



## ORDINANCE NO. 28236

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AN ORDINANCE granting a non-exclusive franchise to tw telecom of washington llc, a Delaware limited liability company, to construct, operate, and repair a telecommunications system throughout the City of Tacoma; setting forth provisions, terms and conditions of the grant of franchise; specifically making such grant subject to the provisions of Title 16B and Title 10 of the Tacoma Municipal Code and the Tacoma City Charter; providing for City regulation of the Telecommunications System; prescribing liquidated damages and certain other remedies for violation of franchise provisions in addition to those specified pursuant to the Municipal Code and the City of Tacoma Charter.

WHEREAS tw telecom of washington llc, a Delaware limited liability company registered to do business in the state of Washington (“tw” or “Franchisee”) is a telecommunications company currently involved in the business of operating a telecommunications network utilizing fiber optic technology, and

WHEREAS, as part of expanding such network, tw desires to obtain a franchise to operate a system of fiber optic cable in City of Tacoma right-of-way, and

WHEREAS tw has applied to the City to install and operate fiber optic cable within the City streets and public rights-of-way, and

WHEREAS the City Council has determined to grant such a franchise to tw upon those certain terms and conditions which the Council deems necessary due to the unique nature of fiber optic cable, and

WHEREAS the City Council understands and acknowledges that tw’s parent, tw telecom, inc. will possibly be acquired by Level 3 Communications, Inc. (also a City franchisee) sometime during the approval process of this Franchise or shortly thereafter and for purposes of that transaction, the City pre-approves that



transaction pursuant to Section 2.4 of the Franchise and Tacoma Municipal Code  
 Chapter 16B, and

WHEREAS this City of Tacoma Telecommunications Franchise Ordinance  
 contains the following sections:

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33 Now, Therefore,

34 BE IT ORDAINED BY THE CITY OF TACOMA:

35 Section 1 - DEFINITIONS. For the purposes of this Franchise, the following

36 terms, phrases, words, and their derivations shall have the meaning given herein;



1 words not defined herein which are defined in Title 16B, shall have the same  
2 meaning or be interpreted as provided in Title 16B. Words not defined here or in  
3 Title 16B shall be construed consistently with Title 47 of the United States Code,  
4 and if not therein, they shall have their common and ordinary meaning. A  
5 reference to any Title of the Tacoma Municipal Code ("City Code") or to the City's  
6 Charter refers to the same as may be amended from time to time.

7 1.1 "City" means the City of Tacoma, a municipal corporation of the state  
8 of Washington, and all departments, divisions, and agencies thereof, including  
9 Tacoma Public Utilities.  
10

11 1.2 "City Manager" means the City Manager or the City Manager's  
12 designee.

13 1.3 "Communications facility" means a device which, along or as part of  
14 an aggregation of devices, is capable of transmitting signals from place to place.  
15

16 1.4 "Communications system" refers to a telecommunications system.

17 1.5 "Construction, operation, or repair" and similar formulations of this  
18 term mean the named actions interpreted broadly, encompassing, among other  
19 things, installation, extension, maintenance, replacement, or components,  
20 relocation, undergrounding, grading, site preparation, adjusting, testing, make-  
21 ready, and excavation.  
22

23 1.6 "Customer" means any Person or entity who legally receives within  
24 the corporate limits of the City any one or more of the services provided by the  
25 Telecommunications System.  
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1.7 "Facilities" or "Installations" are and refer to and include, but are not limited to, plant, systems, improvements, and equipment owned, leased, or otherwise used by the Franchisee, such as poles, fiber, wires, fixtures, equipment, underground circuits, and conduit in public rights-of-way and other property necessary or convenient for the transmission and distribution of communications service where such facilities are located. "Facilities" or "Installations," when used without a modifier, shall be considered to encompass both Overhead Facilities/Installations and Underground Facilities/Installations.

1.8 "Franchise" means the rights granted by this Franchise and conditioned as set forth herein, and under the Tacoma Municipal Code and the City Charter.

1.9 "Franchise Area" means that area within the present and future corporate limits of Tacoma.

1.10 "Franchisee" is tw telecom of washington llc, a Delaware limited liability company, with its home office at 10475 Park Meadows Drive, Littleton, CO 80124.

1.11 "Gross Receipts," for purposes of this Franchise, means any and all receipts or income received directly or indirectly by Franchisee, that is derived from the operation of its System in the City. Gross Receipts/Revenues shall include, by way of example and not limitation, revenues from its Telecommunications Service, all fees, late fees, installation and connection fees, upgrade and downgrade fees, and rental fees. The term Gross Receipts/Revenues shall not include any taxes on Services furnished by Franchisee imposed by any municipality, state, or other



1 governmental unit and collected by Franchisee for such governmental unit, nor  
2 shall the term include any wholesale services provided by Franchisee upon which  
3 fees or taxes have already been levied within the City of Tacoma.

