

**BEFORE THE CITY COUNCIL FOR THE
CITY OF ADAIR VILLAGE, OREGON**

In the Matter of Granting a Franchise to)
Alyrica to Operate and maintain)
A Telecommunications System in the)
City of Adair Village, Oregon)

ORDINANCE NO. 2019 - 01

WHEREAS, this matter having come before the City Council of Adair Village on June 4, 2019 upon recommendation of the City Administrator; and

WHEREAS, Alyrica corporation (“Alyrica” or “Company”), is a regulated public utility that provides Telecommunications, Fiber and Internet to the citizens of the City of Adair Village (the “City”) and other surrounding areas;

WHEREAS, providing Telecommunications requires the installation, operation and maintenance of infrastructure and other related facilities to be located within the public ways of the City;

WHEREAS, the City and Alyrica wish to agree to the terms and conditions by which Alyrica will use the public ways of the City;

THE CITY OF ADAIR VILLAGE CITY COUNCIL ORDAINS AS FOLLOWS:

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 initial term of this Franchise shall be for three years from the effective date of this ordinance, unless terminated sooner as provided in this Agreement. Thereafter, the Agreement shall automatically renew for up to five renewal terms of one year each, unless terminated by either party by giving written notice of its intention to terminate not less than sixty (60) days prior to the end of any renewal term. Every three (3) years, beginning after the adoption of this Franchise, Grantee shall present to the City Council a general overview of Grantee’s current and future operations within the City. The intent behind this presentation is to keep the Council informed of Grantee’s current and future services, development, and infrastructure. Council will contact Grantee to setup the presentation date and time; Grantee will not be obligated to make any presentation unless contacted by the City Council.
3. **Fee.** In consideration of the rights and privileges granted by this Franchise, the Grantee shall provide the following compensation to City:

3.1 Grantee shall pay annually as a franchise fee to the City an amount equal to five percent (5%) of Grantee's annual Gross Revenues, as defined in Section 3.4 below or Three Thousand Dollars (\$3000) per year, whichever is greater. At the end of the initial term, the franchise fee shall be either five percent (5%) of Grantee's annual Gross Revenues or Three Thousand and Five Hundred Dollars (\$3500), whichever is greater. During the initial five years of this Franchise, Grantee may, in lieu of the Franchise fees provided in Section 3, above, provide (1) dedicated, non-shared 1000mbit/second internet connection at each of the below listed locations:

3.1.1 City Hall, 6030 NE William R Carr Ave

3.2 Notwithstanding any provision herein to the contrary, at any time during the term of this Franchise, City may elect by way of City Council ordinance or resolution to increase the franchise fee amount imposed on all telecommunications franchisees, as may then be allowed by State law and the Federal Telecommunications Act of 1996, Section 253. City shall provide Grantee written notice of such increase following the adoption of the applicable ordinance by City. The increase shall be effective sixty (60) days after City has provided Grantee with such notice.

3.3 The parties acknowledge and agree that for any facilities not contemplated under this Agreement, Grantee shall be subject to additional agreements and may be charged added compensation, which shall be memorialized in writing.

3.4 Gross Revenues means any and all compensation in whatever form (grant, subsidy, exchange, or otherwise) received directly or indirectly by Grantee for any Communications Services (as defined below) provided to a customer located within the City, including but not limited to: revenues from customers; any fees related to Grantee's Communications Services; use, access, or attachment charges paid to the Grantee by other Communications Services or carriers, and revenue from the sale or lease of any Grantee Facilities, including wire, cable, facility, pole, duct, conduit or similar transmission equipment. All such revenues remain subject to applicable federal statutes and exceptions including those that may exclude revenues from internet access services. Customers who are served solely via wireless, which is provided using no other wireline connection from Grantee, will not be included in Gross Revenues, wherever located.

4. **Payment.** Franchise fees will be due and payable annually, thirty (30) days after the effective date of this Ordinance. 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. 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.

4.1 The last payment of each calendar year 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.

4.2 The initial twelve months after this ordinance is adopted will be considered a "build period". No payment will be required during the build period.

- 4.3 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.
- 4.4 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.
- 4.4.1 If Grantee underpaid by 5% or more of the amount due, Grantee shall pay interest on the unpaid amount compounded at the annual rate of three percent (3%) compounded monthly. 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.
- 4.4.2 If the Grantee disputes the City's determination of underpayment, grantee may petition the Benton County Circuit Court for a determination of the amount, if any, owed by Grantee, in accordance with paragraph 11.3.
- 4.5 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 seven (7) days' prior written notice, during normal business hours at a mutually agreeable location within 35 miles of the City.
- 4.6 Payment of the franchise fee shall not exempt Grantee from the payment of any license fee, permit 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.

