

ORDINANCE NO. 413

AN ORDINANCE GRANTING DOUGLAS SERVICES, INC., A FRANCHISE TO USE THE PUBLIC WAYS OF THE CITY OF DRAIN FOR PURPOSES OF PROVIDING TELECOMMUNICATIONS SERVICES

WHEREAS, the City of Drain, a municipal cooperation of the State of Oregon, hereinafter called "DRAIN" or "the City", owns and operates utility services within the community. Douglas Services, Inc., dba Douglas Fast Net, a wholly owned subsidiary of Douglas Electric Corporation, hereinafter called "DFN" or "the Franchisee", is a provider of telecommunications services in Douglas County, Oregon.

WHEREAS, DFN wishes to install telecommunication facilities in the public ways in DRAIN, and the City is willing to consider granting permits to DFN to do so, subject to City approval, on the terms and conditions hereafter.

NOW, THEREFORE, the City of Drain ordains as follows:

1. Grant of Franchise. DRAIN hereby grants DFN the non-exclusive right to use and occupy all public ways within the City, solely for the purposes described herein for a period of three (3) years beginning on the effective date of this Ordinance, following DFN's acceptance of the Franchise as provided in Section 11 of this Ordinance.
2. Definitions. As used herein:

"Gross Revenue" means all revenue earned by DFN from operations within the City, including but not limited to telecommunications service to customers located within the City and other persons who use DFN's facilities within the City to provide telecommunications service to customers.

"Public Ways" means the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, bridges, trails, paths, sidewalks, bicycle lanes, public utility easements and all other public ways or areas, including the subsurface under and air space over these areas within the City, but does not include parks or other City-owned property. This definition applies only to the extent of the City's right, title, interest and authority to grant a license or franchise to occupy and use such areas for telecommunications facilities.

"Telecommunications Provider" means: (1) any person that provides telecommunications service to any person or premises within the City, including both telecommunications carriers and non-carrier providers; (2) any person that directly or indirectly owns, leases, operates, manages, or otherwise controls telecommunications facilities which occupy public way within the City; and (3) any person that is directly or indirectly owned or controlled by any person described in this definition. For purposes of this definition, "owns" or "controls" means that one person or entity owns more than

{00047613; 4 }

25% of the stock or assets or has more than 25% common partners, directors or owners with another entity. In addition, any person that leases, purchases or otherwise receives telecommunications service or use of a telecommunications facility for less than a reasonable price, so as to create a reasonable inference that the two parties did not deal at arm's length, shall be deemed to be owned or controlled by the second party.

"Telecommunications Facilities" means the plant and equipment, other than customer premises equipment, including but not limited to line, pipe, wire, cable, fiber, pedestals, and similar facilities or equipment used, designed or intended for use by DFN to provide telecommunications service. "Telecommunications Facilities" does not include facilities for the provision of wireless services, including cell phone or internet access services.

"Telecommunications Service" means the transmission for money or other valuable consideration of voice, video or data in electromagnetic, electronic or optical form. It includes, but is not limited to, telephone service, other forms of voice service, non-cable video service, data transport, internet access service, video and cable television. It does not include (1) one-way broadcast of radio or television signals; (2) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996; (3) surveying; (4) private telecommunications networks that do not use the public way; (5) communications of the customer which take place on the customer side of on-premises equipment; or (6) cell phone or wireless services.

"Regional Fiber Consortium" means several units of local governments formed for the ownership and operation of a fiber optic system. Ordinance No. 406 establishes an intergovernmental agreement between DRAIN and the Regional Fiber Consortium.

3. Rights Granted. This Franchise authorizes and permits DFN, subject to and provided DFN is in compliance with the provisions of the Municipal Code and other applicable provisions of state or federal law, to construct, place, maintain and operate telecommunications facilities in the public ways for the term of the Franchise. This Franchise shall not convey equitable or legal title in the public ways, and may not be assigned or transferred without the written consent of the City. Neither the issuance of the Franchise nor any provisions contained herein shall constitute a waiver or bar to the exercise of any governmental right or power, police power or regulatory power of the City as may exist at the time the Franchise is granted or thereafter obtained. This Franchise does not confer any exclusive right, privilege, license or franchise to occupy or use the public ways for delivery of telecommunications facilities or services or any other purpose. The City expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the City's right to use the public ways, for similar or different purposes. This Franchise does not permit DFN to attach to any City-owned poles or other facilities of the City in the public ways. DFN agrees that use of such poles or facilities will require separate agreement with and compensation to the City.

4. Placement of Facilities. DFN shall apply for and receive all required permits from the City, and pay all applicable permit fees, prior to construction and placement of

{00047613; 4 }

telecommunications facilities in the public ways. The telecommunications facilities shall be constructed, installed, operated and maintained in accordance with the permit requirements and all applicable federal, state and local codes, rules and regulations. Upon expiration or termination of the Franchise, DFN shall remove its telecommunications facilities and repair or restore the public ways as required in Section 7 within a reasonable time and at no cost to the City.

