

ORDINANCE NO. 709

AN ORDINANCE TERMINATING THE FRANCHISE OF RCN TELECOM SERVICES OF OREGON, INC., AND RELEASING THE COMPANY FROM ITS OBLIGATIONS UNDER THE FRANCHISE

The Troutdale City Council finds:

1. On October 24th, 2000, under Ordinance No. 699, the City of Troutdale ("City"), at the request of RCN Telecom Services of Oregon, Inc. ("RCN"), and upon recommendation of the Mount Hood Cable Regulatory Commission ("MHCRC" or the "Commission") granted RCN a long-term franchise to construct, operate and maintain a cable system in the streets of the City.
2. The MHCRC (created by Intergovernmental Agreement dated December 24, 1992) carries out cable regulation and administration on behalf of the City of Portland; and on behalf of Multnomah County and the Cities of Fairview, Gresham, Troutdale, and Wood Village (collectively, the "Jurisdictions"). Among other things, the Commission acts in an advisory capacity to the Jurisdictions in connection with proposed cable franchise award or termination.
3. In the time since the City granted the franchise to RCN, the company's business plans have changed, and it no longer intends to construct a cable system in the Jurisdictions. Accordingly, RCN has requested that the franchises granted within these Jurisdictions be terminated, and that it be released from its obligations under these franchises. A copy of RCN's letter to MHCRC and the Jurisdictions formally requesting termination of these franchises and release is attached as Exhibit A. The company has also requested assurance that the Jurisdictions will not take certain legal actions against them.
4. The MHCRC has worked with RCN to arrange RCN's orderly exit from the Jurisdictions, and recommends that the City terminate the franchise and release RCN from its obligations, as well as foregoing certain legal actions, under specific conditions. These conditions include paying certain moneys owed the Commission under agreements with Jurisdictions, releasing the Commission from certain confidentiality requirements, and submitting to the Commission and the Jurisdictions its formal request for franchise termination. The staff report and Resolution 2001-06 containing the details of this recommendation are attached as Exhibit B.
5. It is in the interest of the City to help provide for an orderly exit of RCN from the Jurisdictions, and RCN has met the conditions recommended by the Commission as warranting the Jurisdictions' accommodating the requests of RCN.

6. In accordance with the City of Troutdale Charter, Section 30, it is necessary that this ordinance be considered for immediate adoption. The Council is not scheduled to meet again until August 28, 2001. Several weeks have passed since RCN requested to be released from its obligations under the franchise. Terminating the franchise and releasing RCN from its obligations is needed immediately. Copies of this ordinance have been distributed to the Council and made available for public inspection at least twenty-four hours before its adoption.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TROUTDALE:

Section 1

1. Termination of Franchise. The City franchise with RCN, adopted pursuant to Ordinance No. 699, is terminated and of no further force and effect, as of July 24, 2001, and RCN is released from all obligations under the franchise, and the City shall forego pursuing any penalty or other remedies available under the franchise, including drawing upon RCN's performance bonds, for RCN's failure to meet its construction schedule, complete construction, or otherwise fully perform under franchises granted to RCN by the City.
2. Agreement to Forego Certain Legal Action. The City shall not pursue any claims for damages associated with RCN's withdrawal from promised operations within the City.

Section 2

An emergency is declared. Immediate adoption of this ordinance is necessary for the public health, safety and welfare. The Ordinance is effective immediately upon its passage and execution by the Mayor.

YEAS:	<u>6</u>
NAYS:	<u>0</u>
ABSTAINED:	<u>0</u>


Paul Thalhofer, Mayor

Dated: 8-16-01


Debbie Stickney, City Recorder

Adopted: August 14, 2001
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Exhibit "A"

COPY

David A. Hankin
Vice President
Regulatory & Government

1400 Fashion Island Blvd., Suite 100
San Mateo CA 94404
(650) 212-8010
Fax (650) 212-8009

July 10, 2001

Mary Beth Henry, Acting Director
Mount Hood Cable Regulatory Commission
1120 SW Fifth Avenue, Room #704
Portland OR 97204

Re: Multnomah County, and the cities of Fairview, Gresham, Troutdale & Wood Village

To: Multnomah County, and the cities of Fairview, Gresham, Troutdale & Wood Village:

RCN holds franchises in Multnomah County and the cities of Fairview, Gresham, Troutdale, and Wood Village ("Jurisdictions"), to construct, operate and maintain a cable system.

