

RESOLUTION NO. 1389

A Resolution Approving a Telecommunications Franchise Agreement Between the City of Central Point and Hunter Communications.

RECITALS:

A. Hunter Communications, Inc. dba Core Digital Services is requesting Council Consideration of a proposed telecommunications franchise agreement. .

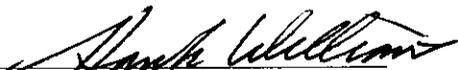
B. The proposed franchise agreement between the City of Central Point and Hunter Communications is for a period of 5 years.

C. The proposed franchise agreement meets the conditions established by the Oregon Telecommunications Act of 1996 and Chapter 12.40 of the Central Point municipal code.

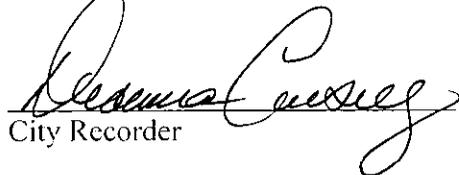
The City of Central Point resolves:

Section 1. The attached franchise agreement between the City of Central Point and Hunter Communications, Inc. dba Core Digital Services is approved and the Mayor is authorized to execute the agreement on behalf of the City.

Passed by the Council and signed by me in authentication of its passage this 23 day of January, 2014.


Mayor Hank Williams

ATTEST:


City Recorder

City of Central Point
Telecommunications Franchise Agreement
Hunter Communications, Inc.

Franchise agreement authorized pursuant to Central Point Municipal Code Chapter 12.40, Telecommunications Infrastructure, between the City of Central Point (City) and Hunter Communications, Inc. (Grantee) and dated this _____ day of _____, 20__.

1. **Grant of franchise.** Subject to the provisions and restrictions of this agreement and the Charter and the Municipal Code of Central Point, City grants to Grantee the non-exclusive privilege to use the public rights-of-way to construct and maintain telecommunication facilities within the corporate limits of the City.
 - 1.1. For purposes of this agreement, and in addition to the definitions contained in Chapter 12.40, Telecommunication Services means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used and Telecommunications is defined as "the transmission, between or 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."
 - 1.2. Upon the annexation of any territory to the City, the rights of Grantee in this agreement shall extend to the annexed territory to the extent the City has such authority. All facilities owned, maintained, or operated by Grantee located within any public rights of ways of the annexed territory shall be subject to all of the terms of this agreement.
2. **Term.** The term of this franchise shall be five years from the date listed above and shall renew automatically for 3 additional periods of 5 years each unless written notice is given by either party 90 days before expiration of its intent to terminate the franchise or unless terminated sooner as provided in this agreement or as provided in Chapter 12.40. This franchise may be terminated by the City at any time upon 30 days prior written notice to Grantee specifying Grantee's failure to comply with the other provisions of this agreement or the Municipal Code of Central Point, unless such default is remedied within the 30 day period. Said notice and termination shall not prejudice or limit any other remedy of City. Upon termination or expiration of the franchise, Grantee shall remove all of its facilities from the City's rights of way as provided in Chapter 12.40.
3. **Fee.**
 - 3.1 Grantee shall pay as a franchise fee to the City, through the duration of this franchise, an amount equal to seven percent of Grantee's gross revenues. Payment of the franchise fee shall be made quarterly on or before April 30, July 31, October 31 and January 31 for the calendar

quarter immediately preceding each of these dates. Grantee shall pay a pro rata fee for the last annual payment to the date of termination in addition to any other sums due the City and shall make such payment within 30 days of termination.

3.1.1. Gross revenue means revenue of Grantee or any affiliate of Grantee in whatever form accrued from all sources in connection with operation of the communication facilities throughout the entire franchise area, and includes any amount even if separately identified or accounted for by Grantee as franchise or other license fees, including but not limited to, revenues from subscribers and customers for internet access; installation fees, equipment fees, and other fees related to the communications service; advertising revenue; access and attachment charges paid to Grantee by other communications services or carriers; and revenue from the sale or lease of any wire, cable, facility, pole, duct, conduit or similar transmission equipment. As used in this section, "internet access" means access to content, information, electronic mail or other services offered over the internet, including voice over internet protocol (VOIP)." The fees and costs provided for in this franchise are subject to applicable federal and state laws.

3.1.2. Should Grantee determine that any revenue from Telecommunication Services or the use of Grantee's telecommunication facilities within the City is excluded from gross revenues, as defined above, because of federal or state laws, Grantee shall in any case account for such revenue in each of its payments. The accounting shall indicate the amount of revenue that was not included in the calculation of the fee paid to the city and the reason for the exclusion.

