

**ORDINANCE 2015-05
FRANCHISE AGREEMENT
BEEHIVE BROADBAND, LLC**

AN ORDINANCE GRANTING A FRANCHISE TO BEEHIVE BROADBAND, LLC, TO OPERATE AND MAINTAIN A FIBER OPTIC NETWORK IN TOOELE COUNTY; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE; PROVIDING FOR COUNTY REGULATION AND ADMINISTRATION OF THE FIBER OPTIC NETWORK; AND PRESCRIBING PENALTIES FOR VIOLATION OF THE FRANCHISE PROVISIONS

WHEREAS, Beehive Broadband, LLC (“Grantee”) is a limited liability company, that provides data services to the citizens of Tooele County (the “County”) and other surrounding areas; and

WHEREAS, providing data services requires the installation, operation, and maintenance of power poles, cables, and other related facilities to be located within the public ways of the County; and

WHEREAS, the County, pursuant to Utah Code Ann. § 17-50-306 (2012), has the authority to grant to Grantee a franchise for the use thereof; and

WHEREAS, the County desires to set forth the terms and conditions by which Grantee shall use the public ways of the County.

NOW, THEREFORE, the County Legislative Body of Tooele County ordains as follows:

SECTION 1. GRANT OF FRANCHISE. The County hereby grants to Grantee the right, privilege, and authority to construct, maintain, operate, upgrade, and relocate its cables and related appurtenances, including power poles (collectively referred to herein as “Facilities”) in, under, along, over, and across the present and future streets, alleys, and public ways of the County (collectively referred to herein as “Public Ways”), for the purpose of providing data services to the inhabitants of the County and persons and corporations beyond the limits thereof.

SECTION 2. TERM. The term of this Franchise is for ten (10) years commencing on the effective date of the Franchise as set forth in Section 19, unless otherwise lawfully terminated in accordance with the terms of this Franchise.

SECTION 3. NON-EXCLUSIVE FRANCHISE. The right to use and occupy the Public Ways of the County shall be nonexclusive and the County reserves the right to use the Public Ways for itself or any other entity; provided, however, that such use shall not unreasonably interfere with Grantee’s Facilities or Grantee’s rights as granted herein.

SECTION 4. COUNTY REGULATORY AUTHORITY. In addition to the provisions contained herein, the County 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 Utah, the laws of Utah, or County Ordinance.

SECTION 5. INDEMNIFICATION.

5.1 The County shall in no way be liable or responsible for any loss or damage to property or any injury to, or death of, any person that may occur in the construction, operation, or maintenance by Grantee of its Facilities.

5.2 Grantee shall indemnify, hold harmless, and defend the County, its officers, agents, and employees from and against all claims, demands, suits, costs, liens, liabilities, injuries, and damages of whatsoever kind resulting directly or indirectly from, or arising out of: 1) any acts or omissions of or by Grantee, its agents, representatives, officers, employees, or subcontractors in connection with Grantee's use of the Public Ways within the County; or 2) Grantee's failure to inspect, discover, correct, or otherwise address any defect, dangerous condition, or other condition created by or resulting from Grantee's use of the Public Ways within the County. Grantee agrees that its duty to defend and indemnify the County under this Franchise includes all attorney's fees, litigation and court costs, expert witness fees, and any sums expended by or assessed against the County for the defense of any claim or to satisfy any settlement, arbitration award, debt, penalty, or verdict paid or incurred on behalf of the County.

5.3 Notwithstanding any provision hereof to the contrary, Grantee shall not be obligated to indemnify, defend, or hold the County harmless to the extent any claim, demand, suit, cost, lien, liability, injury, or damage arises out of or in connection with any negligent or willful act or failure to act of the County or any of its officers, agents, or employees.

SECTION 6. INSURANCE REQUIREMENTS.

6.1 General Insurance Requirements for all Policies.

A. Any insurance coverage required herein that is written on a "claims made" form rather than on an "occurrence" form shall: 1) provide full prior acts coverage or have a retroactive date effective before the date of this Franchise; and 2) be maintained for a period of at least three (3) years following the end of the term of this Franchise or contain a comparable "extended discovery" clause. Evidence of current extended discovery coverage and the purchase options available upon policy termination shall be provided to the County.