4 1.12 "Operator" when used with reference to a system, refers to a Person  
5 (a) who provides service over a Communications System and directly or through  
6 one or more affiliates owns a significant interest in such facility; or (b) who  
7 otherwise controls or is responsible for, through any arrangement, the  
8 management and operation of such a facility. A Person that operates under  
9 agreement of a Telecommunications System or a specific portion of a  
10 Telecommunications System to provide Telecommunications Services shall be  
11 treated as an Operator for purposes of this Franchise.

12 1.13 "Overhead Facilities" refers to electric utility and Communications  
13 Facilities located above the surface of the ground, including the underground  
14 supports and foundations for such Facilities.

15 1.14 "Person" includes any individual corporation, partnership,  
16 association, joint stock company, trust, or any other legal entity, but not the City for  
17 purposes hereof.

18 1.15 "Public Rights-of-Way" mean the public streets and easements  
19 which, under the City Charter, the Tacoma Municipal Code, City ordinances, and  
20 applicable laws, the City has authority to grant Franchises, permits, or Licenses for  
21 use thereof or has regulatory authority there over, but expressly excluding railroad  
22 rights-of-way, airport, and harbor areas. Public Rights-of-Way, for the purpose of  
23 this Franchise, do not include buildings, parks, poles, conduits, or similar facilities  
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1 or property owned by or leased to the City, including, by way of example and not  
2 limitation, structures in the Public Rights-of-Way such as utility poles and light  
3 poles.

4 1.16 "System" means the Telecommunications System.

5 1.17 "Telecommunications Service" or "Service" means the transmission  
6 for hire of information in electronic or optical form, including, but not limited to,  
7 voice, video, or data, whether or not the transmission medium is owned by the  
8 provider itself. Telecommunications Service includes telephone service but does  
9 not include Cable TV Service or over-the-air broadcasts to the public-at-large from  
10 facilities licensed by the Federal Communications Commission or any successor  
11 thereto.

12 1.18 "Telecommunications System" means a tangible facility that is used  
13 to provide one or more Telecommunications Services, any portion of which  
14 occupies Public Right-of-Way. The term "Telecommunications System," by way of  
15 example and not limitation, includes wires, equipment cabinets, guys, conduit,  
16 radio transmitting towers, poles, other supporting structures, and associated and  
17 appurtenant facilities used to transmit telecommunications signals. The term  
18 "Telecommunications System" includes all devices mounted on light poles in the  
19 Public Rights-of-Way through which Telecommunications Services are originated  
20 or terminated. An Open Video System is not a Telecommunications System to the  
21 extent that it provides only video services; a Cable System is not a  
22 Telecommunications System to the extent that it provides only Cable Service. The  
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term "Telecommunications System" includes any of the tangible components of a  
1 Telecommunications System which occupies Public Rights-of-Way.

2 1.19. "Telephone Service" means the providing by any person of access to  
3 a local telephone network, local telephone network switching service, intrastate toll  
4 service, or coin telephone service, or providing telephonic, video, data, or similar  
5 communication or transmission for hire via a local telephone network, toll line,  
6 channel, cable, microwave, or similar communication or transmission system.

7 Telephone Service includes intrastate or interstate service, including toll service,  
8 originating from, or received on, communications equipment or apparatus in this  
9 state if the charge for the service is billed to a person in this state. Telephone  
10 Service does not include the providing of competitive Telephone Service as  
11 defined in Tacoma Municipal Code 6A.40.030, the providing of cable television  
12 service, or the providing of broadcast services by radio or television stations.

13 1.20 "Title," when used alone in the context of referring to this Title of the  
14 Tacoma Municipal Code, shall mean Title 16 (and more specifically Title 16B) of  
15 the Tacoma Municipal Code.

16 1.21 "Underground Facilities" refers to electric utility and Communications  
17 Facilities located under the surface of the ground, excluding the underground  
18 foundations or supports for Overhead Facilities.

19 Section 2 - FRANCHISE.

20 2.1 Grant of Franchise. The City hereby grants to Franchisee a  
21 non-exclusive Franchise which, once it becomes effective, shall authorize  
22 Franchisee, to use the City's Public Rights-of-Way within the Franchise Area to  
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1 construct, repair, and operate a fiber optic Telecommunication System to provide  
2 Telecommunication Service and internet access service, and to continue using the  
3 City's Public Rights-of-Way as authorized herein.

