


Date: December 17, 2020

To: Weber County Board of County Commissioners

From: Sean Wilkinson, AICP 
Director, Community Development Department

Subject: **Request for approval of the final reading of an ordinance granting a non-exclusive franchise to All West/Utah, Inc. for the purpose of installing, operating, and maintaining a communications system within the public rights of way of Weber County**

Agenda Date: December 22, 2020

Documents: Exhibit A: Franchise Ordinance

Summary:

All West/Utah, Inc. is requesting approval of an ordinance granting a non-exclusive franchise for the purpose of installing, operating, and maintaining a communications system within the public rights of way of Weber County. Following is a brief summary of the ordinance:

- The initial term is for 30 years, with the option to reach 50 years on a year to year basis.
- All West must obtain the required excavation and construction permits prior to any work in the County's rights of way.
- The franchise is non-exclusive and does not prevent other franchisees from locating infrastructure in the County's rights of way, with the provision that the County will not allow other franchisees to physically interfere with All West's communication facilities.
- All West will provide as built plans of its facilities to Weber County.
- All West will relocate its facilities at its own expense if the County conducts work within its rights of way requiring such relocation, unless public funding is available.
- All West will indemnify the County for any damage, injury, etc. that may occur under this franchise, and will maintain appropriate insurance coverage.
- Upon expiration of termination of the franchise, All West will either remove its facilities or transfer ownership to Weber County.

Exhibit A

WEBER COUNTY ORDINANCE NO. _____

An ordinance of Weber County granting to All West/Utah, Inc. (“All West”) and its affiliates a non-exclusive franchise to install, operate and maintain a communications system in, on, over, upon, along, and across the public rights of way of Weber County, prescribing certain rights, duties, terms, and conditions with respect thereto and establishing an effective date.

WHEREAS, All West, has requested that the County grant it the right to install, operate, and maintain a communications system within the public ways of the County; and

WHEREAS, the County has found it desirable for the welfare of the County and its residents that such a non-exclusive franchise be granted to the Franchisee; and

WHEREAS, the County has the authority under Article 1, Section 23 of the Constitution of the State of Utah and the statutes of the United States and the State of Utah to grant franchises for the use of its streets and other public properties; and

WHEREAS, the County is willing to grant the rights requested subject to certain terms and conditions, NOW, THEREFORE,

WEBER COUNTY, STATE OF UTAH DOES ORDAIN AS FOLLOWS:

Section 1. Definitions. For the purposes of this franchise, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number.

A. “Affiliate” means the entity which owns or controls, is owned or controlled by, or is under common ownership with the Franchisee.

B. “Communication(s) Service” shall mean any communications services, communications capacity, or dark fiber, provided by the Franchisee using its Communication System or facilities, either directly or as a carrier for its subsidiaries, affiliates, or any other person engaged in Communication Service, including but not limited to, the transmission of voice, data, or other electronic information, facsimile reproduction, burglar alarm monitoring, meter reading, and home shopping, or other subsequently developed technology that carries an electronic signal over fiber optic cable or copper cable. Communication Service shall also include non-switched, dedicated, and private line, high capacity fiber optic transmission services to firms, businesses, or institutions within the County.

C. “Communication System” or “Facilities” shall mean the Franchisee’s fiber optic and/or copper cable system constructed and operated within the County’s public ways and

shall include all cables, wires, fibers, conduits, ducts, pedestals, and any associated converter, equipment, or other facilities within the County's public ways designed and constructed for the purpose of providing Communication Service.

D. "County" means the County of Weber, Utah.

E. "FCC" means the Federal Communications Commission, or any successor governmental entity hereto.

F. "Franchise" shall mean the initial authorization, or renewal thereof granted by the County, through this ordinance or subsequently adopted ordinance, which authorizes construction and operation of the Franchisee's Communication System and associated Facilities for the purpose of offering Communications Service.

G. "Franchisee" means All West/Utah, Inc., a Utah corporation, or the lawful successor, transferee, assignee, or affiliate thereof.

H. "Person" means an individual, partnership association, joint stock company, trust, corporation, or governmental entity.