B. All policies of insurance shall be issued by insurance companies licensed to do business in the state of Utah and either:

1. (a) Be currently rated A- or better by A.M. Best Company; and

(b) For construction contracts only, the insurer must also have an A.M. Best Company financial size category rating of not less than VII.

—OR—

2. Be listed in the United States Treasury Department's current Listing of Approved Sureties (Department Circular 570), as amended.

C. Grantee shall furnish evidence of insurance, acceptable to the County, verifying compliance with the insurance requirements herein prior to Grantee's written acceptance of this Franchise. Grantee shall also provide evidence of insurance throughout the life of this Franchise upon request by the County.

D. In the event any work is subcontracted, Grantee shall require its contractor, at no cost to the County, to secure and maintain all minimum insurance coverages required of Grantee hereunder.

E. Grantee's insurance policies shall be primary and non-contributory to any other coverage available to the County. The workers' compensation, general liability, and auto liability policies shall be endorsed with a waiver of subrogation in favor of the County.

F. In the event that governmental immunity limits are subsequently altered by legislation or judicial opinion, Grantee shall provide a new certificate of insurance within thirty (30) days after being notified thereof in writing by the County, certifying coverage in compliance with the modified limits or, if no new limits are specified, in an amount acceptable to the County.

G. In the event Grantee fails to maintain and keep in force any insurance policies as required herein, County shall have the right at its sole discretion to obtain such coverage and charge Grantee for the costs of said insurance.

6.2 Required Insurance Policies. Grantee, at its own cost, shall secure and maintain during the term of this Franchise, including all renewal terms, the following minimum insurance coverage:

A. Workers' compensation and employer's liability insurance as required by the State of Utah, unless a waiver of coverage is allowed and acquired pursuant to Utah law. This requirement includes contractors who are doing business as an individual and/or as a sole proprietor as well as corporations and partnerships. In the event any work is subcontracted, Grantee shall require its contractor(s) similarly to provide workers' compensation insurance for all of the latter's employees, unless a waiver of coverage is allowed and acquired pursuant to Utah law.

B. Commercial general liability insurance, on an occurrence form, with the County as an additional insured, in the minimum amount of \$2,000,000 per occurrence with a \$3,000,000 general policy aggregate and \$2,000,000 products completed operations policy aggregate. The policy shall protect the County, Grantee, and any contractor from claims for damages for personal injury, including accidental death, and from claims for property damage that may arise from Grantee's operations under this Franchise, whether performed by Grantee itself, any contractor, or anyone directly or indirectly employed or engaged by either of them. Such insurance shall provide

coverage for premises operations, acts of independent contractors, and completed operations. The policy shall be primary and not contributing to any other policy or coverage available to the County whether such coverage is primary, contributing, or excess.

C. Commercial automobile liability insurance that provides coverage for owned, hired, and non-owned automobiles, in the minimum amount of \$1,000,000 per person, \$2,000,000 per accident, \$500,000 per occurrence for property damage, or a single combined limit of \$2,000,000.

SECTION 7. ANNEXATION. When any territory is approved for annexation to any City within County boundaries, the County shall, not later than ten (10) working days after the County's receipt of notice that such City has passed an ordinance approving the proposed annexation, provide by certified mail to Grantee: (a) each site address to be annexed as recorded on County assessment and tax rolls; (b) a legal description of the proposed boundary change; and (c) a copy of the City's ordinance approving the proposed annexation.

SECTION 8. PLAN, DESIGN, CONSTRUCTION, AND INSTALLATION OF GRANTEE'S FACILITIES.

8.1 All Facilities installed or used under authority of this Franchise shall be used, constructed, and maintained in accordance with applicable federal, state, and county laws, codes, and regulations.

8.2 Except in the case of an emergency, Grantee shall, prior to commencing new construction or major reconstruction work in Public Ways or other public places, apply for a permit from the County which permit shall not be unreasonably withheld, conditioned, or delayed. Grantee will abide by all applicable ordinances and all reasonable rules, regulations, and requirements of the County consistent with applicable law and the County may inspect the manner of such work and require remedies as may be reasonably necessary to assure compliance. Notwithstanding the foregoing, Grantee shall not be obligated to obtain a permit to perform emergency repairs.