4         Such grant is subject to and must be exercised in strict accordance with and  
5 subject to this Franchise Agreement, Title 16B and other applicable provisions of  
6 the Tacoma Municipal Code, and the Tacoma City Charter, including, but not  
7 limited to, the provisions set forth in Article VIII of the Charter, and this Franchise  
8 may be revoked if it is not so exercised. The exercise of any rights pursuant to this  
9 Franchise is subject to the exercise of the City's police powers and other regulatory  
10 powers as the City may have or obtain in the future, and all rights granted herein  
11 must be exercised in strict accordance with applicable law, including, by way of  
12 example and not limitation, zoning codes and permitting requirements. No rights  
13 shall pass to the Franchisee by implication. This Franchise shall constitute both a  
14 right and an obligation to provide the services of the Telecommunications System  
15 as required by the provisions of this Franchise.  
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18         The grant of this Franchise is limited to the purpose of Franchisee providing  
19 Telecommunications Service. This Franchise does not include permission to  
20 provide cable service, as defined in 47 U.S.C. § 522, multichannel video  
21 programming, open video systems, or uses other than Telecommunications  
22 Service.  
23

24         Notwithstanding the above grant to use Public Rights-of-Way, no Public  
25 Rights-of-Way shall be used by Franchisee if the City, in its non-arbitrary opinion,  
26 determines that such use is inconsistent with the terms, conditions, or provisions



1 by which such Public Right-of-Way was created or dedicated, or presently used  
2 under applicable laws.

3 In the event of any conflict between a provision in this Franchise and any  
4 provision of the City Charter, which Charter is incorporated herein by reference,  
5 the applicable provision of the Charter shall control over any inconsistent provision  
6 of this Franchise.

7 2.2 Franchise Term. The term of the Franchise shall be ten years  
8 unless terminated sooner in accordance with this Franchise, Title 16B, or the City  
9 Charter.

10 2.3 Franchise Non-Exclusive. The Franchise granted herein shall be  
11 non-exclusive.

12 2.4 Transfers, Generally.

13 A. Any transfer of this Franchise, as the term "Transfer" is defined  
14 in TMC 16B.01.030.Y, shall be accomplished in accordance with TMC 16B.02.120.  
15 Any Transfer not made in accordance with TMC 16B.02.120 may be considered a  
16 substantial violation of this Franchise by the City and may subject the Franchise to  
17 termination proceedings by the City and may subject the Franchise to  
18 termination proceedings by the City as provided herein and in Title 16B.

19 B. Applications for approval of any Transfer shall be filed in  
20 accordance with procedures set out in Title 16B of the Tacoma Municipal Code.

21 C. Franchisee, shall within 60 days of the closing date of any  
22 Transfer, file with the City Clerk a copy of the deed, agreement, contract,  
23 mortgage, lease, SEC filing, or other written instrument evidencing such sale,  
24 lease, contractual agreement, mortgage, assignment or Transfer, certified and  
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1 sworn to as correct by Franchisee, subject to any confidentiality provisions in any  
2 such document. Every such Transfer, whether voluntary or involuntary, may be  
3 deemed void and of no effect as to the effectiveness of this Franchise by the City  
4 unless Franchisee files the required copy within the 60-day period.

5 D. The requirements of this section shall not be deemed to  
6 prohibit the use of Franchisee's property as collateral for security in financing the  
7 construction or acquisition of all or part of the Telecommunications System  
8 franchised hereunder, provided that no such security shall purport to attach to the  
9 City's real property interest in the Public Right-of-Way. In addition, no such  
10 arrangement may be made if it would in any respect under any condition prevent  
11 the Operator or any successor from complying with the Franchise and applicable  
12 law. Any mortgage, pledge, or lease shall be subject to and subordinate to the  
13 rights of the City under this Franchise and other applicable law.

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15 2.5 Revocation. In addition to any rights set out elsewhere in this  
16 Franchise, the City Charter or Title 16, subject to the notice and cure provisions  
17 contained in Title 16B, Section 16B.05.100, the City reserves the right to declare a  
18 forfeiture or otherwise revoke this Franchise, and all rights and privileges  
19 pertaining thereto, as provided in Title 16(B) or in the event that:  
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21 A. Franchisee is in non-compliance with a material provision this  
22 Franchise; or  
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24 B. Franchisee is found to have engaged in any actual or  
25 attempted fraud or deceit upon the City, Persons, or Customers in the City; or  
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C. Franchisee fails to obtain and maintain any permit required by any federal or state regulatory body or by the City, relating to the construction, repair, and operation of the Facilities within the Public Rights-of-Way within the Franchise Area; or

D. At any time during the term of the Franchise, Franchisee fails to provide and maintain all of the securities required under this Franchise, including, but not limited to, the performance bond required under this Franchise; fails to maintain the insurance required by this Franchise; or fails to satisfy the indemnity set out in this Franchise; or if any guarantor of Franchisee revokes its guarantee or fails to satisfy or becomes unable to satisfy its obligations under such guarantee.

