

STAFF REPORT

For Meeting of Sept. 12, 2016

MAYOR AND MEMBERS OF THE CITY COUNCIL

Agenda Item #

NO. 2016-

SUBJECT:

New Telecom
Franchise- Fatbeam

Subject

Fatbeam, LLC has applied for a Franchise agreement to utilize the city's rights-of-way to provide fiber optic service for the Hermiston School District.

Summary and Background

City Code Chapter 115 establishes a lengthy set of requirements on telecommunications companies which use the city's rights-of-way to deliver service to their customers. Fatbeam has completed the City's standard application form, and requests approval of this franchise agreement, which is similar to existing agreements that the City has in place with companies such as Centurylink, Charter Communications, Eastern Oregon Telecom, and others.

This franchise agreement language has been reviewed by the city's Franchise attorneys at Cable-Huston.

Financial Information

The proposed Franchise Fee of 5% of Gross Revenue is relatively standard among cities across Oregon. According to the latest League of Oregon Cities Franchise Fee Survey, 95% of cities charge fees of between 5% and 7% for this type of franchise. However, since the company will be new to the area, and competing with existing companies, their future revenues are unknown, so it is difficult to predict how this franchise will impact City franchise fee revenues.

Alternatives and Recommendation

Alternatives

1. Motion to approve Resolution No. 2038
2. Motion to deny Resolution No. 2038

Recommendation

Staff recommends approval of the resolution.

Requested Action/Motion

Motion to approve Resolution No. 2038.

Department Head- Mark Morgan, Assistant City Manager

City Manager Approval- Byron Smith, City Manager

City of Hermiston

RESOLUTION NO 2038

A RESOLUTION OF THE CITY OF HERMISTON APPROVING AND AUTHORIZING EXECUTION OF A FRANCHISE AGREEMENT WITH FATBEAM, LLC.

WHEREAS, Fatbeam (“Grantee”) has applied for a telecommunications franchise for the construction, maintenance, and operation of a telecommunications system as a Competitive Local Exchange Carrier (“CLEC”) within the city of Hermiston; and

WHEREAS, Grantee has substantially complied with Hermiston City Code to show that Grantee has the financial, legal, and technical ability to sufficiently provide services, facilities, and equipment necessary to meet the future communications-related needs of the community; and

WHEREAS, City and Grantee have negotiated a Franchise with terms agreeable to both parties; and

WHEREAS, City and Grantee wish to execute and inter into a Franchise Agreement.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Hermiston, Oregon as follows:

1. The foregoing recitals are approved and incorporated herein by reference.
2. The Franchise Agreement is accepted and approved by the City.
3. The City Manager is authorized to execute the Franchise Agreement on behalf of the City.
4. This resolution shall be deemed effective upon adoption.

PASSED by the Common Council this 12th day of September, 2016.

Signed by the Mayor this 12th day of September, 2016

MAYOR

ATTEST:

CITY RECORDER

**City of Hermiston
Telecommunications Franchise Agreement**

This Franchise Agreement, authorized pursuant to Hermiston Municipal Code (“Code”) Title XI, is between the City of Hermiston (City) and Fatbeam, LLC, a Washington Limited Liability Company (Grantee) and dated this 12th day of September, 2016.

1. **Grant of Franchise.** City grants to Grantee, its successors and assigns, a non-exclusive franchise to construct, operate and maintain telecommunications facilities in, under, and over the surface of the City's Public Rights of Way (“Franchise”) subject to the terms of this Agreement.
2. **Term.** The term of this Franchise shall be five (5) years from the date listed above, unless terminated sooner as provided in this agreement or as provided in Title XI of the Code, and thereafter from year to year unless terminated by either Party by giving written notice of its intention to do so not less than sixty (60) days prior to the end of any period.
3. **Fee.** Except as provided below, Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, an amount equal to 5% of the Grantee’s gross revenues directly attributable to its business operations within the City. Notwithstanding the forgoing, for purposes of calculating the franchise fee, Grantee’s gross revenues shall not include any revenues derived from customers that have a franchise with, and pay franchise fees to, the City.
4. **Payment.** Payment of the franchise fee shall be made quarterly or before April 30, July 31, October 31 and January 31 for the calendar quarters immediately preceding. Franchise fee payments not received by the City on or before the due date shall be assessed interest at the rate of one percent (1%) compounded monthly, or, if lower, the maximum rate allowed by law. 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.
 - 3.1 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 of Grantee's Gross Revenues and the computation basis and method. Such reports shall be in a form satisfactory to the City.
 - 3.2 No acceptance of any payment by the City shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall the acceptance of any payment be construed as a release of any claim the City may have for further or additional sums payable.
 - 3.3 All amounts paid shall be subject to audit and confirmation by the City, provided that such audit is completed within three years of the date the audited payment is due. If no such audit is conducted within the three-year period, then any claim that the City might have had for additional compensation shall be waived.
 - 3.3.1 Grantee shall reimburse the City for the reasonable costs of such audit if Grantee has paid 95% or less of the franchise fee owing for

the period at issue upon receipt.

3.3.2 If Grantee underpaid by 5% or more of the amount due, Grantee shall pay interest on the unpaid amount compounded at the rate of one percent (1%) compounded monthly or, if less, the maximum amount allowed by law. 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.

3.3.3 If the Grantee disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account until final resolution.

3.4 All Grantee's books, maps, and records directly concerning its calculation of franchise fee payments to the City shall be open for audit by the City, upon no less than 48 hours prior written notice, during normal business hours.

3.5 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.

4. Title XI Hermiston Municipal Code, 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 Title XI of the Code. All applicable provisions of Title XI are incorporated by reference and made a part of this Franchise. In the event of any inconsistencies between the terms of this Franchise and the Code, this Franchise shall control.

