

RESOLUTION NO. 2014-18

A RESOLUTION AUTHORIZING THE CITY TO ENTER INTO A FRANCHISE AGREEMENT WITH FALCON TELECABLE, A CALIFORNIA LIMITED PARTNERSHIP LOCALLY KNOWN AS CHARTER COMMUNICATIONS, AND AUTHORIZING THE MAYOR TO SIGN AN AGREEMENT

WHEREAS, the City of Garibaldi (City) pursuant to Oregon Revised Statutes has the legal authority to regulate publicly owned rights-of-way under its control and grant franchises and/or impose charges upon publicly and privately owned suppliers of telecommunication services; and,

WHEREAS, the City and Falcon Telecable, also known as Charter Communications, have an existing franchise agreement established by Ordinance 276 on December 15, 2003, that allows Falcon Telecable to operate a cable television utility within the City; and,

WHEREAS, the current agreement expired December 31, 2013, and is extended by mutual agreement of both parties to May 31, 2014; and,

WHEREAS, the City's legal counsel has reviewed an agreement proposed by Falcon Telecable and proposes changes that serve the best interests of the City; and,

Whereas, Falcon Telecable has rejected portions of an agreement proposed by the City on 19 May 2014; and,

WHEREAS, the City Council has reviewed and accepts an agreement proposed to the City and presented to the City Council by the City Manager,

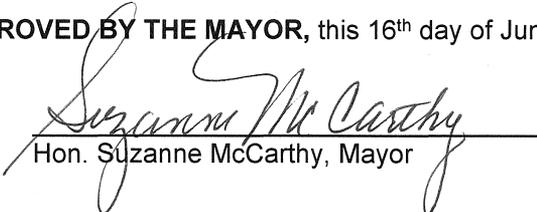
NOW, THEREFORE, THE COMMON COUNCIL OF THE CITY OF GARIBALDI RESOLVES AS FOLLOWS:

Section 1. The City Council finds that the recitals of this resolution are relevant facts, and are incorporated as findings herein.

Section 2. The City Council hereby authorizes the Mayor sign an agreement titled FRANCHISE AGREEMENT GARIBALDI, OREGON as attached to this resolution as **Exhibit A**.

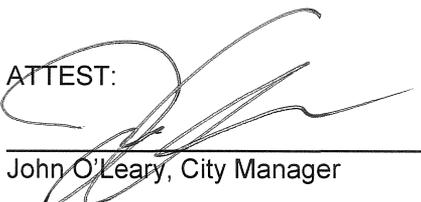
Section 3. This resolution is effective on the date of adoption by the City Council.

PASSED BY THE CITY COUNCIL AND APPROVED BY THE MAYOR, this 16th day of June, 2014.



Hon. Suzanne McCarthy, Mayor

ATTEST:



John O'Leary, City Manager

Attached – **Exhibit A**

**FRANCHISE AGREEMENT
GARIBALDI, OREGON**

This Franchise Agreement (“Franchise”) is between the City of Garibaldi, Oregon, hereinafter referred to as the “Grantor” and Falcon Telecable, a California Limited Partnership, locally known as CHARTER COMMUNICATIONS, hereinafter referred to as the “Grantee.”

The Grantor hereby acknowledges that the Grantee has substantially complied with the material terms of the current Franchise under applicable law, and that the financial, legal, and technical ability of the Grantee is reasonably sufficient to provide services, facilities, and equipment necessary to meet the future cable-related needs of the community, and having afforded the public adequate notice and opportunity for comment, desires to enter into this Franchise with the Grantee for the construction and operation of a cable system on the terms set forth herein.