I. "Public Way" shall mean the surface of and any space above or below any public street, highway, freeway, bridge, path, alley, court, boulevard, sidewalk, parkway, lane, drive, circle, or any other public right of way including, but not limited to, public utility easements, utility strips, or rights of way dedicated for compatible uses and any temporary or permanent fixtures or improvements located thereon, now or hereafter held by the County in the Service Area which shall entitle the County and the Franchisee the use thereof for the purpose of installing, operating, repairing, and maintaining the Communications System. Public way shall also mean any easement now or hereafter held by the County within the Service Area for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other easements or rights of way which within their proper use and meaning, entitle the County and the Franchisee the use thereof for the purposes of installing or transmitting the Franchisee's Communications Service over wires, cables, conductors, amplifiers, appliances, attachments, and other property as may be ordinarily and necessarily pertinent to the Communications System.

J. "Service Area" means the boundaries of the County.

Section 2. Authority Granted. The County hereby grants to the Franchisee, its heirs, successors, legal representatives, affiliates and assigns, subject to the terms and conditions hereinafter set forth, the right, privilege and authority to utilize the public ways of the County for

construction and operation of the Franchisee's Communications System and to acquire, construct, operate, maintain, replace, use, install, remove, repair, reconstruct, inspect, sell, lease, transfer, or to otherwise utilize in any lawful manner, all necessary equipment and facilities thereto for the Franchisee's Communications System, and to provide Communications Service.

Section 3. Construction Permits Required.

A. Prior to site specific location and installation of any portion of its Communications System within a public way, the Franchisee shall apply for and obtain a construction permit pursuant to the ordinances of the County presently existing or as amended from time to time.

B. Unless otherwise provided in said permit, the Franchisee shall give the County at least 48 hours' notice of the Franchisee's intent to commence work in the public ways. The Franchisee shall file plans or maps with the County showing the proposed location of its Communication Facilities and pay all duly established permit and inspection fees associated with the processing of the permit. In no case shall any work commence within any public way without said permit except as otherwise provided in this franchise.

Section 4. Grant Limited to Occupation. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the public ways of the County to the Franchisee nor shall anything contained herein constitute a warranty of title.

Section 5. Term of Franchise. The first term of this franchise shall be for a period of thirty (30) years from the date of acceptance as set forth herein, and will continue thereafter on a year to year basis unless either party provides to the other party one hundred twenty (120) days' written notice of its intent to terminate the Franchise or to renegotiate the terms and conditions of this Franchise. In no case will the initial term last longer than 50 years. At the end of the initial term, additional terms and extensions will be negotiated upon terms and conditions deemed reasonable to both the County and the Franchisee.

Section 6. Non-Exclusive Grant. This Franchise shall not in any manner prevent the County from entering into other similar agreements or granting other or further franchises in, under, on, across, over, through, along or below any of said public ways of the County. However, the County shall not permit any such future Franchisee to physically interfere with the Franchisee's Communication Facilities. In the event that such physical interference or disruption occurs, the County Engineer may assist the Franchisee and such subsequent Franchisee in resolving the dispute. Further, this franchise shall in no way prevent or prohibit the County from using any of its public ways or affect its jurisdiction over them or any part of them, and the County shall retain power to make all necessary changes, relocations, repairs, maintenance,

establishment, improvement, dedication of the same as the County may deem fit, including the dedication, establishment, maintenance, and improvement of all new public ways all in compliance with this franchise.

Section 7. Maps and Records. After construction is complete, the Franchisee shall provide the County with accurate copies of as-built plans and maps in a form and content prescribed by the County Engineer. These plans and maps shall be provided at no cost to the County and shall include hard copies and digital copies in a format specified by the County Engineer.

Section 8. Work in Public Ways.

A. During any period of relocation, construction, or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said public ways and other public properties so as to interfere as little as possible with the free passage of traffic and the free use of adjoining property. The Franchisee shall, at all times, post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the County or the laws of the State of Utah.

B. The Franchisee shall cooperate with the County and all other persons with authority from the County to occupy and use the public ways of the County in coordinating construction activities and joint trenching projects. By March 1st of each calendar year, the Franchisee shall provide the County with a schedule of its proposed construction activities in, around, or that may affect the public ways of the County. The Franchisee shall also meet with the County and other grantees, franchisees, permittees, and other users of the public ways of the County annually or as determined by the County to schedule and coordinate construction activities. The County Engineer shall coordinate all construction locations, activities and schedules to minimize public inconvenience, disruption, or damage to the public ways of the County.

C. If either the County or the Franchisee shall at any time after the installation of the facilities plan to make excavations in an area covered by this franchise and as described in this section, the party planning such excavation shall afford the other upon receipt of written request to do so an opportunity to share such an excavation provided that: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs; (2) such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and (3) either party may deny such request for safety reasons or if their respective uses of the trench are incompatible.