The franchises were granted by the Jurisdictions at the request of RCN. However, RCN's business plans have changed, and the company does not intend to construct or operate a system in the Jurisdictions. RCN has worked with the Mount Hood Regulatory Commission (the "Commission") to arrange for an orderly exit from the Jurisdictions. Accordingly, pursuant to Resolution No. 2001-06, Adopted by the Commission on July 10, 2001, RCN requests that the Jurisdictions terminate the existing franchises with RCN, and release RCN from all obligations under the franchises.

RCN acknowledges that such termination and release shall be without recourse by RCN against any of the Jurisdictions for actions taken in either issuing or terminating RCN's franchise.

Sincerely

David Hankin

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Vice President
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July 10, 2001

Mary Beth Henry, Acting Director
Mount Hood Cable Regulatory Commission
1120 SW Fifth Avenue, Room #704
Portland OR 97204

Re: Multnomah County, and the cities of Fairview, Gresham, Troutdale & Wood Village:

Dear Ms Henry:

Pursuant to Resolution No. 2001-06, adopted by the Mount Hood Cable Regulatory Commission ("Commission") on July 10, 2001, RCN hereby releases the Commission and each of its member jurisdictions, Multnomah County and the cities of Fairview, Gresham, Portland, Troutdale, and Wood Village ("Jurisdictions"), from any requirements of confidentiality regarding any maps and other records in the possession of the Commission or the Jurisdictions pertaining to RCN plant construction.

Sincerely,

David Hankin

COVER SHEET - AGENDA ITEM #6

For Commission Meeting: July 10, 2001

Consideration of RCN Franchise Termination Recommendation/ Continuing Negotiations with WIN

Recommendation

Staff recommends that the Commission, by adopting the attached Resolution, recommend to the Jurisdictions that RCN, at RCN's request, be released from existing franchises in the Jurisdictions, and be granted a temporary, limited, non-renewable permit to facilitate RCN's transfer of assets in Portland, in exchange for certain considerations from RCN. In addition, Staff recommends that the Commission direct staff to continue negotiations with WIN to conclude agreements by which WIN would construct and operate a system in the Jurisdictions.

Background

In 1999 and 2000, the MHCRC sought applications from companies interested in bringing competitive cable, telephone and Internet access services to the Jurisdictions. Four companies made application to the MHCRC. Following a period of negotiations, two of the companies, Open Access Broadband and Wide Open West, withdrew from the MHCRC process. Western Integrated Networks Oregon Operating, LLC (WIN) and RCN Telecom Services of Oregon, Inc. (RCN), following recommendations by the MHCRC, were awarded long-term franchises by the jurisdictions of Multnomah County, Gresham, Troutdale, Fairview and Wood Village. Both companies wished to begin construction immediately in Portland, and were granted temporary, revocable permits by the City of Portland for that purpose. The permits expire on July 19, 2001.