1. Definitions:

- a. “Cable Act” means the Cable Communications Policy Act of 1984, P.L. 98-549, 47 U.S.C. §521 Supp., as it may be amended or superseded.
- b. “Cable System,” “Cable Service,” and “Basic Cable Service” shall be defined as set forth in the Cable Act.
- c. “Franchise” means the authorization granted hereunder of a franchise, privilege, permit, license or otherwise to construct, operate and maintain a Cable System within the Service Area.
- d. “Gross Revenue” means any revenue, as determined in accordance with generally accepted accounting principles received by the Grantee from the operation of the Cable System to provide Cable Services in the Service Area, provided, however, that such phrase shall not include: (1) any taxes, fees or assessments collected by the Grantee from Subscribers for pass-through to a government agency, including, without limitation, the FCC user fee, franchise fee, or sales or utility taxes; (2) bad debt; (3) credits, refunds and deposits paid to Subscribers; and (4) any exclusion available under applicable state law.
- e. “Service Area” shall mean the geographic boundaries of the Grantor.
- f. “Streets” means the public streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, alleys, all other rights-of-way and easements, and the public grounds, places or water within the geographic boundaries of Grantor.
- g. “Subscriber” means any person lawfully receiving any Cable Service from the Grantee.

- 2. Granting of Franchise.** The Grantor hereby grants to Grantee a non-exclusive Franchise for the use of the Streets and dedicated easements within the Service Area for the construction, operation and maintenance of the Cable System, upon the terms and

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conditions set forth herein. Nothing in this Franchise shall be construed to prohibit the Grantee from offering any service over its Cable System that is not prohibited by federal or state law.

3. **Term.** The Franchise shall be for a term of ten (10) years, commencing on the Effective Date of this Franchise as set forth in Section 21.

4. **Use of the Streets and Dedicated Easements.**

- a. Grantee shall have the right to use the Streets of the Grantor for the construction, operation and maintenance of the Cable System, including the right to repair, replace and enlarge and extend the Cable System, provided that Grantee shall utilize the facilities of utilities whenever practicable.
- b. Grantee shall conform to the relevant engineering and construction standards of Grantor when installing, repairing, replacing or enlarging Cable System facilities and infrastructure within the Streets of Grantor. Grantee shall not install, repair, replace, enlarge or improve in any way its facilities or infrastructure in a manner that conflicts with the existing use of the Streets of Grantor. Grantor has the right to require accommodation by Grantee for planned future improvements within the Streets of the Grantor at the time new or improved facilities or infrastructure is proposed by Grantee.
- c. Grantee agrees to obtain all regulatory permits required by Grantor and all other relevant state, county and local agencies prior to installation, construction or reconstruction of facilities or infrastructure within Streets of Grantor.
- d. The facilities of the Grantee shall be installed underground in those Service Areas where existing telephone and electric services are both underground at the time of system construction. In areas where either telephone or electric utility facilities are installed aerially at the time of system construction, the Grantee may install its facilities aerially with the understanding that at such time as the existing aerial facilities are required to be placed underground by the Grantor, the Grantee shall likewise place its facilities underground.
- e. Grantee shall have the right to trim, cut and keep clear of the Cable System, the trees and vegetation in and along the Streets of the Grantor.
- f. Grantee in the exercise of any right granted to it by the Franchise shall, at no cost to the Grantor, promptly repair or replace any facility or service of the Grantor which Grantee damages, including but not limited to any Street or sewer, electric facility, water main, fire alarm, police communication or traffic control.

5. **Maintenance of the System.**

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- a.** Grantee shall at all times employ ordinary care in the maintenance and operation of the Cable System so as not to endanger the life, health or property of any citizen of the Grantor or the property of the Grantor
- b.** All construction practices and installation of equipment shall be done in accordance with all applicable sections of the National Electric Safety Code.
- c.** The Cable System shall be designed, constructed and operated so as to meet those technical standards adopted by the FCC relating to Cable Systems contained in part 76 of the FCC's rules and regulations as they may, from time to time, be amended, regardless of the transmission technology utilized.