Section 9. Restoration after Construction. The Franchisee shall, after the installation,

construction, relocation, maintenance, removal or repair of its Communication Facilities within the public ways restore the surface of said public ways and any other County-owned property that may be disturbed by the work to at least the same condition the public way or County-owned property was in immediately prior to any such installation, construction, relocation, maintenance or repair, reasonable wear and tear excepted. The Franchisee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the public ways or other affected area at its sole cost and expense according to the time and terms specified in the construction permit issued by the County in accordance with the applicable ordinances of the County.

Section 10. Emergency Work Permit Waiver. In the event of any emergency in which any of the Franchisees' Communication Facilities located in, above, or under any public way break, are damaged, or if the Franchisee's construction area is otherwise in such a condition as to immediately endanger the property, life, health, or safety of any individual, the Franchisee shall immediately take proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health, or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve the Franchisee from the requirement of notifying the County of the emergency work and obtaining any permits necessary for this purpose after the emergency work. The Franchisee shall notify the County by telephone immediately upon learning of the emergency and shall apply for all required permits not later than the second succeeding day during which the County Hall is open for business.

Section 11. Relocation. In the event that at any time during the period of this franchise, the County shall lawfully elect to alter or change any street, alley, public utility easement, bridge, culvert or other public way requiring the relocation of Franchisee's Facilities, then in such event, Franchisee, upon reasonable notice by the County, shall remove, relay and relocate the same at its own expense; except that Franchisee shall, in all cases, have the right, in Franchisee's sole discretion, to abandon its Facilities in place, in lieu of relocation. If public funds are available for such relocation pursuant to law, Franchisee shall not be required to pay the costs of such relocation.

In the event the County requests relocation efforts from the Franchisee for aesthetic purposes, the County agrees to pay all costs associated with relocation. Franchisee shall not be required to pay for the relocation of Franchisee's Facilities, and may require advance payment for costs and expense, to the extent such removal or relocation is requested solely for aesthetic purposes, in cases where the original location of the Franchisee Facilities was approved by the County through the permitting process.

Franchisee shall, upon the request of any person holding a building moving permit issued by the County, temporarily raise or lower its lines to permit the moving of the building, provided: (a) the expense of such temporary removal shall be paid by the person(s) requesting the same, and Franchisee shall have the authority to require payment in advance; and (b) the Franchisee is given not less than five (5) business days' advance notice to arrange for such temporary line changes.

Section 12. Trimming. Franchisee shall have the authority to trim trees upon and overhanging all streets, alleys, public utility easements, sidewalks and public places of the County so as to prevent the branches of such trees from coming into contact with Franchisee's Facilities. Franchisee shall, when practical, provide notice to the County and to any property owner before commencing such work. Franchisee shall not be required to provide notice in advance of such work in emergency conditions.

Section 13. Dangerous Conditions. Whenever construction, installation or excavation of the Communication Facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining public way, street, or public place, or endangers the public street, utilities or County-owned property, the County Engineer may reasonably request the Franchisee to take action to protect the public, adjacent public places, County-owned property, streets, utilities and public ways. Such action may include compliance within a prescribed time. In the event that the Franchisee fails or refuses to promptly take the actions directed by the County or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the County may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, utilities, public ways to maintain the lateral support thereof or actions regarded as necessary safety precautions and the Franchisee shall be liable to the County for the reasonable costs thereof.

Section 14. Non-Liability of County for Acts of Franchisee. The County shall not at any time become liable or responsible to any person, firm, corporation, or individual for any damage or injury, including loss of life or loss by reason of the activities of Franchisee under this franchise, and Franchisee hereby indemnifies the County and holds it harmless against all such liabilities, loss, cost, damage, or expense, including cost of defense, which may be incurred by the County by reason of the exercise or arising out of the implementations of this franchise. The Franchisee's obligation to indemnify the County is not limited or waived in any way by compliance or non-compliance with the insurance requirements of this ordinance. The Franchisee will be required to indemnify the County to the fullest extent allowed by law, regardless of whether the Franchisee has sufficient insurance to cover this obligation.