3.2. Franchise fee payments not received by the City on or before the due date shall be assessed interest at the rate of one percent over the existing prime rate as set by the bank with which the City contracts for its banking services, compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

Each payment shall be accompanied by a written report to the City, verified by an officer or other authorized representative of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's gross revenues and the computation basis and method. Such reports shall be in a form satisfactory to the City.

3.3. No acceptance of any payment by Grantee shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City

may have for further or additional sums payable. All amounts paid shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within three years of the date any audited and recomputed payment is due. If no such audit or financial review is conducted within the three year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. Grantee agrees to reimburse the City for:

- 3.3.1. The reasonable costs of such confirmation if the City's recomputation discloses that Grantee has paid 95% or less of the franchise fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit; or
- 3.3.2. One-half of the reasonable costs of such confirmation if the City's recomputation discloses that Grantee had paid more than 95% but less than 98% of the franchise fees owing for the period at issue.
- 3.3.3. The City's costs which may be reimbursed under this section shall not exceed \$5,000.00 per audit or financial review.
- 3.3.4. If the City determines that Grantee made any underpayment, and that the underpayment exceeded five percent of the amount due, Grantee shall pay interest compounded at the rate of one percent over the existing prime rate as set by the bank with which the City contracts for its banking services, compounded monthly. Interest shall be due on the entire underpayment from the date on which payment was due until the date on which full payment is received.
- 3.3.5. If the City determines that Grantee has made any overpayment, it shall immediately refund such overpayment to Grantee. If the overpayment exceeded five percent of the amount due, City shall pay interest compounded at the rate of one percent over the existing prime rate as set by the bank with which the City contracts for its banking services, compounded monthly. Interest shall be due on the entire overpayment from the date on which the overpayment was made until the date on which refund is made.
- 3.4. If Grantee disputes the City's determination of underpayment, Grantee shall place the disputed amount in an escrow account until final resolution.
- 3.5. All Grantee's books, maps, and records directly concerning its gross revenues under this franchise and its calculation of franchise fee payments to the City shall be open for inspection by the proper officers or agents of the City, upon no less than 48 hours prior written notice, during normal business hours to determine the amount of compensation due the

City under this franchise, and shall be kept so as to accurately show the same.

- 3.6. Payment of the franchise fee shall not exempt Grantee from the payment of any license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax or charge.
- 3.7. Grantee shall make its telecommunications services available to the City at its most favorable rate offered at the time of the request charged to a similar user within Oregon for a similar volume of service, subject to any of Grantee's tariffs or price lists on file with the Oregon Public Utilities Commission. Grantee may deduct the applicable charges from franchise fee payments. Other terms and conditions of such services may be specified in a separate agreement between the City and Grantee.

4. Central Point Municipal Code Chapter 12, Charter and General Ordinances to Apply.

- 4.1 Unless the context requires otherwise, words and phrases used in this franchise shall have the same meaning as defined in Chapter 12.40, Telecommunications Infrastructure. All of the provisions of Chapter 12.40 are incorporated by reference and made a part of this franchise. In the event of any inconsistencies in the terms of this franchise and Chapter 12.40, the more restrictive provisions of Chapter 12.40 shall take precedence over franchise terms unless Chapter 12.40 specifically authorizes the franchise to provide otherwise.
- 4.2 The Charter of the City and general ordinance provisions of the City affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or adopted in the future, are incorporated by reference and made a part of this franchise. Nothing in this franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid, or the manner of construction.

5. General Financial and Insurance Provisions.

- 5.1. Grantee shall secure and maintain the following liability insurance policies insuring both Grantee and City, its elected and appointed officers, officials, agents and employees as coinsured during the term of this agreement:

Bodily Injury/Death:	\$1,000,000
Property Damage:	\$1,000,000
Automobile Liability:	\$1,000,000
Workers' Compensation:	\$1,000,000

Explosion, Collapse, Product Hazard: \$1,000,000

In lieu of the above, Grantee may provide evidence of self-insurance subject to review and acceptance by City.

6. Covenant to Indemnify and Hold City Harmless.

- 6.1. Grantee shall defend, indemnify and hold the City and its officers, employees, agents, elected officials, and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or resulting from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the Grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed or prohibited by Chapter 12.40 or by this agreement.
- 6.2. Grantee also shall indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its facilities in the public rights-of-way in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer, unless Grantee's failure arises directly from the City's negligence or willful misconduct.
- 6.3. Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties or injuries incurred by any third party, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims. The indemnifying party shall have the sole right to defend such claims at its own expense. The other party shall provide, at the indemnifying party's expense, such assistance in investigating and defending such claims as the indemnifying party may reasonably request. This indemnity shall survive the termination of this Agreement.