8.3 To the extent practical and consistent with the permit issued by the County, all Facilities shall be located so as to cause minimum interference with the Public Ways and shall be constructed, installed, maintained, cleared of vegetation, renovated or replaced in accordance with applicable rules, ordinances, and regulations of the County.

8.4 If, during the course of work on its Facilities, Grantee causes damage to or alters the Public Way or public property, Grantee shall replace and restore such Public Way at Grantee's expense to a condition reasonably comparable to the condition of the Public Way that existed immediately prior to such damage or alteration. All replacement and restoration work under this section shall be subject to the approval and acceptance of the County.

8.5 Grantee shall have the right to excavate the Public Ways subject to reasonable conditions and requirements of the County. Before installing new underground facilities or replacing existing underground facilities, each party shall first notify the other of such work by written notice allowing the other party, at its own expense, to share the trench for laying its own facilities therein, provided that such action will not unreasonably interfere with the first party's use of the trench or delay project completion.

8.6 Before commencing any street improvements or other work within a Public Way that may affect Grantee's Facilities, the County shall give written notice to Grantee.

8.7 Grantee shall not attach to, or otherwise use or commit to use, any pole owned by County until a separate pole attachment agreement has been executed by the parties.

SECTION 9. RELOCATION OF FACILITIES.

9.1 Upon its receipt of reasonable advance written notice, to be not less than thirty (30) business days, or as mutually agreed by the parties after reviewing the requirements of the proposed project, Grantee shall, at its own expense, protect, support, raise, lower, temporarily disconnect, relocate in, or remove from the Public Way, any property of Grantee when lawfully required by the County by reason of traffic conditions, public safety, street abandonment, freeway, and street construction, change, or establishment of street grade, installation or maintenance of sewers, drains, gas or water pipes, power lines or other municipal utility infrastructure. Grantee shall in all cases have the right of abandonment of its property.

9.2 Grantee shall, on the request of any person holding a lawful permit issued by the County, protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way as necessary, any property of Grantee, provided: (a) the expense of such is paid by said person benefiting from the relocation, including, if required by Grantee, making such payment in advance; and (b) Grantee is given reasonable advance written notice to prepare for such changes. For purposes of this subsection, "reasonable advance written notice" shall be no less than ten (10) business days in the event of a temporary relocation, and no less than sixty (60) days for a permanent relocation. All relocations will be jointly coordinated to set a move date that is reasonable for the scope of the project and the availability of needed resources to support the relocation.

SECTION 10. ANNUAL INFORMATION COORDINATION. On or before February 28 of each calendar year, or such other date Grantee and County may agree upon from year to year, Grantee and the County shall meet for the purpose of exchanging information and documents regarding construction and other similar work within the County, with a view toward coordinating their respective activities in those areas where such coordination may prove mutually beneficial. Any information regarding future capital improvements that may involve land acquisition shall be treated with confidentiality upon request.

SECTION 11. VEGETATION MANAGEMENT. Grantee shall have the authority to trim trees or other natural growth in the Public Way in order to access and maintain the Facilities. Nevertheless, nothing in this section shall authorize Grantee to trim trees or other natural growth not located in the Public Way without the prior written consent of the owner of such trees or other natural growth.

SECTION 12. RENEWAL. At least one hundred twenty (120) days prior to the expiration of this Franchise, Grantee and the County shall either agree to extend the term of this Franchise for a mutually acceptable period of time, or the parties shall use best faith efforts to renegotiate a replacement Franchise.

SECTION 13. TERMINATION.

13.1 In the event that the County believes that Grantee has not complied with the terms of the Franchise, the County shall informally discuss the matter with Grantee. If these discussions do not lead to resolution of the problem, the County shall notify Grantee in writing of the exact nature of the alleged noncompliance.

13.2 Grantee shall have thirty (30) days from receipt of the notice described in Subsection 13.1 to: (a) respond to the County, contesting the assertion of noncompliance; (b) cure such default; or (c) in the event that, by the nature of default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the County of the steps being taken and the projected date that they will be completed.

13.3 In the event that Grantee fails to respond to the notice described in Subsection 13.1 pursuant to the procedures set forth in Subsection 13.2, or in the event that the alleged default is not remedied within thirty (30) days or the date projected pursuant to 13.2(c) above, if it intends to continue its investigation into the default, then the County shall schedule a public hearing. The County shall provide Grantee at least ten (10) days prior written notice of such hearing, which specifies the time, place, and purpose of such hearing, and provide Grantee the opportunity to be heard.

