

RESOLUTION NO. 5732

A RESOLUTION AUTHORIZING THE CITY MANAGER OR HIS DESIGNEE TO SIGN A SETTLEMENT AGREEMENT WITH QWEST FOR FRANCHISE FEE PAYMENTS FROM 2000-2005 INCLUSIVE.

WHEREAS, Chapter 3.20 of the Albany Municipal Code sets forth the terms and conditions under which Qwest is given the right and privilege to conduct a general communication business within the City; and

WHEREAS, in consideration for the privilege, Qwest pays to the City a franchise fee equal to 7% of its gross revenues derived from exchange access services, as defined in ORS 401.710; and

WHEREAS, following a 2002 District Court ruling affirming the legality of franchise fees, and after a period of franchise fee reductions in several calendar quarters with inadequate explanations from Qwest, about 70 Oregon cities decided to formally review the franchise fees paid by Qwest and Verizon from 2000-2005; and

WHEREAS, the cities entered into an intergovernmental agreement under ORS 190 to create the Oregon Municipal Audit Review Committee (OMARC) and the City of Albany is a participating city in OMARC; and

WHEREAS, in 2002-2003 OMARC requested proposals for audit services and selected Maximus, Inc. to perform the review; and

WHEREAS, despite typical franchise requirements for mandated franchise fee reviews, Qwest informed OMARC and Maximus that it would be unable to begin the review until 2006 due to "corporate-wide legal, financial and staffing difficulties"; and

WHEREAS, subsequent irreparable problems with Maximus regarding the scope of the project and the inability of the contractor to manage the volume of data provided by Qwest have caused Maximus to terminate the contract; and

WHEREAS, Qwest has offered to settle the franchise fee review for 2.% of the franchise fees paid from 2000-2005 to OMARC participating cities and the settlement totals \$1.4 million statewide with Albany's portion totaling \$36,950; and


WHEREAS, the settlement precludes future litigation for the subject years but does not limit audits from 2006 forward.

NOW, THEREFORE, BE IT RESOLVED that the City Manager or his designee is hereby authorized to sign the settlement agreement, attached as Exhibit A, with Qwest for payment of franchise fees between 2000 and 2005 inclusive.

DATED AND EFFECTIVE THIS 28th DAY OF JANUARY 2009.

ATTEST:


Betty Langwell
City Clerk


Mayor

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is between Qwest Corporation ("Qwest"), a Colorado corporation, and the City of Albany ("City"), an Oregon municipal corporation. Qwest and the City are referred to collectively herein as "the Parties."

RECITALS

- A. Qwest pays a monthly franchise fee of seven percent (7%) of gross revenues derived from exchange access services as defined in ORS 401.701 within the corporate limits of the City, less net uncollectibles, for the right and privilege to conduct a general communication business ("Telecommunications Fee").
- B. A group of Oregon cities formed the Oregon Municipal Audit and Review Committee ("OMARC"), to review and analyze Telecommunications Fee revenues received from Qwest ("Review").
- C. OMARC formed the OMARC Steering Committee ("Steering Committee") to make certain administrative decisions on behalf of the Oregon Cities in undertaking the Review.
- D. On January 22, 2003, the Steering Committee sent Qwest a notice of intent to review Qwest's payment of the City's Telecommunications Fee on behalf of the members of OMARC.
- E. Qwest and the City have not yet undertaken the Review, and no final determination has been made with respect to whether Qwest underpaid the Telecommunications Fee to the City during a review period commencing on January 1, 2000 and continuing through December 31, 2005 ("Review Period"), which, if underpaid, would constitute a debt to the City.
- F. Qwest and the City are desirous of avoiding further expense in undertaking the Review, and desire and agree to provide for payment, in accordance with the terms of this Agreement, and thereby to settle and resolve any and all potential claims and

disputes between them with respect to the Telecommunications Fee during the Review Period (“the Claim”).

- G. Qwest and the City have reached an amicable resolution of the outstanding issues and wish to effectuate a payment by Qwest, with such actions resulting in full satisfaction and settlement of all outstanding claims for the Telecommunications Fee during the Review Period.

