

CITY OF TIGARD, OREGON  
TIGARD CITY COUNCIL  
RESOLUTION NO. 10-55

A RESOLUTION GRANTING A NON-EXCLUSIVE UTILITY FRANCHISE TO XO COMMUNICATIONS SERVICES, INC. PURSUANT TO TIGARD MUNICIPAL CODE SECTION 15.06.060.

---

WHEREAS, the Tigard Municipal Code ("TMC") Section 15.06.060 allows the City Council to grant a non-exclusive utility franchise to any person providing utility services which meets the requirements of the TMC; and

WHEREAS, XO Communications Services, Inc. was the parent company of NEXTLINK Oregon, Inc. and held a franchise agreement with the City from 5/4/00 through 5/4/10 at which time it expired with XO Communications continuing to pay franchise fees to the City after the franchise expired; and

WHEREAS, XO Communications Services, Inc. is now the provider of services in Oregon, has requested a new utility franchise and has met all necessary requirements in TMC Chapter 15.06; and

WHEREAS, XO Communications Services, Inc. has signed a standard Utility Franchise Agreement without modification.

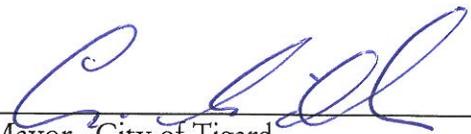
NOW, THEREFORE, BE IT RESOLVED by the Tigard City Council that:

SECTION 1: XO Communications Services, Inc. is hereby granted a non-exclusive utility franchise for a period of 10 years from the date of this action.

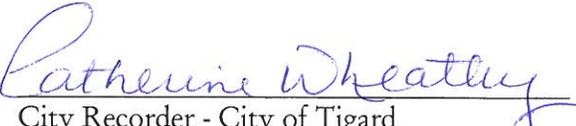
SECTION 2: The Mayor is authorized to execute the attached franchise agreement with XO Communications Services, Inc.

SECTION 3: This resolution is effective immediately upon passage.

PASSED: This 26<sup>th</sup> day of October 2010.

  
\_\_\_\_\_  
Mayor - City of Tigard

ATTEST:

  
\_\_\_\_\_  
Catherine Wheatley  
City Recorder - City of Tigard

RESOLUTION NO. 10 - 55

**CITY OF TIGARD, OREGON  
FRANCHISE AGREEMENT**

THIS FRANCHISE AGREEMENT ("Agreement") is made and entered into by and between the City of Tigard, an Oregon municipal corporation, ("City") and XO Communications Services, Inc. a Dacore corporation, ("Franchisee") qualified to do business in Oregon:

**RECITALS**

1. Pursuant to Federal law, State statutes, and City Charter and local ordinances, the City is authorized to grant non-exclusive franchises to occupy the rights-of-way as defined in Chapter 15.06 of the Tigard Municipal Code ("TMC"), in order to place and operate a Utility System within the municipal boundaries of the City of Tigard ("Franchise Area"); and
2. Franchisee has requested a franchise to place and operate a telecommunication system (the "Utility System"), as defined in TMC 15.06.020, within the Franchise Area; and
3. The City has found that Franchisee meets all lawful requirements to obtain a franchise, and therefore approves the application.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

**AGREEMENT**

1. GRANT OF AUTHORITY

The City grants Franchisee the non-exclusive right to occupy City rights-of-way to place and operate a Utility System for a term of ten (10) years from and after the Effective Date of this Agreement (the "Term"), except as set forth below.

2. AUTHORITY NOT EXCLUSIVE

This Agreement shall be nonexclusive, and is subject to all prior rights, interests, agreements, permits, easements or licenses granted by the City to any person to use the rights-of-way for any purpose whatsoever, including the right of the City to use same for any purpose they deem fit, including the same or similar purposes allowed Franchisee hereunder. The City may, at any time, grant to other persons authorization to use the rights-of-way for any purpose. This Agreement does not confer on Franchisee any right, title or interest in any right-of-way.

3. PERFORMANCE

During the term of this Agreement, Franchisee agrees to comply with all lawful terms and conditions of TMC Chapter 15.06, including but not limited to the permit and permit fee requirements set forth in TMC 15.06.200 and TMC Chapter 15.04, and the right-of-way usage fee set forth in TMC 15.06.100, the provisions of which are incorporated herein as though fully set forth.