Recent Developments

RCN

RCN began construction in Portland, placing approximately 200-300 miles of strand and some cable in Portland streets; but, in view of altered economic conditions and its own changed business plans, the company has ceased construction, and has requested to be released from all its franchise obligations in the Jurisdictions. RCN has also requested to be assured the jurisdictions will not take certain legal actions against them, and to be given a new, temporary, limited permit in Portland for the purpose of facilitating the transfer of their assets to a new owner. Staff has discussed these requests with RCN at length, and proposed certain conditions under which the company's withdrawal might be accomplished without harm to the Commission or the Jurisdictions. These conditions include paying certain moneys owed the Commission under agreements with the Jurisdictions, posting a surety bond, releasing the

Commission from certain confidentiality requirements, and the submitting to the Commission and the Jurisdictions a formal request for immediate release from all its franchise obligations without recourse. Staff and RCN have reached a working agreement regarding the manner in which, and the conditions upon which, the Commission and the Jurisdictions might accommodate RCN's requests. Staff believes this agreement, incorporated in the attached Resolution, represents a reasonable arrangement with RCN for an orderly exit from the Jurisdictions. In the course of its discussions with RCN, Staff also proposed that RCN pay certain sums to defray costs incurred by Portland Cable Access in the improvement of PCA facilities to accommodate overbuilders, but no agreement was reached with RCN concerning such payment.

WIN

WIN has not commenced construction in the Jurisdictions, but has expressed the desire to maintain its franchises in the Jurisdictions pending certain modifications, and to negotiate a franchise with the City of Portland similar to modified franchises in the other Jurisdictions. Staff has discussed this possibility with WIN at length, with the intention of bringing the Commission a recommendation regarding a proposed WIN franchise and franchise amendments, as well as other related matters. It was thought that the WIN matter could be considered by the Commission at the same time as it considered the arrangements for RCN's orderly withdrawal from the Jurisdictions. However, in the course of discussions with WIN, it has become evident that the complexities of the economic and legal circumstances involved in the franchising situation make it impossible to conclude discussions with WIN without first concluding matters with RCN. Staff has proposed, and WIN has agreed, that following conclusion of the exit arrangements for RCN, discussions regarding possible new and amended authorizations for WIN will be concluded. WIN has committed to Staff to return to the table to conclude the discussions in good faith at the invitation of the Commission. WIN sees no need to have its current temporary permit in Portland renewed or extended as part of the current process.

Attachment: Resolution

Prepared by: Julie S. Omelchuck
July 6, 2001

Before the
Mt. Hood Cable Regulatory Commission
1120 SW Fifth Ave., Room 704
Portland, OR 97204

Recommend to the Jurisdictions that RCN, at RCN's request, be released from existing franchises in the Jurisdictions, and be granted a temporary, limited, non-renewable permit to facilitate RCN's transfer of assets in Portland, in exchange for certain considerations from RCN.

Resolution No. 2001-06
Adopted by the Commission
July 10, 2001

Section 1. Findings

- 1.1 The Mount Hood Cable Regulatory Commission ("Commission" or "MHCRC") was created by Intergovernmental Agreement (dated 12/24/1992) ("IGA") to carry out cable regulation and administration on behalf of Multnomah County and the cities of Portland, Gresham, Troutdale, Fairview, and Wood Village (the Jurisdictions"). Among other things the Commission acts in an advisory capacity to the Jurisdictions in connection with the granting or termination of cable franchises. The Jurisdictions themselves have authority in these matters; and have agreed to consider the advice and recommendations of the MHCRC and to take no action in connection with these matters until the Commission has had a prior opportunity to consider them.
- 1.2 RCN holds cable franchises in the Jurisdictions of Multnomah County and the cities of Gresham, Troutdale, Fairview, and Wood Village, containing certain requirements and authorizations connected with constructing, operating and maintaining a cable system. The franchises are due to expire in 2010, with possible extension under certain conditions. RCN also holds a temporary permit, due to expire July 19, 2001, under which the company has constructed cable plant in the streets of the City of Portland.
- 1.3 Due to changing economic conditions and its own business plans, RCN has requested to be released from all its obligations under its existing franchises in the Jurisdictions, and has expressed to City officials and Commission staff its intent to forego any operation of its plant in City of Portland. RCN has also requested that the Jurisdictions and the Commission forego certain legal action against the company connected with the company's withdrawal from the Jurisdictions, and that the City of Portland assist in certain ways to facilitate the orderly transfer of RCN assets to a new owner. In exchange, RCN offers to pay the MHCRC certain

moneys owed under its agreements with the Jurisdictions, post a performance bond, and make certain written representations to the Jurisdictions.

