

**RESOLUTION NO. 1467
CITY OF PRINEVILLE, OREGON**

A RESOLUTION AUTHORIZING AN INDEFEASIBLE RIGHT OF USE

Whereas, the City of Prineville (“City”) has negotiated an Indefeasible Right of Use with PrineTIME Internet Solutions, LLC (“PrineTIME”).

Whereas, PrineTIME owns and is in the process of building additional fiber optic cable within the City.

Whereas, an Indefeasible Right of Use has been prepared between the City and PrineTIME and a copy of that document is attached to this Resolution; and

Whereas, City staff recommends that the attached Indefeasible Right of Use Agreement be approved by City Council.

Now, Therefore, the City of Prineville resolves as follows:

1. The attached Indefeasible Right of Use Agreement is approved.
2. The Mayor is authorized and instructed to execute on behalf of the City the Indefeasible Right of Use Agreement.

Approved by the City Council this 8th day of December, 2020.



Stephen P. Uffelman, Mayor

ATTEST:



Lisa Morgan, City Recorder

INDEFEASIBLE RIGHT OF USE AGREEMENT

This Indefeasible Right of Use Agreement (“**Agreement**”), dated effective December 9, 2020 (the “**Effective Date**”), is entered into between the City of Prineville hereinafter called “**City**”, and PrineTIME Internet Solutions, L.L.C., an Oregon limited liability company, hereinafter called “**PrineTIME**.” Each City and PrineTIME shall individually be referred to as “**Party**” and collectively “**Parties**.”

RECITALS:

- A. PrineTIME owns and is in the process of building additional fiber optic cable in Prineville, Oregon, and within Crook County.
- B. PrineTIME desires to enter into an agreement with City for the Indefeasible Right of Use (“**IRU**”) of one pair of single-mode fiber optic cable owned by PrineTIME (the “**Fiber**”) and City desires to enter into this Agreement for the use of the Fiber.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

AGREEMENT

1. GRANT OF INDEFEASIBLE RIGHT OF USE

- 1.1. Subject to the terms and conditions of this Agreement, PrineTIME hereby grants to City and City hereby acquires from PrineTIME for the purposes described herein an exclusive, indefeasible right of use in and access to the Fiber at the locations specified in Exhibit A.
- 1.2. Use of the Fiber is solely for the City and its departments. City may sublease or allow others to use the Fiber provided that City complies with each of the following: (i) City will remain responsible for such sublessee’s use of the Fiber and Access Points, (ii) all sublessee’s must comply with the terms and conditions of this Agreement, and (iii) City may not sublease or allow any person to use the Fiber and/or any Access Points that will compete in any way with PrineTIME.

2. TERM

The term of this Agreement shall be twenty (20) years from the Effective Date (the “**Term**”).

3. FACILITIES TO BE PROVIDED BY PRINETIME

- 3.1. Subject to the terms and conditions of this Agreement, PrineTIME will use commercially reasonable efforts to complete the construction of the Fiber on or before March 1, 2021. Except as specifically provided in this Agreement, all costs of construction of the Fiber and obtaining any necessary governmental approvals for the installation and construction of the Fiber will be paid by PrineTIME. PrineTIME shall complete the construction of the Fiber in a good and workmanlike manner, using good engineering practices, in accordance with all applicable federal, state, and local, laws, ordinances, rules, and regulations (“**Laws**”).

- 3.2. PrineTIME shall provide the Fiber to City at the locations identified on Exhibit A. PrineTIME has no obligation to extend the Fiber to locations that are not identified on Exhibit A.

4. CONSIDERATION

- 4.1. Concurrent with executing this Agreement, City shall pay to PrineTIME as follows: (a) \$85,000 within five (5) business days of executing this Agreement; and (b) \$7,200.00 per year (increased automatically by 3% per year on each anniversary) for maintenance payable on the execution of this Agreement and on each anniversary of this Agreement during the Term; and (c) 20% of all the Repair Costs as defined below.
- 4.2. All payments are due on the dates specified. Any payment outstanding for ten (10) days or more will bear interest at the rate of twelve percent (12%) per annum from the due date or the maximum lawful rate (if lower) from the due date until paid in full.