13.4 Subject to applicable federal and state law, in the event the County, after the hearing set forth in Subsection 13.3, determines that Grantee is in default of any provision of the Franchise, the County may:

- A. Seek specific performance of any provision, which reasonably lends itself to such remedy, as an alternative to damages; or
- B. Commence an action at law for monetary damages or seek other equitable relief; or
- C. In the case of a substantial default of a material provision of the Franchise, seek to revoke the Franchise in accordance with Subsection 13.5.

13.5 If the County should seek to revoke the Franchise after following the procedures set forth in Subsections 13.1 to 13.4 above, the County shall give written notice to Grantee of its intent. The notice shall set forth the exact nature of the noncompliance. Grantee shall have ninety (90) days from such notice to object in writing and to state its reasons for such objection. In the event the County has not received a satisfactory response from Grantee, it may then seek termination of the Franchise at a public hearing. The County shall cause to be served upon Grantee, at least thirty (30) days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke the Franchise. At the designated hearing, the County shall give Grantee an opportunity to state its position on the matter, after which it shall determine whether or not the Franchise shall be revoked. Grantee may appeal such determination to an appropriate court, which shall have the power to review the decision based on the record developed at the hearing. Such appeal to the appropriate court must be taken within sixty (60) days of the issuance of the determination of the County. The County may, at its sole discretion, take any lawful action which it deems appropriate to enforce the County's rights under the Franchise in lieu of revocation of the Franchise.

SECTION 14. NO WAIVER. Neither the County nor Grantee shall be excused from complying with any of the terms and conditions of this Franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions. Each party expressly reserves all rights under applicable law.

SECTION 15. TRANSFER OF FRANCHISE. Grantee's right, title, or interest in the Franchise shall not be sold, transferred, assigned, or otherwise encumbered, other than to an entity controlling, controlled by, or under common control with Grantee, without the prior written consent of the County, which consent shall not be unreasonably withheld, conditioned, or delayed. No such consent shall be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of Grantee in the Franchise or Facilities in order to secure indebtedness. Within thirty (30) days of receiving a request for transfer, the County shall notify Grantee in writing of any additional information it reasonably requires to determine the legal, financial, and technical qualifications of the transferee. If the County has not taken action on Grantee's request for transfer within one hundred twenty (120) days after receiving such request, consent by the County shall be deemed given.

SECTION 16. AMENDMENT. Amendments to this Franchise shall be mutually agreed upon by the County and Grantee and formally adopted by the County Commission as an ordinance amendment, which is accepted in writing by Grantee.

SECTION 17. NOTICES. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received (a) upon personal delivery or actual receipt thereof, or (b) within two days after such notice is deposited in the United States Mail, postage prepaid, and certified and addressed to the Parties as set forth below:

The County: Tooele County
47 South Main
Tooele, UT 84074

Grantee: Beehive Broadband, LLC
2000 Sunset Road
Lake Point, UT 84074

SECTION 18. SEVERABILITY. If any section, sentence, paragraph, term, or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority including any state or federal regulatory authority having jurisdiction thereof or unconstitutional, illegal, or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such determination shall have no effect on the validity of any other section, sentence, paragraph, term, or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

SECTION 19. EFFECTIVE DATE. This ordinance shall become effective fifteen (15) days after its passage, provided it has been published, or at such publication date if more than fifteen (15) days after passage, for a six-month period.

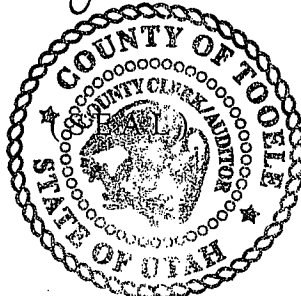
IN WITNESS WHEREOF the Tooele County Commission, which is the legislative body of Tooele County, passed, approved, and enacted this ordinance this 17th day of February, 2015.

ATTEST:

TOOELE COUNTY COMMISSION:



MARILYN K. GILLETTE, Clerk / Auditor


WADE B. BITNER, Chairman



Commissioner Bateman voted aye
Commissioner Bitner voted aye
Commissioner Milne voted aye

APPROVED AS TO FORM:


SCOTT A. BROADHEAD
Tooele County Attorney