- 1.4 In the light of existing economic conditions affecting overbuilders generally, and RCN in particular, RCN's request for release from its obligations and associated requests are understandable, and their offer of considerations in exchange is reasonable. It is in the interest of the Jurisdictions and the Commission to facilitate the orderly exit of RCN under reasonable terms.

NOW, THEREFORE, the Commission resolves:

Section 2.

- 2.1 The Commission recommends that the Jurisdictions formally act to acknowledge and accept RCN's request for release from its franchise obligations, as well as certain other requests including a modification or replacement of the revocable permit granted by the City of Portland, under certain conditions. Thus, subject to the complete fulfillment by RCN of the conditions specified in Section 2.2 below it is recommended to the Jurisdictions that:
 - 2.1.1 The Jurisdictions of Multnomah County and the cities of Gresham, Fairview, Troutdale and Wood Village should agree to release RCN from its obligations under existing, initially granted franchises; and forego pursuing any penalty or other remedies available under the franchise, including drawing upon RCN's performance bonds, for RCN's failure to meet its construction schedule, complete construction, or otherwise fully perform under franchises granted to RCN by these Jurisdictions.
 - 2.1.2 The Jurisdictions should not pursue any claims for damages associated with RCN's withdrawal from promised operations within the Jurisdictions.
 - 2.1.3 The City of Portland should grant a temporary, limited, non-renewable permit, beginning on July 20, 2001 and having a term of no more than Ninety (90) days, to provide RCN with additional time for orderly disposition of its existing plant constructed within Portland's streets, and the authority to maintain such facilities during that time. Such permit should explicitly prohibit a) any construction of additional facilities in the Streets by RCN, and b) any operation of the plant or provision of services by RCN. This permit should be modified to address the limited grant of authority, both durationally and operationally.
 - 2.1.4 The Jurisdictions should cooperate with RCN, if requested, to help facilitate a timely transfer of ownership of existing RCN plant.
- 2.2 The Commission recommends to the Jurisdictions that the actions described in Section 2.1 be undertaken only upon complete fulfillment of the following actions by RCN:
 - 2.2.1 Submission of a written request, addressed to the Jurisdictions, acknowledging the company's change in business plans and asking for the Jurisdictions to release

RCN from the existing RCN franchises in the MHCRC Jurisdictions. The written request should also acknowledge that the release shall be without recourse for RCN against any of the Jurisdictions for actions taken in either issuing or terminating RCN's franchise.

- 2.2.2 Payment to the MHCRC, at the earliest possible time but no later than 5:00 p.m. on July 17, 2001, of the sum of Fifty Thousand Dollars (\$50,000) in fulfillment of the agreement signed by RCN.
 - 2.2.3 Posting and maintenance of a performance bond, in the amount of Two Hundred Thousand Dollars (\$200,000), running to the City of Portland, in a form acceptable to the Portland City Attorney's Office, so long as RCN continues to own facilities in City rights of way. RCN shall have the bond in place to coincide with the issuance of the Portland City Council's approval of a replacement for the existing revocable permit, as referred to in Section 2.1.3 above.
 - 2.2.4 Release of the MHCRC, in writing, at the earliest possible time but no later than 5:00 p.m. on July 17, 2001, from any requirements of confidentiality regarding any maps and other records in the possession of the MHCRC or the Jurisdictions pertaining to RCN plant construction. RCN shall also provide copies of any "as-built" maps for any Facilities actually placed in the Streets of any Jurisdiction by that time.
- 2.3 The Commission directs staff to prepare all necessary documents to facilitate the implementation of the recommendations in this Resolution.

RESOLVED BY THE COMMISSION on July 10, 2001

Sue Dicile, Chair

Reviewed by:

Benjamin Walters, Legal Counsel