5. OWNERSHIP AND USE OF FIBER

- 5.1. PrineTIME shall retain the ownership and title to the Fiber. This Agreement does not convey any title to the Fiber or Access Points to City.
- 5.2. City covenants that it will use and access the Fiber and Access Points only in accordance with all applicable Laws and the terms and conditions of this Agreement.
- 5.3. City shall have access to the Fiber only at access points designated by PrineTIME as may be modified or adjusted from time to time (“**Access Points**”). It is City’s obligation at City’s cost to bring its fiber to the Access Points.

6. INTEGRITY OF THE FIBER

- 6.1. PrineTIME is responsible for maintaining the physical integrity of the Fiber and shall make commercially reasonable efforts to ensure the integrity of the Fiber during the Term. PrineTIME agrees to pay 100% of the costs incurred while locating the underground fiber facilities covered under this Agreement. City shall not alter, modify, construct, reconstruct, or do any work associated with (or hire any persons to do any work) with the Fiber and/or Access Points.
- 6.2. Should the Fiber and/or Access Points be damaged or made unusable in any way during the Term, PrineTIME agrees to use commercially reasonable efforts to make all necessary repairs. PrineTIME may seek reimbursement from the party responsible for the damage. During the Term, City will reimburse PrineTIME 20% of the costs of all repairs made to the Fiber and/or Access Points, as applicable (the “**Repair Costs**”). All costs will be charged based on the then applicable rates.
- 6.3. Within one day of notification to PrineTIME by City that the Fiber requires troubleshooting or repair, PrineTIME shall have tested the Fiber and reported back to City when the Fiber can be repaired. PrineTIME shall make commercially reasonable efforts to repair the Fiber as soon as reasonably possible.

7. RELOCATION OF FIBER

If, after the Effective Date, PrineTIME is required (i) by any relocation authority or governmental authority or utility provider, or (ii) by the occurrence of any Force Majeure Event, to relocate the Fiber or

any portion thereof, or any Access Point, PrineTIME shall have the right to either proceed with such relocation, including, but not limited to, the right, in good faith, to reasonably determine the extent and timing of, and methods to be used for, such relocation, or to pay such amounts to the applicable party as are necessary to avoid the need for such relocation. City shall be informed if a relocation needs to occur as promptly as reasonably possible. In connection with such relocation, any such relocation shall be constructed substantially in accordance with the original Fiber in existence at the time of the relocation.

8. FEES, LICENSES AND TAXES

City will not withhold any taxes from any payments made to PrineTIME. Each party shall be responsible for any personal property taxes on property it owns or leases from the other party or from a third party, franchise and privilege taxes on its business, income taxes based on its net income and sales, use, excise, value added, services, duty, consumption or other taxes assessed on the sale, installation, use or provision of its services. The parties agree to reasonably cooperate with each other to enable each to more accurately determine its own tax liability and to minimize such liability to the extent legally permissible.

9. TERMINATION

- 9.1. This Agreement may be terminated by mutual written consent of both parties. Such termination by mutual consent shall be in written form stating the effective date of termination and shall not result in any penalty to either party.
- 9.2. This Agreement may be terminated by either party in the event that the other party fails to comply with applicable Laws. In the event that either party wishes to terminate under this provision, written notice to cure must be given to the other party allowing ninety (90) days to cure the alleged breach. In the event that the notified party has failed to comply with the applicable Law by the end of the ninety (90) day notification period, this Agreement shall be immediately terminated.
- 9.3. PrineTIME may deny City access to the Fiber and cease to provide any fiber type specified in this Agreement or to complete any repairs or maintenance without notice if City (a) violates any provision of PrineTIME's applicable acceptable use policies now existing or hereinafter provided from PrineTIME to City; (b) engages in any conduct or activity that PrineTIME, in its sole discretion, reasonably believes causes a risk that PrineTIME may be subjected to civil or criminal litigation, charges, or damages; (c) City allows use of the Fiber or any portion thereof in violation of this Agreement; and/or (d) City violates any representation, warranty, or covenant, term, or condition in this Agreement and fails to cure the default within thirty (30) days of PrineTIME's written notice of default.
- 9.4. This Agreement may be terminated by either party by providing written notice to the other party if the franchise agreement (Ordinance 1192) between PrineTIME and the City of Prineville is terminated, provided, however, City will not be permitted to terminate this Agreement if PrineTIME enters into a new agreement with the City of Prineville allowing PrineTIME to continue providing the services described in this Agreement on such terms and conditions approved by PrineTIME.
- 9.5. This Agreement may be terminated by PrineTIME at any time by providing written notice to City if PrineTIME is unable to maintain access to the utility poles through the applicable utility provider on such terms and conditions approved by PrineTIME.