Section 15. Insurance. The Franchisee shall procure and maintain insurance against

claims for injuries to persons or damages to the property which may arise from, or in connection with the exercise of the rights, privileges, and authority granted hereunder to the Franchisee, its agents, representatives, or employees. The Franchisee shall provide to the County for its inspection an insurance certificate prior to the commencement of any work or installation of any facilities pursuant to this franchise. Such insurance certificate shall evidence:

A. Comprehensive general liability insurance written on an occurrence basis, including contractual liability coverage with limits inclusive of umbrella or excess liability coverage of not less than: (1) \$2,000,000 for bodily injury or death to each person; and (2) \$3,000,000 for property damages resulting from any one accident.

B. Automobile liability for owned, non-owned, and hired vehicles with a limit inclusive of umbrella or excess liability coverage of not less than \$500,000 for each person and \$1,000,000 for each accident.

C. Workers' compensation within statutory limits.

The liability insurance policies required by this section shall be maintained by the Franchisee throughout the term of this franchise and such other period of time during which the Franchisee is operating without a franchise hereunder, or is engaged in the removal of its Communication System. Payment of deductibles and self-insured retentions shall be the sole responsibility of the Franchisee.

Section 16. Abandonment and Removal of the Franchisee's Communication Facilities. Upon the expiration or termination of the rights granted under this franchise, the Franchisee shall either, at Franchisee's sole option, remove all of its Communication Facilities from the public ways of the County within ninety (90) days or abandon the Facilities in place. Upon permanent abandonment and Franchisee's agreements to transfer ownership of the Communication Facilities to the County, the Franchisee shall submit to the County a proposal and instruments for transferring ownership to the County. Any such facilities which are not permitted to be abandoned in place which are not removed within one (1) year of receipt of said notice shall automatically become the property of the County.

Section 17. Modification. The County and the Franchisee hereby reserve the right to alter, amend, or modify the terms and conditions of this franchise upon the written agreement of both parties to such alteration, amendment or modification. Said modifications shall be approved by the County by ordinance and accepted by the Franchisee consistent with this section herein.

Section 18. Forfeiture and Revocation.

A. This franchise may be terminated for failure by Franchisee to comply with the material provisions hereof and other provisions of the County ordinances.

B. If the County has reason to believe that the Franchisee is in violation of this franchise or other provisions of the County ordinances, the following procedures shall be followed by the County:

(1) The County shall provide the Franchisee with a detailed, written notice by certified mail detailing the violation, the steps necessary to cure such violation, and the time period within which the violation must be cured. Within thirty (30) days thereafter, Franchisee shall respond demonstrating that no violation occurred, that any problem has been corrected, or with a proposal to correct the problem within a specified period of time.

(2) Franchisee may request an extension of time to cure an alleged violation if construction is suspended or delayed by the County or where unusual weather, natural consequences, extraordinary acts of third parties, or other circumstances which are reasonably beyond the control of the Franchisee delay progress, provided that the Franchisee has not, through its own actions or inactions, contributed to the delay.

(3) If said response is not satisfactory to the County, the County may declare the Franchisee to be in default with written notice by certified mail to Franchisee. Within ten (10) business days after notice to Franchisee, Franchisee may deliver to the County a request for a hearing before the County Commission. If no such request is received, the County may declare the franchise terminated for cause.

(4) If Franchisee files a timely written request for hearing, such hearing shall be held within thirty (30) days after the County's receipt of the request therefor. Such hearing shall be open to the public and Franchisee and other interested parties may offer written and/or oral evidence explaining or mitigating such alleged noncompliance. Within ten (10) days after the hearing, the County Commission on the basis of the record will make the determination as to whether there is cause for termination and whether the franchise will be terminated. The County Commission may, in its sole discretion, fix an additional time period to cure violations. If the deficiency has not been cured at the expiration of any additional time period, or if the County Commission does not grant any additional period, the County Commission may, by resolution, declare the franchise to be terminated.

(5) If Franchisee appeals revocation and termination, such revocation may be held in abeyance pending judicial review by a court of competent jurisdiction provided the Franchisee is otherwise in compliance with this franchise.

C. Franchisee shall not be deemed to be in default, failure, violation or noncompliance with any provision of this franchise where performance was rendered impossible due to an act of God, fire, flood, storm, or other element or casualty, theft, war, disaster, strike, lockout, boycott, prevailing war, or war preparation, or bona fide legal proceedings, beyond the control of the Franchisee.

Section 19. County Ordinances and Regulations. Nothing herein shall be deemed to direct or restrict the County's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The County shall have the authority at all times to control by appropriate regulations the locations, elevation, manner or construction and maintenance of facilities by the Franchisee and the Franchisee shall promptly conform with all such regulations unless compliance would cause the Franchisee to violate other requirements of the law.

