

ORDINANCE NO. 5522

AN ORDINANCE ADDING CHAPTER 3.60 TO THE ALBANY MUNICIPAL CODE AND GRANTING A NONEXCLUSIVE AUTHORITY TO CONDUCT BUSINESS AS A TELECOMMUNICATIONS CARRIER WITHIN THE CITY OF ALBANY, FIXING TERMS, CONDITIONS, AND COMPENSATION TO ADVANCED TELCOM, INC.: AND DECLARING AN EMERGENCY.

WHEREAS, Advanced TelCom, Inc. (Franchisee) has been operating a system within the City of Albany; and

WHEREAS, the City of Albany intends by the adoption of this franchise to authorize the continued operation of the system; and

WHEREAS, it is the determination of the City Council that such continue operation can contribute significantly to the communication needs and desires of the City; and

WHEREAS, the City has the power to grant a franchise by virtue of its Charter and federal statutory authority,

NOW, THEREFORE, THE PEOPLE OF THE CITY OF ALBANY DO ORDAIN AS FOLLOWS:

Section 1: ADVANCED TELCOM, INC., FRANCHISE

Chapter 3.60

ADVANCED TELCOM, INC., FRANCHISE

Sections:

- 3.60.010 Franchise Granted.
- 3.60.020 Excavations and construction.
- 3.60.030 Tree Trimming.
- 3.60.040 Use of poles.
- 3.60.050 Construction and Performance Bond-Liability Insurance.
- 3.60.070 Street repair-Expense responsibility.
- 3.60.080 Improvements-Utility obstruction prohibited.
- 3.60.090 Emergency removal and alternate routing of facilities.
- 3.60.100 Cables, wires-Rearrangement-Notice.
- 3.60.110 Compliance with law, rules and regulations.
- 3.60.120 Sale of subscriber lists prohibited.
- 3.60.130 Payment.
- 3.60.135 Abandonment
- 3.60.140 Other fees and charges
- 3.60.150 Reporting of funds.
- 3.60.160 Indemnification.
- 3.60.170 Continuation-Termination.
- 3.60.180 Forfeiture and Remedies.
- 3.60.190 Severability.
- 3.60.200 Attorney Fees.
- 3.60.210 Successors and Assigns.
- 3.60.220 Franchise nonexclusive.

3.60.010 Franchise Granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City", to Advanced TelCom, Inc., a California corporation authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee", the non-exclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to property to operate and maintain the same. Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public ways will be used and the location of communication facilities within the public way as may be reasonably necessary to minimize public inconvenience.

3.60.020 Excavations and construction.

It shall be lawful for Franchisee, to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution strictures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions, public safety, street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.60.030 Tree Trimming.

Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming shall be performed in accordance with City ordinances.

3.60.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefor.

3.60.050 Construction and Performance Bond-Liability Insurance.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond.

Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond. The Franchisee, pursuant to this chapter, shall also maintain in full force and effect public liability insurance in an amount specified by the City sufficient to cover potential claims for bodily injury, death or disability and for property damage, which may arise from or be related to projects and activities of the Franchisee in connection with this franchise, naming the City, and its officers, agents and employees as an additional insured.

3.60.070 Street repair-Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.60.080 Improvements-Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.60.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire or disaster in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.60.100 Cables, wires-Rearrangement-Notice.

Whenever it becomes necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the person or persons desiring to move said building, machinery, other objects, or widen/realign City streets. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such re-arrangement shall be borne by the person or persons giving said notice except that a request by the City of Albany to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.60.110 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and 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 the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.60.120 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.60.130 Payment.

Effective July 1, 2000, and until the franchise's expiration, said Franchisee shall pay to the City monthly, seven percent of gross revenues derived from exchange access services, as defined in ORS 401.710, within the corporate limits of the City. A minimum fee of \$750 per month will be due the City for administration of this agreement and for use of the City's right of way. If the seven-percent of gross revenues exceeds the minimum fee each month, then the greater amount will be due the City. This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Administrative Services Director of the City and postmarked on or before the last business day of the month following the month revenues were received by the franchisee. If a payment is not mailed by the date set forth above, the payment shall be deemed delinquent and shall accrue payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter. The payment of \$33,858 in April of 2001 by ATG to the City of Albany shall be credited against the fees due the City on and after July 1, 2000, until the entire amount of that April

2001 payment is exhausted. ATG agrees to submit calculations of amounts due the City for the year beginning July 1, 2000, and thereafter so the amount of credit can be established.

3.60.135 Abandonment.

If the franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former franchisee at its own expense.

3.60.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.60.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee.

The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchise shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchise, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due.

3.60.160 Indemnification.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees which may arise, from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise.

3.60.170 Continuation-Termination.

The rights, privileges and franchise herein granted shall continue and be in force until July 1, 2004, except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon six months notice in writing.

3.60.180 Forfeiture and Remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the franchise, and all of the Franchisee's rights arising thereunder in the event that Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this Franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this

chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal 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 the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

**3.60.190 Severability.**

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

**3.60.200 Attorney Fees.**

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorney fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorney fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding.

**3.60.210 Successors and Assigns.**

This Franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City 's consent shall be null and void.

**3.60.220 Franchise nonexclusive.**

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

**Section 2:** Inasmuch as this ordinance is necessary for the immediate preservation of the peace, health, and safety of the citizens of the City of Albany, an emergency is hereby declared to exist. This ordinance will be in full force and effect immediately upon its passage by the Council and approval by the Mayor.

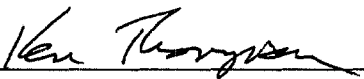
Passed by Council: February 13, 2002

Approved by Mayor: February 13, 2002

Effective Date: February 13, 2002

  
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Mayor

ATTEST:

  
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City Recorder