9.6. Termination of this Agreement will not constitute a waiver or termination of any rights, claims, and/or causes of action that may have arisen prior to termination.

10. INDEMNIFICATION

Subject to the conditions and limitations of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 through 30.300, PrineTIME shall indemnify, defend, and hold harmless City and City's officers, agents, and employees against all claims, demands, actions, and suits (including all reasonable attorney fees, expert fees, and costs and expenses) brought against any of them arising from PrineTIME's work under this Agreement.

Subject to the conditions and limitations of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 through 30.300, City shall indemnify, defend, and hold harmless PrineTIME and PrineTIME's current and future members, managers, directors, officers, agents, and employees for from and against all claims, demands, actions, and suits (including all reasonable attorney fees, expert fees, and costs and expenses) brought against any of them arising from City's work or any City's contractor's work and City's use of the Fiber or Access Points under this Agreement.

Each party shall provide the other party with prompt written notice of each written third-party claim covered by this Section 10 and shall cooperate with the other party in evaluating each such claim. If requested by the indemnitee, the indemnitor shall reasonably defend, assume the defense, or pay reasonable defense fees and costs of indemnitee as to such claim. Neither party shall settle or compromise any such claim, or consent to a judgment, without the other party's consent and an unconditional release of the indemnitee as to all indemnified claims of said third party.

11. INSURANCE

PrineTIME will maintain insurance with bodily injury limits of \$500,000 for each person and \$500,000 for each occurrence and property damage limits of \$500,000. Certificates evidencing such insurance will be provided by PrineTIME to City on City's written request.

12. DISCLAIMER OF WARRANTIES

EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, TO THE EXTENT PERMITTED BY APPLICABLE LAW, PRINETIME IS PROVIDING THE FIBER AS IS AND WITH ALL FAULTS, AND HEREBY DISCLAIMS ALL IMPLIED WARRANTIES, WITH RESPECT TO ANY OF THE FIBER, ACCESS POINTS, AND FACILITIES PROVIDED OR TO BE PROVIDED UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR LACK OF NEGLIGENCE OR LACK OF WORKMANLIKE EFFORT.

PrineTIME expressly disclaims that City's use of the Fiber will be uninterrupted or error free.

13. LIMITATION OF LIABILITY

To the maximum extent permitted by applicable law, in no event will PrineTIME be liable under any contract, negligence, strict liability, or other theory for any special, indirect, incidental, or consequential damages (including, without limitation, to damages for loss of profits or confidential or other information, for business interruption, for personal injury, for loss of privacy, for failure to meet any duty including of good faith or of reasonable care, for negligence and for any other pecuniary or other loss whatsoever) arising out of or in any way related to any breach by PrineTIME of this Agreement, to the

18. ASSIGNMENT

City is not permitted to assign this Agreement without the prior written consent of PrineTIME, which consent may be withheld by PrineTIME in its sole discretion. PrineTIME may assign this Agreement to any successor or assigns of PrineTIME by providing written notice to City. All references to PrineTIME in this Agreement will include PrineTIME's successors and assigns.

19. RELATIONSHIP

This Agreement does not create an agency relationship between PrineTIME and City and it does not establish a joint venture or partnership between PrineTIME and City. PrineTIME does not have the authority to bind City or represent to any person that PrineTIME is an agent of City. PrineTIME has the authority to hire other persons to assist PrineTIME in performing the services described in this Agreement (and has the authority to fire such persons).

20. FORCE MAJEURE EVENT

Neither party will be liable for any failure to perform, or delay in performing, any of its obligations under this Agreement caused by forces or circumstances beyond its reasonable control, and without fault or negligence on the part of that party (a "**Force Majeure Event**"). Such forces or circumstances include, but are not limited to, cable cuts, Acts of God, acts of civil or military authority, fires, floods, epidemics, quarantines, civil commotion, and governmental action. However, in the event such a Force Majeure Event, the party that finds itself unable to perform will, within five (5) days of such event, notify the other party in writing and will take all reasonable steps to remove such impediments to its performance. The terms of this Section 20 will not apply with respect to payment of due from City to PrineTIME, which will not be excused for any reason.