4.2 The Charter of the City of Hermiston 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. Indemnity.

5.1 Grantee agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its facilities in a safe condition, but not to the extent that such casualty or accident arises out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee with prompt notice

of any such claim, which Grantee shall defend with counsel of its own choosing. No settlement or compromise of any such claim will be done by the Grantee without the prior written approval of the City. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

- 5.2 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 City Rights-of-Way in a timely manner, when required to do so, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

6. Construction and Relocation.

- 6.1 Subject to the terms of this Franchise and the Code, Grantee may construct, operate and maintain its facilities. All construction and maintenance of any and all of Grantee's facilities within City Rights-of-Way shall, regardless of who performs such installation or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation or construction of any such facilities, and for excavation and laying of any facilities within City Rights-of-Way.
- 6.2 At least two weeks prior to beginning construction in any City Rights-of-Way, Grantee shall provide the City with a construction schedule.
- 6.3 Grantee may make excavations in the City Rights-of-Way, subject to obtaining permits from the City. Prior to doing such work, Grantee must give appropriate notices to any other franchisees, licensees or permittees of the City owning or maintaining facilities that may be affected by the proposed excavation. Grantee shall, at its own expense, restore any damage or disturbance caused to City property as a result of its operation, construction, or maintenance of its facilities to a condition reasonably comparable to the condition of such property immediately prior to such damage or disturbance.
- 6.4 In the event that emergency repairs are necessary for Grantee's facilities in City 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.
- 6.5 Grantee shall comply with the terms and conditions ORS Chapter 757, governing the location of underground facilities (the "One-Call statutes").
- 6.6 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.
- 6.7 All construction practices and installation of equipment shall be done in accordance with all applicable sections of the then current version of the National Electric Safety Code, in accordance with good engineering practices and

performed by qualified maintenance and construction personnel.

- 6.8 The Grantee shall at all times employ ordinary care and shall use commonly accepted methods and devices preventing failures and accidents.
- 6.9 To the extent possible, the Grantee shall use utility poles, conduits and other facilities already existing in the City Rights-of-Way.
- 6.10 Whenever any existing utilities are located underground within a public right of way of the City, Grantee shall also locate its facilities underground. Whenever any overhead electric utilities are relocated underground, Grantee shall also relocate its facilities underground. Any and all such installation and relocation under this paragraph shall be without expense to the City.

7. **Reservation of City Rights.**

- 7.1 Nothing in this Franchise shall be construed to prevent the City from constructing sewers, water systems, electric systems, grading, paving, repairing or altering any street or constructing or establishing any other public work or improvement. Grantee's facilities 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.
- 7.2 If any of the Grantee's facilities interfere with any City sewer, water or electric system, street or public improvement, Grantee shall remove or replace its Facilities as directed by the City. Any and all such removal or replacement by Grantee shall be without expense to the City. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City, the City may undertake such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

8. **Assignment.** Grantee's rights under this Franchise may not be assigned or transferred without the prior consent of the City, which consent shall not be unreasonably withheld or delayed. No such consent shall be required for an assignment by Grantee to a corporate affiliate; Provided, however, that the Grantee, not more than ten (10) business days following such assignment, provides the City with written notice of the assignment and the assignee agrees in writing to be bound by the terms of this Agreement.

- 8.1 Grantee and the proposed assignee or transferee shall provide and certify the following information to the City not less than sixty (60) days prior to the proposed date of transfer or assignment:
 - 8.1.1 Complete information setting forth the nature, terms and condition of the proposed transfer or assignment;
 - 8.1.2 All information required of a telecommunications franchise applicant with respect to the proposed transferee or assignee;

- 8.1.3 Any other information reasonably required by the City.
- 8.2 No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other requisite qualifications to comply with the terms of this Franchise.
- 8.3 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 the Franchise.
- 8.4 Any transfer or assignment of this Franchise without prior approval of the City under this section shall be void.

9. Miscellaneous Provisions.

- 9.1 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 determines such section, provision, or clause was material to the City's agreement to grant the Franchise to the Grantee.
- 9.2 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.
- 9.3 This Franchise should be governed by the laws of the State of Oregon. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Umatilla County Circuit Court, and if in the federal courts, in the United States District Court for the District of Oregon.
- 9.4 Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party shall specify in writing:

If to the City: City Manager, City of Hermiston, 180 NE 2nd Street, Hermiston, Oregon 97838; FAX 541-567-5530

If to the Grantee: General Counsel of Fatbeam, 2065 W. Riverstone Dr., Ste. 105, Coeur d'Alene, ID 83814.

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three business days after

depositing in the United States mail, one business day after shipment by commercial air courier or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

- 10. **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.
- 11. **Cable Authority.** This Franchise does not authorize the Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C.A § 522 (Supp. 1997).

12. **Insurance.**

- A. The Grantee shall maintain throughout the term of the Franchise insurance in amounts at least as follows:

Workers' Compensation	Statutory Limits
Commercial General Liability	[\$691,200] per occurrence, Combined Single Liability (C.S.L) [\$1,382,300] General Aggregate
Auto Liability including coverage On all owned, non-owned Hired autos Umbrella Liability	[\$1,382,300] per occurrence C.S.L.
Umbrella Liability	[\$1,382,300] per occurrence C.S.L.

- B. The City shall be added as an additional insured, arising out of work performed by Grantee, to the above Commercial General Liability, Auto Liability and Umbrella Liability insurance coverage.
- C. The Grantee shall furnish the City with current certificates of insurance evidencing such coverage upon request.

- 13. This Agreement may be executed by the Parties in one or more counterparts.

Grantee

City

By: _____

By: _____

Title: _____

Title: City Manager_____