5. Previous Agreements.

a. Agreements between DFN and the Regional Fiber Consortium provide a fiber optical connection to Drain City Hall and other specific sites free of charge.

b. An agreement between DFN and DRAIN provides space for fiber optical equipment at no charge to DFN.

c. Nothing in this Franchise shall amend, supersede or otherwise alter the terms of the previous agreements referenced in this Section.

6. Franchise Fees. Franchise fees shall be based on DFN's annual use of the City's public ways, as provided below:

a. Fee Base. For the privileges granted by this Franchise, DFN shall pay five percent (5%) of its gross revenue derived from telecommunication services provided to customers within the City limits of Drain.

b. Payment. All payments due hereunder shall be paid to the City of Drain by check or money order delivered to the address of the City for notices as set forth herein.

c. Due Date. Franchise fees shall be paid to the City on a quarterly basis, based on the revenues derived from the quarter just passed, not more than 30 days following the end of each quarter.

d. Late Fee. If DFN fails to pay the Franchise fee when due, DFN shall be charged a penalty of ten percent (10%), and the legal rate of interest established by state statute on the unpaid balance.

7. Conditions on Street Use. All telecommunications facilities erected by DFN within the City shall be located so as not to interfere with the proper use of the public ways, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the said public ways, and not to interfere with existing public utility installation.

If DFN disturbs any pavements, sidewalks, driveways or other surfacing, it shall, at its own expense, and in the time and manner provided by the City, replace and restore

all such pavings, sidewalks, driveways or other surfaces of any streets or alleys thus disturbed to at least that condition which existed prior to the disturbance.

If at any time during the period of this Franchise, the City shall lawfully elect to alter, or change the grade of, any public ways, or otherwise find removal or relocation of DFN's facilities to be in the public interest, DFN shall upon reasonable notice by the City, remove and relocate its telecommunications facilities and other fixtures at its own expense, and in each instance comply with the requirements of the City.

8. Insurance.

a. The Franchise shall not be effective until the Franchisee secures, and shall at all times be conditioned upon the Franchisee maintaining a comprehensive liability insurance policy which shall contain the following provisions:

Workers' Compensation	<u>Statutory Limits</u>
Commercial General Liability	\$1,000,000.00 per occurrence, Combined Single Liability C.S.L.
Auto Liability including coverage On all owned, non-owned and hired Autos	\$2,000,000.00 General Aggregate \$1,000,000.00 per occurrence C.S.L.
Umbrella Liability	\$1,000,000.00 per occurrence C.S.L.

b. The City shall be added as an Additional Insured to the above Commercial General Liability and Auto Liability Insurance Coverage.

c. The Franchisee shall furnish the City with current Certificates of Insurance evidencing such coverage.

9. Indemnification.

a. The Franchisee 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 to the City.

b. The Franchisee shall pay, save harmless, defend and indemnify the City for any loss or claim against the City on account of or in connection with any activity of the Franchisee in the construction, operation or maintenance of its telecommunications facilities and the provision of services.

10. Additional Capacity. DFN shall have the right, without prior DRAIN approval, to offer or provide capacity or bandwidth to another telecommunications provider for resale

{00047613; 4 }

or service to end-user customers, provided that the grantee shall notify DRAIN that such lease or agreement has been granted to a customer or lessee.

11. Acceptance of Franchise. Upon receipt of this Ordinance, DFN shall sign in the space below to indicate its unconditional acceptance of the terms and conditions upon which DRAIN has offered the Franchise described herein, and immediately return such acceptance to the CITY. If DFN fails to accept the Franchise and return acceptance to Drain within 30 days of the adoption of this Ordinance, this Ordinance and the Franchise granted herein shall become void and have no force or effect.

PASSED BY CITY COUNCIL OF THE CITY OF DRAIN, DOUGLAS COUNTY, OREGON THIS 12th DAY OF OCTOBER, 2009.

Suzanne Anderson
Suzanne Anderson, Mayor

ATTEST:

Carl A. Patnode
Carl A. Patnode, City Administrator

DFN'S ACCEPTANCE OF ORDINANCE NO. 413

This Ordinance is hereby accepted by Douglas Services, Inc., on this 21 day of October, 2009.

By: Todd Way
Todd Way, Manager

State of Oregon, County of Douglas)ss

This acceptance was signed before me on this 21 day of October, 2009, by Todd Way as Manager of Douglas Services, Inc., dba Douglas Fast Net, a wholly owned subsidiary of Douglas Electric Cooperative.



La Crecia Pearson
Notary Public for Oregon
My Commission Expires: 9-15-2013

{00047613; 4 }