21. AUTHORITY

PrineTIME is duly organized or registered to do business under Oregon law. PrineTIME has full power and authority to sign and deliver this Agreement and to perform all PrineTIME's obligations under this Agreement. City has full power and authority to sign and deliver this Agreement and to perform all City's obligations under this Agreement.

22. ENTIRE AGREEMENT; AMENDMENT; WAIVER

This Agreement and all attachments and exhibits constitute the entire agreement between the parties. No waiver, consent, modification or change of terms of this Agreement shall bind either party unless in writing and signed by duly authorized representatives of both parties. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. There are no other understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. Each party, by the signature of its authorized representative, hereby acknowledges that the representative has read this Agreement, understands it, and agrees to be bound by its terms and conditions.

23. NO WAIVER FROM COURSE OF DEALING

No course of dealing between the parties or any delay on the part of a party to exercise any right it may have under this Agreement shall operate as a waiver of any of the rights under this Agreement, or provided by law or equity. No waiver of any prior breach or default of this Agreement shall operate as the waiver of any subsequent breach or default. No express waiver shall affect any term or condition of

this Agreement other than the one specified in the waiver, and any such waiver shall apply only for the time and manner specifically stated.

24. CONSTRUCTION AND INTERPRETATION

No ambiguities shall be resolved against either party by reason of such party's participation in the drafting of this Agreement or the exhibits or attachments. For purposes of this Agreement, the term "person" means any natural person, corporation, limited liability company, partnership, joint venture, firm, association, trust, unincorporated organization, government or governmental agency or political subdivision, or any other entity. All pronouns contained herein and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular includes the plural and the plural includes the singular. The word "or" is not exclusive. The words "include," "includes," and "including" are not limiting. The titles, captions, or headings of the sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

25. NO THIRD-PARTY BENEFICIARY

There are no third-party beneficiaries of this Agreement.

26. FURTHER ASSURANCES.

The parties will sign such other documents and take such other actions as are reasonably necessary to further effect and evidence this Agreement.

27. SUCCESSION

Subject to the above-stated limitations concerning the transfer and assignment of this Agreement under Section 18, this Agreement will be binding upon and inure to the benefit of the parties and their respective successors and assigns.

28. ATTORNEY FEES

If any arbitration or litigation is instituted to interpret, enforce, or rescind this Agreement, including, without limitation, any proceeding brought under the United States Bankruptcy Code, the prevailing party on a claim will be entitled to recover with respect to the claim, in addition to any other relief awarded, the prevailing party's reasonable attorney fees, expert fees, and other fees, costs, and expenses of every kind, including, without limitation, the costs and disbursements specified in ORCP 68 A(2), incurred in connection with the arbitration, the litigation, any appeal or petition for review, the collection of any award, or the enforcement of any order, as determined by the arbitrator or court.

29. SIGNATURES

The parties may execute this Agreement in separate counterparts, each of which when executed and delivered will be an original, but all of which together will constitute one and the same instrument. Facsimile or electronic transmission of any signed original document will be the same as delivery of an original. At the request of either party, the parties will confirm facsimile or email transmitted signatures by signing and delivering an original document.

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed and effective for all purposes as of the Effective Date.

City:

PrineTIME Internet Solutions, L.L.C.:

By



By _____

Name:

Stephen P. Uffelman

Name: Jason Wilkins

Title:

Mayor, City of Prineville

Title: Member

Date

December 9, 2020

Date _____

Exhibit A

The Fiber will be located at the following locations:

- Service location A: City of Prineville Dispatch – 1251 NE Elm Street, Prineville, OR
- Service location B: City Hall / CC Annex – 387 NE 3rd Street, Prineville, OR
- Service location C: Crook City Fairgrounds - 1280 Main Street, Prineville, OR
- Service location D: Crook City Fire & Rescue - 500 NE Belknap St, Prineville, OR
- Service location E: Crook City Fire & Rescue Annex - 500 NE Belknap St, Prineville, OR
- Service location F: Crook City RV Park – 1040 S Main Street, Prineville, OR
- Service location G: Crook City Parks & Rec – 296 S Main Street, Prineville, OR
- Service location H: Crook City Parks & Rec Maintenance – 475 NE Elm Street, Prineville, OR
- Service location I: City of Prineville Water Treatment Facility – 1412 S Main St Street, Prineville, OR