5. **Municipal Code, Charter and General Ordinances Apply.** Unless the context requires otherwise or expressly otherwise defined herein, words and phrases used in this Franchise shall have the same meaning as defined in the City Municipal Code. All applicable provisions of the City Municipal Code are incorporated by reference and made a part of this Franchise, specifically including the City's fee schedule as adopted by the City Council. In the event of any inconsistencies between the terms of this Franchise and the Code, this Franchise shall control. The Charter of the City of Adair Village and ordinances, rules, and regulations of the City 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, regulations, and ordinances of the City.

6. **City Regulatory Authority.** In addition to the provisions herein contained, City reserves the right to adopt such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties, or exercise any other rights, powers, or duties required or authorized under the Constitution of the State of Oregon, the laws of Oregon or City ordinances. Specifically, the City reserves the right to:

- 6.1 Construct, install, maintain, remove, relocate, replace, and operate any City facility,

Rights-of-Way, or public place.

- 6.2 Do any work that City may find desirable on, over, or under any Rights-of- Way or public place in accordance with all applicable federal, state or local regulations.
- 6.3 Exercise any power that the City currently holds, or may hereafter be authorized or granted by the laws of the State of Oregon or the City Charter or ordinances.
- 6.4 Abate any nuisance or dangerous condition.
- 6.5 In addition to the reservations herein and existing applicable ordinances, adopt such additional regulations for the construction, maintenance, and operation of Grantee's Facilities as the City finds necessary in the exercise of its police powers or for the orderly development of the City (including but not limited to: zoning, land use, historic preservation ordinances, standard specifications, design standards and drawings, other safety or construction standards, and other applicable requirements), or for the protection of City Facilities.

7. **Indemnity.**

- 7.1 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 directly by reason of any negligent 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 is directly caused by negligence or willful misconduct of the City, its officers, agents or employees or any third party. 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.
- 7.2 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, 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.

8. **Construction, Relocation, Removal.**

- 8.1 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.

- 8.2 At least two weeks prior to beginning construction in any City Rights-of-Way, the parties shall provide each other with a construction schedule, including a digging or trenching schedule, so that the parties may coordinate all Right of Way work and so that they may use any open trenches to repair, move or relocate facilities.
- 8.3 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 the same or better condition of such property immediately prior to such damage or disturbance.
- 8.4 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.
- 8.5 Grantee shall comply with the terms and conditions of ORS Chapter 757, governing the location of underground facilities (the "One-Call statutes").
- 8.6 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.
- 8.7 The Grantee shall at all times employ ordinary care and shall use industry accepted methods and devices preventing failures and accidents. To the extent possible, the Grantee shall use utility poles, conduits and other facilities already existing in the City Rights-of-Way.
- 8.8 Whenever any existing utilities are located underground within a public right of way of the City, Grantee shall also locate its facilities underground. Any and all such installation and relocation under this paragraph shall be without expense to the City.
- 8.9 Relocation of Facilities. City shall have the right to require Grantee to change the location of any facilities within the public Rights-of-Way when the public convenience requires such change; and the expense thereof shall be paid by Grantee. If relocation is for the benefit of a private organization the expense of the relocation will be paid by the person or entity requesting such relocation, and the Grantee may require a cash deposit equal to the estimated cost of the relocation. Should Grantee fail to remove or relocate any such Facilities by the date established by City, the City may effect such removal 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. City shall give Grantee reasonable advanced written notice to relocate its facilities prior to the date established by the City as the deadline for relocation. If at any time, in case of fire or other disaster in the Franchise territory, it shall become necessary in

the reasonable judgment of City to cut or move any facilities, such cutting or moving may be done and any repairs rendered necessary thereby shall be made by Grantee, at its sole expense. City shall indemnify, protect and hold Grantee, its officers, employees and agents harmless against and from all damages, claims, loss, liability, cost or expense resulting from damage to property, or injury or death, to any third person caused by Grantor's cutting or moving any of the wires, equipment or other facilities. City shall take reasonable efforts to notify Grantee prior to acting under this subsection.

- 8.10 Upon completion of construction of any new Facilities, Grantee shall promptly furnish City with two (2) sets of "as built" plans showing the exact location and construction details of all of Grantee's Facilities. New plans will be furnished promptly for any additions or modifications. All plans shall be full sized "as built" plans unless mutually agreed to otherwise.
- 8.11 Discontinuance. Whenever Grantee intends to discontinue using any Facilities, Grantee shall submit for City's approval a complete description of the Facilities and the date on which the Grantee intends to discontinue using the Facilities. Grantee may remove the Facilities or request that City permit it to remain in place. City may require the Grantee to remove the Facilities. Grantee shall complete such removal in accordance with a schedule set by City. Until such time as Grantee removes the Facilities as directed by City, or until the rights to and responsibility for the Facilities are accepted by another person having authority to construct and maintain such Facilities, Grantee shall be responsible for all necessary repairs and relocations of the Facilities, as well as street repairs, in the same manner and degree as if the Facilities were in active use, and Grantee shall retain all liability for such Facilities.