7. Construction and Relocation.

- 7.1. Subject to applicable regulations of the City, Grantee may perform all necessary construction to construct, operate and maintain its telecommunications system. All construction and maintenance of any and all telecommunications system facilities within public rights-of-way incident to Grantee's provision of telecommunications services shall, regardless of who performs installation or construction, be and remain the responsibility

of Grantee. Grantee shall apply for and obtain all permits (no-fee permits are typically issued for franchise utilities) necessary for installation or construction of any such facilities, and for excavation and laying of any telecommunications system facilities within City public rights-of-way. Grantee shall pay all applicable fees due for City construction permits.

- 7.2. Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the public rights-of-way and the estimated total cost of such work. The schedule shall be submitted at least two weeks in advance of construction.
- 7.3. Grantee may make excavations in the City public rights-of-way for any facility needed for the maintenance or extension of Grantee's telecommunications system, subject to obtaining permits from the City. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any other franchisees, licensees or permittees of the City owning or maintaining facilities which may be affected by the proposed excavation.
- 7.4. In the event that emergency repairs are necessary for Grantee's facilities in the public rights-of-way, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all ordinance provisions relating to such excavations or construction.
- 7.5. Grantee is responsible for becoming familiar with, and understanding the provisions of ORS Chapter 757, governing the location of underground facilities (the "One-Call statutes"). Grantee shall comply with the terms and conditions set forth in the One-Call statutes.
- 7.6. Grantee shall at its own expense temporarily or permanently remove, relocate, change or alter the position of any of its facilities when directed to do so by City in compliance with Chapter 12.40.
- 7.7. Grantee's telecommunications system shall be constructed and maintained in such manner as not to interfere with City sewers, water systems, electric systems or any other facilities of the City.
- 7.8. Where Grantee installs its telecommunications facilities under or adjacent to any existing paved bicycle path, the path shall be overlaid with a new asphalt surface after construction. Where Grantee installs its telecommunication facilities along the route of a planned bicycle path, the City may require Grantee to construct the bicycle path as a condition of plan approval. All such bicycle path repair and construction shall be at Grantee's expense.

- 7.9. Upon completion of construction of any new facilities, Grantee shall promptly furnish the City with two sets of "as built" plans showing the exact location and construction details of all of Grantee's facilities. New plans will be furnished promptly for any additions or modifications.

Upon request, Grantee shall provide the City with an accurate map or maps certifying the location of all telecommunication facilities within the public rights-of-way. Grantee will otherwise provide updated maps annually.

- 7.10. Except in the case of an emergency, within ninety days following the written notice by the city, Grantee shall, at no expense to City, temporarily or permanently remove, relocate, change or alter the position of any telecommunications facilities within the public rights-of-way whenever the City shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

7.10.1. The construction, repair, maintenance or installation of any city or other public improvement in or upon the public rights-of-way;

7.10.2. The operations of the city or other governmental entity in or upon the public rights-of-way;

7.10.3. The public interest.

- 7.11. Should it ever become necessary to temporarily rearrange or temporarily remove Grantee's telecommunications facilities at the request of a private person or business, Grantee shall perform such rearrangement or removal as expeditiously as possible upon receipt or reasonable written notice from the business or person desiring the temporary change of the telecommunication facilities. The notice shall:

7.11.1. be approved by the City Manager;

7.11.2. detail the route of movement;

7.11.3. provide that the costs incurred by Grantee in making the temporary change be borne by the person or business giving said notice;

7.11.4. provide that the person or business giving the notice shall indemnify and hold harmless Grantee of and from any and all damages or claims of whatsoever kind or nature caused directly or indirectly from such temporary change of Grantee's telecommunications facilities, and (e) if required by Grantee, be accompanied by a cash deposit or a good

and sufficient bond to pay any and all of Grantee's estimated costs as estimated by Grantee.

8. Reservation of City Public rights-of-way Rights; Requirements for Undergrounding.

- 8.1. Nothing in this franchise shall be construed to prevent the City from constructing sewers, water systems, electric systems, grading, paving, repairing or altering any public rights-of-way or constructing or establishing any other public work or improvement.
- 8.2. Grantee's telecommunication facilities shall be installed underground unless Grantee contracts with another City of Central Point franchisee to employ that franchisee's above-ground facilities in place at the time this franchise is granted. It shall be lawful for Grantee to make all necessary excavations in any public way for the purpose of constructing and maintaining its telecommunication facilities. Provided, however, that Grantee's use of the public way shall be subject to the City Manager's authority to prescribe which public way will be used and the location within the public way, which authority is hereby expressly reserved by the City and delegated to the City Manager.
- 8.3. Whenever all new or existing electric utilities, telecommunications facilities are located or relocated underground within a public right-of-way of the city, a grantee with permission to occupy the same public right-of-way must also locate its telecommunications facilities underground.
- 8.4. Whenever all new or existing electric utilities, telecommunications facilities are located or relocated underground within a public right-of-way of the city, a grantee that currently occupies the same public right-of-way shall relocate its facilities underground concurrently with the other affected utilities to minimize disruption of the public right-of-way, absent extraordinary circumstances or undue hardship as determined by the city and consistent with applicable state and federal law.

