such that it cannot be completely remedied or cured within the City Cure Period, there will not be a default by City under this Ordinance if City begins correction of the default within the City Cure Period and thereafter proceeds with reasonable diligence to effect the remedy as soon as practicable.

6.5 Remedies. If a party breaches or otherwise fails to perform any of its terms, covenants, conditions, and/or obligations under this Ordinance, the non-defaulting party may, in addition to any other remedy provided to the non-defaulting party under this Ordinance, pursue any and all remedies available to the non-defaulting party at law or in equity. All available remedies are cumulative and may be exercised singularly or concurrently.

7. MISCELLANEOUS

7.1 Assignment or Transfer of Franchise. BendBroadband will not assign or transfer in any manner whatsoever any interest in or to the franchise created by this Ordinance and/or in any Facilities located within City unless and until the following conditions are met: (a) the grantee, assignee, or transferee agrees in writing (in form and substance reasonably satisfactory to City) to assume and abide by the terms and conditions contained in this Ordinance; and (b) BendBroadband provides City ninety (90) days' prior written notice of the proposed assignment or transfer and City provides prior written consent of the proposed assignment or transfer. Subject to the terms and conditions contained in this Section 7.1, this Ordinance will be binding on the parties and their respective heirs, executors, administrators, successors, and assigns and will inure to their benefit.

7.2 Severability. Each provision contained in this Ordinance will be treated as a separate and independent provision. The unenforceability of any one provision will in no way impair the enforceability of any other provision contained herein. Any reading of a provision causing unenforceability will yield to a construction permitting enforcement to the maximum extent permitted by applicable law.

7.3 Attorney Fees. With respect to any dispute relating to this Ordinance, or if a suit, action, arbitration, or other proceeding of any nature whatsoever is instituted to interpret or enforce the provisions of this Ordinance, including, without limitation, any proceeding under the U.S. Bankruptcy Code and involving issues peculiar to federal bankruptcy law or any action, suit, arbitration, or proceeding seeking a declaration of rights or rescission, the prevailing party will be entitled to recover from the losing party its reasonable attorney fees, paralegal fees, expert fees, and all other fees, costs, and expenses incurred in connection therewith, as determined by the judge or arbitrator at trial, arbitration, or other proceeding, or on any appeal or review, in addition to all other amounts provided by law.

7.4 Governing Law; Venue. This Ordinance is subject to any and all applicable federal, state, and local laws, rules, regulations, codes, and ordinances, including, without limitation, any City ordinances, standards, and regulations, all as now in force

and/or which may hereafter be amended, modified, enacted, or promulgated (individually and collectively, the "Legal Regulation(s)"). Any action or proceeding arising out of or concerning this Ordinance will be litigated in courts located in Jefferson County, Oregon, or the United States District Court for the District of Oregon. Each party consents and submits to the jurisdiction of any local, state, or federal court located in Jefferson County, Oregon, or the United States District Court for the District of Oregon.

7.5 Action by the Parties. In any action mandated or permitted by City or BendBroadband under this Ordinance, such party will act in a reasonable, expeditious, and timely manner. Whenever the approval or consent of either City or BendBroadband is required under this Ordinance, such consent will not be unreasonably withheld, conditioned, or delayed.

7.6 Compliance with Laws. BendBroadband will comply with any and all applicable Legal Regulations, both generally and in connection with Bendbroadband's performance of its obligations arising out of or under this Ordinance. The rights and privileges granted by City to BendBroadband under this Ordinance extend only to the extent of City's right or authority to grant a franchise to occupy and use the Right-of-Ways for the Facilities.

7.7 Notices. All notices or other communications required or permitted by this Ordinance must be in writing, must be delivered to the parties at the addresses set forth below, or any other address that a party may designate by notice to the other party, and are considered delivered upon actual receipt if delivered personally, by fax, or by a nationally recognized overnight delivery service, or at the end of the third business day after the date of deposit if deposited in the United States mail, postage pre-paid, certified, return receipt requested.

To City:
City of Madras
Attn: City Manager
71 SE D Street
Madras, Oregon 97741
Facsimile No.: 541-475-7061

To BendBroadband:
BendBroadband
Attn: Amy Tykeson, President and CEO
63090 Sherman Road
Bend, Oregon 97701
Facsimile No.: 541-617-8420

with a copy to:
Jeremy M. Green
Bryant, Lovlien & Jarvis, PC
591 SW Mill View Way
Bend, Oregon 97709
Facsimile No.: 541-389-3386

with a copy to:
Mark P. Trincherro
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2300
Portland, Oregon 97201
Facsimile No.: 503-778-5318

7.8 Person and Interpretation. For purposes of this Ordinance, the term "person" means any natural person, corporation, limited liability company, partnership, joint venture, firm, association, trust, unincorporated organization, government or governmental agency or political subdivision, or any other entity. All pronouns contained herein and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular

includes the plural and the plural includes the singular. The words "include," "includes," and "including" are not limiting. The word "or" is not exclusive. Reference to "days" means calendar days, with any deadline falling on a day other than a business day being extended to the next business day.

7.9 Expenses. Notwithstanding anything contained in this Ordinance to the contrary, BendBroadband will bear any and all fees, costs, and expenses incurred or arising out of BendBroadband's performance of its obligations under this Ordinance.

7.10 Entire Agreement. This Ordinance contains the entire agreement and understanding between the parties with respect to the subject matter of this Ordinance and contains all of the terms and conditions of the parties' agreement and supersedes any other oral or written negotiations, discussions, representations, or agreements. BendBroadband has not relied on any promises, statements, representations, or warranties except as set forth expressly in this Ordinance.

7.11 BendBroadband Acceptance. Within thirty (30) days after City's passage of this Ordinance, BendBroadband will file with City the written acceptance attached hereto as Exhibit A (the "Acceptance"). If BendBroadband fails to timely file the Acceptance with City, this franchise (and the rights granted to BendBroadband herein) will be null and void and will be repealed by City in all respects.

7.12 Corrections. This Ordinance may be corrected by order of City's City Council to cure editorial and clerical errors.

7.13 Emergency Declaration. Passage of this Ordinance is deemed to be necessary for the immediate preservation of the peace, health, and safety of City's citizens. Consequently, an emergency is hereby declared to exist. This Ordinance will be in full force and effect upon its passage by the City Council and approval of the Mayor.

ADOPTED by the Council and signed by the Mayor this 26TH day of July, 2011.

EXHIBIT A
Acceptance

The forgoing Ordinance No. 839, adopted by the City of Madras on July 26, 2011, consisting of 10 pages, including this Exhibit A, is approved, accepted, and agreed upon by Bend Cable Communications, LLC, an Oregon limited liability company d/b/a BendBroadband.

ACCEPTED by Bend Cable Communications, LLC. dba BendBroadband on the 29TH day of July, 2011.