#### 4. CHANGE OF LAW; AMENDMENT OF FRANCHISE AGREEMENT

a. It is the intent of the parties that this Agreement may be amended from time to time to conform to any changes in the controlling federal or state law or other changes material to this agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This Agreement may be amended or terminated by the mutual consent of the parties and their successors-in-interest.

b. To the extent any lawful City rule, ordinance or regulation, including any amendment to the provisions of TMC Chapter 15.06, including any change to TMC 15.06.100, is adopted on a jurisdiction-wide basis and is generally imposed on similarly situated persons or entities, the rule, ordinance or regulation shall apply without need for amendment of this Agreement. The City shall provide Franchisee notice of any such change in local law.

#### 5. TAXES

Nothing contained in this Agreement shall be construed to exempt Franchisee from any license, occupation, franchise or excise tax or assessment, which is or may be hereafter lawfully imposed on Franchisee.

#### 6. INSURANCE

By the Effective Date of this Agreement, Franchisee shall provide a certificate of insurance that names the City as an additional insured and is otherwise consistent with the requirements of TMC 15.06.180.

#### 7. SEVERABILITY

If any section, subsection, sentence, paragraph, term, or provision hereof is determined to be invalid, or unconstitutional by any court of competent jurisdiction, such determination shall have no effect on the validity of any other section, subsection, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Agreement. If any material portion of the Agreement becomes invalid or unconstitutional so that the intent of the Agreement is frustrated, the parties agree to negotiate replacement provisions to fulfill the intent of the Agreement consistent with applicable law.

#### 8. REMEDIES

a. This Agreement shall be subject to termination as set forth in TMC 15.06.310, provided that the City complies with the requirements set forth in TMC 15.06.320 and 15.06.330.

b. All remedies under this Agreement, including revocation of the Agreement, are cumulative and not exclusive, and the recovery or enforcement by one available remedy is not a bar to recovery or enforcement by any other such remedy. The City reserves the right to enforce the penalty provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon Franchisee by or pursuant to this Agreement. A specific waiver of a particular breach of any term, condition or obligation imposed upon Franchisee by or pursuant to

this Agreement shall not be a waiver of any other, subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

c. The right is hereby reserved to the City to adopt, in addition to the reservations contained herein and existing applicable ordinances, such additional regulations as it shall find necessary for the regulation of the right-of-way, provided that such regulations, by ordinance or otherwise, shall be reasonable and not in conflict with the rights herein granted. Franchisee shall, at all times during the life of this Agreement, be subject to all lawful exercise of the police power by the City, and to such reasonable regulations as the City may hereafter by resolution or ordinance provide. The City hereby reserves the right to exercise, with regard to this Agreement, all authority now or hereafter granted to the City by state statute or City charter, except where such authority may be modified or superseded by the Constitution of the State of Oregon or the Constitution of the United States.

#### 9. ASSIGNMENT

All rights and privileges granted and duties imposed by this Agreement upon Franchisee shall extend to and be binding upon Franchisee's successors, legal representatives and assigns. This Agreement may not be transferred or assigned to another person unless such person is authorized under all applicable laws to own or operate the Utility System and the transfer or assignment is approved by all agencies or organizations required or authorized under federal or state laws to approve such transfer or assignment. Franchisee shall provide the City with written notice of any transfer or assignment of this Agreement within twenty (20) days of requesting approval from any state or federal agency.

#### 10. NOTICE

Unless specifically provided otherwise herein, all notices shall be mailed, postage prepaid, to the following addresses or to such other addresses as Franchisee or the City may designate in writing:

If to Franchisee: [INSERT NAME AND ADDRESS] *see attached*

If to City: City of Tigard  
Attention: City Manager  
13125 SW Hall Blvd.  
Tigard, Oregon 97223

#### 11. GOVERNING LAW

The law of the State of Oregon governs the validity of this Agreement, and its interpretation, performance and enforcement. Any action or suit to enforce or construe any provision of this Agreement by any party shall be brought in the Circuit Court of the State of Oregon for Washington County, or the United States District Court for the District of Oregon.

#### 12. EFFECTIVE DATE

The effective date of this Agreement ("Effective Date") shall be the date it is fully executed by the City and Franchisee.

CITY OF TIGARD

By: \_\_\_\_\_

Mayor

Date: \_\_\_\_\_

FRANCHISEE

By: Heather B. Gold

Title: Heather B. Gold

Date: 8/12/2010

**XO Communications Services, Inc. Notices**

XO Communications.

Attn: Gegi Leeger

13865 Sunrise Valley Drive

Herndon, VA 20171

With a copy to:

XO Communications

Attn: Barbara Arron

1000 Denny Way, Suite 200

Seattle, WA 98109