6. Service.

- a.** The Grantee shall continue to provide Cable Service to all residences within the Service Area where Grantee currently provides Cable Service. Grantee shall have the right, but not the obligation, to extend the Cable System into any other portion of the Service Area, including annexed areas. Cable Service offered to Subscribers pursuant to this Franchise shall be conditioned upon Grantee having legal access to any such Subscriber's dwelling unit or other units wherein such Cable Service is provided.
- b.** The Grantor shall promptly provide written notice to the Grantee of its annexation of any territory which is being provided Cable Service by the Grantee or its affiliates. Such annexed area will be subject to the provisions of this Franchise upon sixty (60) days' written notice from the Grantor, subject to the conditions set forth below and subsection (a) above. The Grantor shall also notify Grantee in writing of all new street address assignments or changes within the Service Area. Grantee shall within ninety (90) days after receipt of the annexation notice, pay the Grantor franchise fees on revenue received from the operation of the Cable System to provide Cable Services in any area annexed by the Grantor if the Grantor has provided a written annexation notice that includes the addresses that will be moved into the Service Area in an Excel format or in a format that will allow Grantee to change its billing system. If the annexation notice does not include the addresses that will be moved into the Service Area, Grantee shall pay franchise fees within ninety (90) days after it receives the annexed addresses as set forth above. All notices due under this section shall be sent by certified mail, return receipt requested to the addresses set forth in Section 12 with a copy to the Director of Government Relations. In any audit of franchise fees due under this Agreement, Grantee shall not be liable for franchise fees on annexed areas unless and until Grantee has received notification and information that meets the standards set forth in this section.

7. Insurance/Indemnity.

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- 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	\$1,000,000 per occurrence, Combined Single Liability (C.S.L.) \$2,000,000 General Aggregate
Auto Liability including coverage on all owned, non owned hired autos	\$1,000,000 per occurrence C.S.L.
Umbrella Liability	
Umbrella Liability	\$1,000,000 per occurrence C.S.L.

- b. The Grantor shall be added as an additional insured, arising out of work performed by Charter, to the above Commercial General Liability, Auto Liability and Umbrella Liability insurance coverage.
- c. The Grantee shall furnish the Grantor with current certificates of insurance evidencing such coverage upon request.
- d. The Grantee shall indemnify, defend, and hold harmless Grantor, its officers, employees and agents from and against any liability or claims resulting from property damage or bodily injury (including accidental death) that arise out of or are related to Grantee's construction, operator and maintenance of the Cable System in the Service Area. Such indemnification shall include, but shall not be limited to: reasonable attorneys' fees, costs or expenses. This duty to indemnify shall not extend to any willful misconduct or negligence on the part of the Grantor, its officers, employees or agents. The Grantor shall provide Grantee with ten (10) business days of receipt of a claim or action pursuant to this section, which Grantee shall defend at Grantee's sole cost and expense. Grantee shall not settle or compromise any such claim without the prior written approval of Grantor, which shall not be unreasonably withheld, and both parties shall consult and coordinate with each other while Grantee is conducting its defense. The Grantor may, at its own costs, defend or participate in the defense of a claim.

8. Revocation.

- a. If the Grantor lawfully grants a franchise to any entity to use the Public Way for the construction, operation and maintenance of any communications facility that offers services substantially equivalent to the services offered by Grantee under this Franchise, the terms of such franchise shall not be substantially more favorable or less burdensome than the terms of this Franchise, so that Grantee suffers no material competitive disadvantage as a result of the differences in the terms of the franchise granted to the competitive service provider.

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- b.** If Grantee determines that Grantor has granted a franchise on terms failing to meet the requirements of the above Subsection, upon thirty (30) days prior written notice to the Grantor, Grantee may have the right and choose to:

 - i.** request that Grantor modify this Franchise to meet the mutual satisfaction of the Grantor and Grantee; or
 - ii.** deem this Franchise terminated thirty-six (36) months from the date of the above written notice and begin renewal negotiations under Section 626 of the Cable Act; or
 - iii.** terminate this Franchise and request in its place the same franchise agreement the Grantor granted to the competitive provider.
 - c** If any other state or federal governmental entity is lawfully authorized as to the above, then Grantee shall have the right and may choose to deem this Franchise expired and to negotiate a replacement franchise license, consent, certificate or other authorization with any other appropriate government entity.
 - d** The Grantor and the Grantee agree that any undertakings that relate to the renewal of the Grantee’s Franchise with the Grantor shall be subject to the provisions of Section 626 of the Cable Act or any such successor statute. Nothing in this Franchise shall impair the right of the Grantor or Grantee to terminate this Franchise or seek other remedies available under law upon sixty (60) days prior written notice to the other.
- 9. Confidentiality.** If Grantee provides any books and records to the Grantor, the Grantor agrees to treat as confidential such books, records or maps that constitute proprietary or confidential information, subject to Oregon’s Public Records Disclosure Laws. Until otherwise ordered by a court or agency of competent jurisdiction, the Grantor agrees that, to the extent permitted by state and federal law, it shall deny access to any of Grantee’s books and records marked confidential to any person.
- 10. Service to Public Schools and Libraries.** Grantee may, on a voluntary basis, provide one outlet of free Basic and Expanded Basic cable service to public school classroom buildings and to public libraries within the Service Area.
- 11. Notices, Miscellaneous.**
- a.** Unless otherwise provided by federal, state or local law, all notices, reports or demands pursuant to this Franchise shall be in writing and shall be deemed to be sufficiently given upon delivery to a Person at the address set forth below, or by U.S. certified mail, return receipt requested, nationally or internationally recognized courier service such as Federal Express or electronic mail communication to the designated electronic mail address provided below. Grantee shall provide thirty (30) days written notice of any changes in rates, programming services or channel positions using any reasonable written means.

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As set forth above, notice served upon the Grantor shall be delivered or sent to:

Attn: City Manager
City of Garibaldi
107 6th Street
PO Box 708
Garibaldi, OR 98118

And every notice served upon Grantee shall be delivered or sent to:

Attn: Director, Government Relations
Charter Communications
222 NE Park Plaza Drive, #231
Vancouver, WA 98684

With a copy to:

Attn: Vice President, Government Relations
Charter Communications
12405 Powerscourt Drive
St. Louis, MO 63131

- b. All provisions of this Franchise shall apply to the respective parties, their lawful successors, transferees and assigns.
 - c. If any particular section of this Franchise shall be held invalid, the remaining provisions and their application shall not be affected thereby.
 - d. In the event of any conflict between this Franchise and any Grantor ordinance or regulation, this Franchise will prevail.
12. **Force Majeure.** Neither the Grantee nor the Grantor shall not be held in default under, or in noncompliance with the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default, where such noncompliance or alleged defaults occurred or were caused by circumstances reasonably beyond their ability to anticipate and control. This provision includes, but is not limited to, severe or unusual weather conditions, fire, flood, or other acts of God, strikes, work delays caused by failure of utility providers to service, maintain or monitor their utility poles to which Grantee's Cable System is attached, as well as unavailability of materials and/or qualified labor to perform the work necessary.
13. **Franchise Fee.**
- a. Grantee shall pay to the Grantor annually an amount equal to five percent (5%) of the Gross Revenues for such calendar year.

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- b.** Each year during which the Franchise is in force, Grantee shall pay Grantor no later than forty five (45) days after the end of each calendar quarter the franchise fees required by this section, together with a financial statement showing total Gross Revenues derived from the Cable System during such year. The Grantor shall have the right to review the previous year's books of the Grantee to the extent necessary to ensure proper payment of the fees payable hereunder. The Franchise Fees shall not be deemed to be in lieu of or waiver of any ad valorem property tax the City may now or hereafter be entitled to. If applicable federal law regarding the City's authority to collect Franchise Fees is amended to allow the City to collect a Franchise Fee greater than five percent (5%), Grantee agrees to renegotiate this subsection to increase the percentage up to the applicable limits.
 - c.** Upon reasonable prior written notice, during normal business hours, the Grantor shall have the right to audit and/or inspect the Grantee's financial records used to calculate the Grantor's franchise fees. However, the Grantee shall only be responsible for paying any amounts discovered to be owed to the Grantor from such audit or inspection if such amounts were paid (or should have been paid) within thirty-six (36) months of the Grantor's notice of audit and inspection, after which period any such payment shall be considered final.
 - d.** Upon the completion of any such audit by the Grantor, the Grantor shall provide to the Grantee a final report setting forth the Grantor's findings in detail, including any and all substantiating documentation. In the event it is determined that franchise fees for the audit or inspection period have been underpaid, the Grantor shall notify Grantee in writing of its determination. Upon receipt, Grantee shall have forty five (45) days to pay the amount due and owing or to notify the Grantor if it disagrees with the Grantor's determination. The Grantor and Grantee shall discuss all disputed amounts. In the event the parties are not able to reach an agreement on mutually acceptable terms and conditions, either party may pursue their legal remedies
- 14. Books and Records.** Grantee shall keep accurate books of accounts at an office in Oregon for the purpose of determining the amounts due to the Grantor. Throughout the term of this Franchise Agreement, the Grantee agrees that the Grantor, upon reasonable prior written notice to the Grantee, may review such of the Grantee's books and records regarding the operation of the Cable System and the provision of Cable Service in the Franchise Area which are reasonably necessary to monitor Grantee's compliance with the provisions of this Franchise Agreement at the Grantee's business office, during normal business hours, and without unreasonably interfering with Grantee's business operations. Such books and records shall include any records related to this Franchise Agreement or required to be kept in a public file by the Grantee pursuant to the rules and regulations of the FCC. All such documents pertaining to financial matters that may be the subject of an inspection by the Grantor shall be retained by the Grantee for a minimum period of three (3) years.