Section 20. Survival. All of the provisions, conditions and requirements of this franchise shall be in addition to any and all other obligations and liabilities the Franchisee may have to the County at common law, by statute, or by contract. The provisions, conditions and requirements of Section 8 Work in Public Ways; 9 Restoration after Construction; 13 Dangerous Conditions; 14 Non-Liability of County for Acts of Franchisee; 15 Insurance; 16 Abandonment and Removal of the Franchisee's Communication Facilities; and any other provision to which this sentence should, by its nature, apply, shall survive the expiration or termination of this franchise and any renewals or extensions thereof and remain effective until such time as the Franchisee removes its Communication Facilities from the public ways, transfers ownership of said facilities to a third party, or abandons said system in place as provided herein, plus the duration of any applicable statute of limitations or other legal principle that would create continuing liability or responsibility if applied. All of the provisions, conditions, regulations and requirements contained in this franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives, and assigns of the Franchisee and all privileges as well as all obligations and liabilities of the Franchisee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Franchisee is named herein.

Section 21. Severability. If any section, sentence, clause or phrase of this franchise shall be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise, unless the invalidation of the term materially alters this franchise. If the invalidation of the term materially alters the franchise, then the parties shall negotiate in good faith to modify the franchise to match, as closely as possible, the original intent of the parties.

Section 22. Assignment. This franchise may not be assigned or transferred without prior written notice to the County except that the Franchisee may freely assign this franchise without notice in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization, or refinancing. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such notice shall not be required unless and until the secured party elects to realize upon the collateral.

Franchisee may, without the prior written notice to the County: (1) lease the facilities or any portion thereof to another; (2) grant an indefeasible right of user interest in the facilities or any portion thereof to another; or (3) offer to provide capacity or band width in its facilities to another, provided that Franchisee at all times retains exclusive control over such facilities and remains responsible for locating, servicing, repairing, relocating, or removing its facilities pursuant to the terms and conditions of this franchise.

Section 23. Notice. Any notice or information required or permitted to be given to the parties under this franchise may be sent to the following addresses unless otherwise specified:

County:

Weber County Engineer
2380 Washington Blvd., Ste. 240
Ogden, UT 84401

Franchisee:

All West/Utah, Inc.
50 West 100 North
Kamas, Utah 84036
Attn: President

Notice shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the U.S. mail in the case of regular mail, or next day in the case of overnight delivery.

Section 24. Entire Franchise. This franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon approval and acceptance of this franchise. Provided further that the County and the Franchisee reserve all rights they may have under the law to the maximum extent possible and neither the County nor the Franchisee shall be deemed to have waived any rights they may have or may acquire in the

future by entering into this franchise.

Section 25. Attorney's Fees. If any suit or other action is instituted in connection with any controversy arising under this franchise, each party shall be solely responsible for all of its own costs and expenses, including attorney's fees.

Section 26. Governing Law/Venue. This franchise shall be governed by and construed in accordance with the laws of the State of Utah. The venue and jurisdiction over any dispute related to this franchise shall be with the Utah State Court in the county in which the County is located, or with respect to any federal question, with the United States District Court for the District of Utah in Salt Lake City, Utah.

Section 27. Acceptance. Within sixty (60) days after the passage and approval of this ordinance, this franchise shall be accepted by the Franchisee by its filing with the County Clerk an unconditional written acceptance thereof. Failure of the Franchisee to so accept this franchise within said period of time shall be deemed a rejection thereof and the rights and privileges herein granted shall after the expiration of the sixty (60) day period, absolutely cease unless the time period is extended by ordinance duly passed for that purpose.

Section 28. Effective Date. This ordinance, being an exercise of power specifically delegated to the County legislative body, is not subject to referendum and shall take effect fifteen (15) days after the passage and publication of an approved summary thereof.

(Signatures on following page)

PASSED, APPROVED, and A SUMMARY ORDERED PUBLISHED this ____ day of _____, 20____.

BOARD OF COUNTY COMMISSIONERS OF
WEBER COUNTY

By _____
Gage Froerer, Chair

Commissioner Froerer voted _____
Commissioner Harvey voted _____
Commissioner Jenkins voted _____

ATTEST:

Ricky Hatch, CPA
Weber County Clerk/Auditor