9. **Reservation of City Rights.**

- 9.1 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.

10. **Assignment.** Grantee's rights under this Franchise may not be assigned or transferred without the prior written 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 thirty (30) calendar 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.

- 10.1 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:

- 10.1.1 Complete information setting forth the nature, terms and condition of the

proposed transfer or assignment;

10.1.2 All information required of a telecommunications franchise applicant with respect to the proposed transferee or assignee; and

10.1.3 Any other information reasonably required by the City.

10.2 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.

10.3 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.

10.4 Any transfer or assignment of this Franchise without prior approval of the City under this section shall be void.

11. **Miscellaneous Provisions.**

11.1 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.

11.2 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.

11.3 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 Benton County Circuit Court, and if in the federal courts, in the United States District Court for the District of Oregon.

11.4 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 of Adair Village
 Attn: City Administrator
 6030 NE William R Carr Ave
 Adair Village, OR 97330
 FAX: 541-230-5219

If to the Grantee: Alyrica Networks, Inc.
Attn: General Counsel, Alyrica
521b N. 19th St.
Philomath, Oregon 97370

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).

12. **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.

13. **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	[\$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 Hired autos Umbrella Liability	[\$1,000,000] per occurrence C.S.L.
Umbrella Liability	[\$1,000,000] 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.

D. The limits of the insurance shall be subject to any changes as to maximum constitutional and statutory limits of liability imposed on municipalities of the State of Oregon during the term of the Franchise.

14. **Counterparts.** This Agreement may be executed by the Parties in one or more counterparts.

15. **Revocation and Termination.** In addition to all other rights which City has pursuant to law or in equity, City reserves the right to revoke, terminate, or cancel this Franchise, and all rights and privileges pertaining thereto, in the event that Grantee violates any material

provision of this Franchise. The provisions pertaining to excavation and restoration; provision of City internet services, relocation, compensation, damages, insurance, and transfer are hereby deemed to be material to the performance of this Franchise. Further, revocation may occur upon the following:

- A. Grantee practicing any fraud upon Grantor or any Subscriber, as determined by final court adjudication specifically finding the existence of such fraud.
- B. Grantee becoming insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt.
- C. Grantee misrepresenting a material fact in the application for or negotiation of, or renegotiation of, or renewal of, this Franchise.

16. Revocation Procedures.

- 16.1 City shall provide Grantee with a written notice stating the cause of the revocation or termination and its intent to terminate or revoke the Franchise. City shall allow Grantee a minimum of thirty (30) days after service of the notice in which to correct or begin substantial correction of the violation. If, at the end of the thirty (30) day period, Grantee has not corrected or made substantial progress towards correction of the matter, the Franchise shall, at the option of City, become null and void and Grantee shall thereafter be entitled to none of the privileges or rights herein extended to it under this Franchise. City may at its option, pursue any other and different or additional remedy provided to it by law or in equity.
- 16.2 Grantee shall be provided with an opportunity to be heard at a public hearing before the City Council prior to the termination or revocation of the Franchise. The City Council shall hear any persons interested therein, and shall determine whether or not any failure, refusal, or neglect by Grantee has occurred.
- 16.3 Any revocation of this Franchise shall be by formal action of the City Council by ordinance.
- 16.4 For repeated violations of this Franchise occurring without good cause, City may, and in addition to any other remedies provided herein, assess damages against Grantee for failure to adhere to material provisions of this Franchise. In lieu of revocation as described above, damages of One Hundred Dollars (\$100.00) per day for each material violation may be assessed. The imposition of liquidated damages is subject to the notice, hearing, and timeline requirements as provided in this subsection 15. Grantee shall be liable for full payment of all liquidated damages imposed under this Section.
- 16.5 Grantee may seek judicial review of any City Council decision to terminate or revoke this Franchise in accordance with paragraph 11.3, above. Upon such judicial review, the court shall try the matter granting any deference due to Grantee under Oregon law. Additionally, upon such judicial review, Grantee may also bring any and all other claims, in law or equity, in tort or contract, relating to or in any way arising out of the

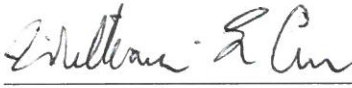
City's termination or revocation of this Franchise.

17. **Administrative Fee.** Grantee agrees to pay City the actual costs of administering this Agreement, including the costs related to administrator time spent reviewing drafts, negotiating with Grantee, and the costs of legal review. Such amount not to exceed \$3,000.

Adopted by the City Council of the City of Adair Village this 4 day of June, 2019.


First reading
Second reading
Adoption
Effective

Approved:



William Corrier, Mayor

Attest:



, City Administrator

Accepted: Grantee accepts the Franchise and Ordinance and agrees to be bound by its lawful terms and conditions.

By: 

Date: 7/3/2019

Printed Name: Jason Richards

Title: Sales Manager