- 9. Repair.** Grantee shall at all times maintain all of its telecommunication facilities in a good state of repair. Motorized vehicles shall not be allowed on any public bicycle paths and landscaped areas, except when necessary to install, remove or repair Grantee's facilities. Except in an emergency, permission shall be obtained from the City Public Works Department before using motorized vehicles on any public bicycle paths and landscaped areas. Any damage to any public way or landscaped areas caused by Grantee shall be repaired by Grantee at no cost to the City. Grantee shall have a local representative available at all times through the Rogue Basin Utilities Coordinating Council to locate Grantee's facilities for persons who need to excavate in the public way.

10. City's Written Consent Required for Assignment, Transfer, Merger, Lease or Mortgage. Ownership or control of a telecommunications system or franchise may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of Grantee, by operation of law or otherwise, without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

10.1. Grantee and the proposed assignee or transferee of the grant or system shall provide and certify the following information to the City not less than 120 days prior to the proposed date of transfer:

10.1.1. Complete information setting forth the nature, terms and condition of the proposed transfer or assignment;

10.1.2. All information required of a telecommunications franchise applicant pursuant this chapter with respect to the proposed transferee or assignee;

10.1.3. Any other information reasonably required by the City.

10.2 No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other requisite qualifications to own, hold and operate the telecommunications system pursuant to this title.

10.3 Grantee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a telecommunications franchise.

10.4 Any transfer or assignment of a telecommunications grant, system or integral part of a system without prior written approval of the City under this section shall be void and is cause for revocation of the franchise.

10.5. Grantee may dedicate or lease its fiber optic system or any portion thereof, or otherwise make its fiber optic system available in the ordinary conduct of its business as a telecommunications company, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its fiber optic system, and so long as the City's bandwidth or access speed are not diminished.

11. Miscellaneous Provisions.

11.1. Both Grantee and the City shall comply with all applicable federal and state laws. Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

- 11.2. If any section, provision or clause of this franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this franchise shall not be affected, unless the city council determines such section, provision, or clause was material to the City's agreement to issue a franchise to Grantee.
- 11.3. The City Manager is authorized to act for the City in all matters pertaining to this agreement. Grantee may appeal any action of the City Manager to the City Council by giving written notice thereof within 21 days after Grantee was notified of such action. The City Council will hear the appeal and render a final decision within 30 days after the notice of appeal is given. Grantee shall not be relieved of its obligations to comply with any of the provisions of this franchise by reason of any 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.
- 11.4. Any litigation between the City and Grantee arising under or regarding this franchise shall occur, if in the state courts, in the Jackson County Circuit Court, and if in the federal courts, in the United States District Court for the District of Oregon.
- 11.5. Whenever any notice is given pursuant to this ordinance, it shall be effective on the date it is sent in writing by registered or certified mail, addressed as follows:

To the City: City Manager, City of Central Point, and 140 S. Third St., Central Point, OR 97502

To Grantee: Richard W. Ryan, Hunter Communications, Inc.
Operations Department, Hunter Communications, Inc., 801
Enterprise Drive, Central Point, OR 97502

Notice of change of address may be given in the same manner as any other notice.

- 11.6. In any situation in which the City is found legally liable to Grantee for damage to Grantee's facilities, the City's liability shall be limited to the cost of repair or replacement of damaged facilities, whichever is less. The City shall not be liable to Grantee for lost revenue, lost profits, incidental or consequential damages or claims of third parties arising from damage to Grantee's facilities. Grantee covenants that it will not assert any claim against the City for any liability, loss, or damage excluded under this section.

12. **Other Authority Superseded.** Upon effectiveness of this franchise, any and all authority to operate previously granted to Grantee by the City shall be superseded by this franchise.
13. **Cable Authority.** This franchise does not authorize Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C.A §522 (Supp. 1997). In the event that Grantee wishes to add cable television services to the list of services, as regulated by the Federal Communications Act of 1934, as amended, Grantee agrees that it must negotiate an additional agreement with the City setting forth the terms and conditions governing such service. Other than as prescribed in Section 3.6, Grantee shall not be required to pay any additional fee, compensation or consideration to the City for its use of the public way. However, Grantee shall pay any charges and penalties imposed by the City for noncompliance with Charter provisions, ordinances, resolutions or permit conditions.

Grantee:

Hunter Communications, Inc.

By: _____

Title: _____

City:

City of Central Point

By: _____

Title: _____