15. Transfer or Change of Control of Cable System or Franchise.

The Franchise granted hereunder shall not be assigned, other than by operation of law or to an entity controlling, controlled by, or under common control with the Grantee, without the prior consent of the Grantor, such consent not to be unreasonably withheld or delayed. No such consent shall be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Grantee in the Franchise or Cable System to secure indebtedness. Within thirty (30) days of receiving a request for transfer, the Grantor shall notify the Grantee in writing of any additional information it reasonably requires to determine the legal, financial and technical qualifications of the transferee. If the Grantor has not taken action on the Grantee's request for transfer within one hundred twenty (120) days after receiving such request, consent by the Grantor shall be deemed given.

16. Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Franchise Agreement is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

17. Governing Law and Choice of Forum. This Franchise Agreement shall be deemed to be executed in the State of Oregon, and shall be governed in all respects, including validity, interpretation and effect, and construed in accordance with, federal law and the laws of the State of Oregon, as applicable to contracts entered into and performed entirely within the State. The parties agree that if a suit is brought, the trial of such action shall be vested exclusively in the State of Oregon Courts, County of Tillamook County or in the US District Court for the District of Oregon.

18. Independent Status. Grantee is not an agent, employee, or representative of the Grantor.

19. Administration of Franchise. This agreement constitutes a binding contract between the Grantee and the Grantor. By accepting the Franchise, Grantee acknowledges and accepts the City's legal right to issue and enforce the Franchise and agrees to comply with the provisions of this Franchise agreement, consistent with applicable law. This Franchise is a contract and neither party may take any unilateral action that materially changes the explicit mutual promises and covenants contained herein. Any changes, modifications or amendments to this Franchise must be made in writing, signed by the Grantor and the Grantee.

20. Effective Date. The Franchise granted herein will take effect and be in full force from such date of acceptance by Grantee recorded on the signature page of this Franchise.

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This Franchise shall expire ten years from the date it is executed by the Grantor unless extended in accordance with Section 3 of this Franchise or by the mutual agreement of the parties.

- 21. Acceptance and Entire Agreement.** The Grantor and the Grantee, by virtue of the signatures set forth below, agree to be legally bound by all provisions and conditions set forth in this Franchise. The Franchise constitutes the entire agreement between the Grantor and the Grantee. No modifications to this Franchise may be made without an appropriate written amendment signed by both parties. If any fee or grant that is passed through to Subscribers is required by this Franchise, other than the franchise fee, such fee or grant shall go into effect sixty (60) days after the Effective Date of this Franchise.

Considered and approved this ___ day of _____, 20__

City of Garibaldi

Signature: _____

Name/Title _____

Accepted this ___ day of ____, 20__, subject to applicable Federal, State and Local law.

Falcon Telecable, a California Limited Partnership, I/k/a Charter Communications

Signature: _____

Mark E. Brown
Vice President, Government Affairs
Charter Communications

Date: _____