NOW, THEREFORE, the Parties, through their undersigned representatives who are fully authorized to take the actions contemplated herein, pursuant to the foregoing recitals and in consideration of the following mutual promises, covenants and agreements, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, agree as follows:

AGREEMENT

1. Telecommunications Fee. The City and Qwest agree that, in consideration for the payment of the Claim, in the amount set forth in Section 3 hereof, that Qwest shall be deemed to, and shall have paid all of the Telecommunications Fee that was due and owing for the Review Period, including interest or penalties, and, that upon payment of such amount, the City shall not undertake any collection activity with respect to the Telecommunications Fee for the Review Period.

2. Effective Date. The Effective Date of the Agreement shall be the date of the last signature hereon, however, it is the intent of Qwest to enter into a similar agreement with 47 other Oregon cities listed in Exhibit A and notwithstanding the date of the last signature in this Agreement, this Agreement will not be effective until the date of the last signature on all 48 Agreements with each of the Oregon cities listed in Exhibit A. Should an Agreement not be secured by Qwest with any one of the 48 Oregon cities listed in Exhibit A, this Agreement will not be effective.

3. Amount. Qwest agrees to pay the City, and the City agrees to accept from Qwest, as full satisfaction of the Telecommunications Fee for the Review Period, within 30 days of the Effective Date, the total amount of \$36,950 (“the Amount”). The City agrees that no further

Telecommunications Fee, including interest or penalties thereon, shall be assessed for the Review Period by the City, and the City agrees to take no further action in any administrative or judicial proceeding to collect such Telecommunications Fee, with respect to any Telecommunications Fee accruing during the Review Period. Receipt by the City of payment of the Amount shall constitute a release by the Parties of all claims, known and unknown, that each party may have against the other with respect to the Telecommunications Fee for the Review Period (“Released Claims”). Payment shall be made at the address provided for notices in Section 9 of this Agreement.

4. This Agreement does not apply to, or release Qwest from payment of any taxes or fees, other than those described in the First Recital of this Agreement.

5. **No Admission.** The Parties agree that this Agreement is a full and complete compromise of the Claim and is made solely for purposes of settlement and that by entering into this Agreement none of the Parties are making any admissions as to the substantive factual or legal issues regarding the Claim, and that in the event of future disputes regarding payment of the Telecommunications Fee that become due and owing after the Review Period, that this Agreement may not, and shall not, be introduced into evidence in any administrative or judicial action.

6. **Voluntarily Entered.** The Parties represent and warrant that this Agreement is entered into voluntarily by the Parties with full knowledge of the consequences and implications of the obligations set forth herein. The Parties also represent and warrant that they have had the opportunity to be represented by counsel of their choice throughout the negotiations which preceded the execution of this Agreement, and in connection with the preparation and execution of this Agreement, and that they have carefully and thoroughly reviewed this Agreement in its entirety.

7. **Exclusive Purpose.** The terms and conditions of this Agreement are made solely for the purpose of resolving outstanding claims for the Telecommunications Fee during the Review Period, do not constitute an admission of fact, and may not be used by either party in any other action or proceeding.

8. Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and may be amended or modified only by a writing signed by the Parties hereto.

9. Notices. All notices required or permitted to be given or to be made upon any party hereto shall be in writing and shall be personally delivered or telecopied, and also sent by registered or certified mail, postage prepaid, return receipt requested, and shall be deemed to have been received for purposes of this Agreement on the day the notice is personally delivered or telecopied and deposited in the mail.

(a) All notices to Qwest regarding this Agreement should be sent to:

Andrew E. Ottinger, Vice President – Corporate Tax
Qwest Corporation
1801 California Street, 25th Floor
Denver, Colorado 80202
Fax: (303) 672-5902

(b) All notices to the City regarding this Agreement should be sent to:

Stewart Taylor, Finance Director
City of Albany
333 Broadalbin SW
PO Box 490
Albany, OR 97321-0144
541 917-7521 Phone
541 917-7511 Fax

10. Waiver of Costs, Etc. In connection with this Agreement, each party shall bear its own costs related thereto, including, but not limited to, attorney fees and each party waives any claim for any award of costs, disbursements or attorney fees in this matter.

11. Governing Law; Venue. The terms, provisions, interpretations and enforcement of this Agreement shall be governed by the laws of the State of Oregon, without regard to conflict of laws analysis. Any litigation between the Parties arising out of or related to this Agreement shall be brought and maintained in the Circuit Court for Linn County, Oregon. Provided, if any litigation arising under this Agreement is brought in a federal forum, it shall be brought and maintained in the United States District Court for the District of Oregon in Portland, Oregon.

12. Binding Obligation. The obligations of the Parties set forth in this Agreement shall be binding on the Parties, their successors and assigns.

13. Warranty of Authority. Each party to this Agreement hereby covenants and represents that the individual signing on its behalf is fully empowered to bind the party to the obligations and commitments set forth herein.

14. Counterparts. This Agreement may be executed in counterparts and by facsimile, and, if so executed, will be effective as if simultaneously executed at the time of receipt of the last executed counterpart.

15. Final Agreement. This Agreement is final and conclusive in all respects and all right to question the same by appeal or otherwise, is hereby waived.

16. No Party Deemed Drafter. The settling Parties agree that this Agreement has been negotiated by the settling Parties, by and through their respective counsel, all of whom have participated in the drafting hereof. The Parties agree that any rule of construction which provides that a document is to be construed against the draftsman shall not apply.

17. Severability. In case any one or more of the provisions of this Agreement shall be found to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired. Further, any provision found to be invalid, illegal or unenforceable shall be deemed, without further action on the part of the Parties to this Agreement, to be modified, amended and/or limited to the minimum extent necessary to render such clauses and/or provisions valid and enforceable.

18. No Assignment. City represents and warrants that it has not previously pledged, encumbered, assigned or transferred, or purported to pledge, encumber, assign or transfer any Released Claims.

IN WITNESS WHEREOF, the undersigned Parties have duly executed this Agreement to be effective on the date as set forth in Section 2 hereof.

QWEST CORPORATION

By: _____
(signature)

Name: _____
(print)

Title: _____

Date: _____

CITY OF ALBANY

By: _____
(signature)

Name: Stewart Taylor

Title: Finance Director

Date: _____

EXHIBIT A

List of Oregon Cities participating in this Settlement Agreement, collectively referred to as the "Oregon Cities":

CITY OF ADAIR VILLAGE
CITY OF ALBANY
CITY OF ASHLAND
CITY OF ATHENA
CITY OF BAKER CITY
CITY OF BEND
CITY OF CANNON BEACH
CITY OF COLUMBIA CITY
CITY OF CORVALLIS
CITY OF COTTAGE GROVE
CITY OF DALLAS
CITY OF EUGENE
CITY OF FALLS CITY
CITY OF FLORENCE
CITY OF GLADSTONE
CITY OF GRANTS PASS
CITY OF GRESHAM
CITY OF HAPPY VALLEY
CITY OF HERMISTON
CITY OF INDEPENDENCE
CITY OF IRRIGON
CITY OF JEFFERSON
CITY OF KLAMATH FALLS
CITY OF LAKE OSWEGO

CITY OF MADRAS
CITY OF MILTON-FREEWATER
CITY OF MILWAUKIE
CITY OF NEWPORT
CITY OF NORTH PLAINS
CITY OF OREGON CITY
CITY OF PENDLETON
CITY OF PHOENIX
CITY OF PORTLAND
CITY OF REDMOND
CITY OF ROGUE RIVER
CITY OF ROSEBURG
CITY OF SALEM
CITY OF SEASIDE
CITY OF SISTERS
CITY OF SPRINGFIELD
CITY OF ST. HELENS
CITY OF STANFIELD
CITY OF TALENT
CITY OF TIGARD
CITY OF TUALATIN
CITY OF WARRENTON
CITY OF WEST LINN
CITY OF WOODBURN