E. The procedures for revocation and forfeiture shall be governed by Title 16B, Section 16B.05.100. Before the Franchise is revoked, Franchisee shall be given notice and opportunity to cure at least equivalent to that required by Title 16B as of the effective date of this Franchise (except in those cases where notice and opportunity to cure are not required), and shall be accorded at least an opportunity to be heard that provides at least the due process protections required by Title 16B as of the effective date of this Franchise, which opportunities and protections are set out in Section 2.6.F, below.

F. (1) Where, after notice and providing the Franchisee an opportunity to be heard (if such opportunity is requested by a Franchisee), the City finds that there has been an act or omission that would justify revocation of the Franchise, the City may make an appropriate reduction in the remaining term of the Franchise or revoke the Franchise. However, the Franchise may only be



1 revoked if the Franchisee (a) was given written notice of the default; and  
2 (b) 30 days to cure the default; and (c) the Franchisee failed to cure the default, or  
3 to propose a schedule for curing the default acceptable to the City where it is  
4 impossible to cure the default in 30 days. The required written notice shall be  
5 given before the City conducts the proceeding required by this paragraph. No  
6 opportunity to cure is required for repeated violations of material provisions of the  
7 Franchise, and fraud shall be deemed incurable.

8 (2) Notwithstanding the foregoing, the City may declare a  
9 Franchise forfeited without opportunity to cure when the Franchisee: (a) fails to  
10 begin to exercise its rights hereunder within 45 days of Franchisee's acceptance of  
11 this Franchise; (b) stops providing all Service it is required to provide under the  
12 Franchise; (c) Transfers without the prior consent of the City as and when required  
13 in the Franchise; or (d) is found by a court or regulatory body with appropriate  
14 jurisdiction to have defrauded or attempted to defraud the City or Franchisee's  
15 customers within the City. Notwithstanding the provisions of Title 16B.05.100.C.2,  
16 if Franchisee fails to timely pay any undisputed Franchise  
17 application/administrative fees or other fees owed hereunder or under Title 16B,  
18 before the City can initiate any termination or forfeiture rights, Franchisee shall be  
19 provided with ten (10) business days' prior written notice and an opportunity to  
20 cure the failure to pay. However, Franchisee shall have the right to receive  
21 30 days' prior notice of an intent to declare a Franchise forfeited, and shall have  
22 the opportunity to show cause why the Franchise should not be forfeited.  
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1 (3) Notwithstanding the foregoing and only to the extent  
2 permitted by applicable law, the Franchise will automatically terminate by force of  
3 law 120 calendar days after an assignment for the benefit of creditors or the  
4 appointment of a receiver or trustee to take over the business of the Franchisee,  
5 whether in a receivership, reorganization, bankruptcy assignment for the benefit of  
6 creditors, or other action or proceeding. However, the Franchise may be  
7 reinstated within that 120-day period, if: (a) such assignment, receivership or  
8 trusteeship has been vacated; or (b) such assignee, receiver or trustee has fully  
9 complied with the terms and conditions of Title 16B and this Franchise and has  
10 executed an agreement, approved by any court having jurisdiction, assuming and  
11 agreeing to be bound by the terms and conditions of Title 16B and this Franchise.  
12 However, in the event of foreclosure or other judicial sale of any of the facilities,  
13 equipment, or property of a Franchisee, the City may revoke this Franchise,  
14 following a public hearing before the City Council, by serving notice upon the  
15 Franchisee and the successful bidder at the sale, in which event the Franchise and  
16 all rights and privileges of this Franchise will be revoked and will terminate  
17 30 calendar days after serving such notice, unless: (a) the City has approved the  
18 Transfer of the Franchise to the successful bidder; and (b) the successful bidder  
19 has covenanted and agreed with the City to assume and be bound by the terms  
20 and conditions of this Franchise and Title 16B.  
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24 2.6 Continuity of Service and Right to Purchase the System.

25 A. In the event the City has declared a forfeiture for cause or  
26 otherwise validly revoked this Franchise as provided herein, or in the event of



1 expiration of the initial term of this Franchise without this Franchise being renewed  
2 or extended (referred to below collectively as a “termination”), Franchisee shall, at  
3 the direction of the City expressed by ordinance, continue its operations for such  
4 reasonable period (the “Continuation Period”) as the City may determine is  
5 necessary to permit transition to another provider, which period may be  
6 established taking into account any appeal of the termination. During such  
7 Continuation Period, Franchisee shall continue to be bound by all its obligations  
8 under this Franchise and Title 16B. Additionally, during this Continuation Period,  
9 Franchisee shall not Transfer any portion of its Telecommunications System to any  
10 other Person, including parts of the System rented, leased, or lease-purchased; or  
11 significantly alter the Telecommunications System or remove property from the  
12 City, or otherwise encumber the Telecommunications System in any manner,  
13 without prior written consent of the City. The Franchisee’s obligations to remove  
14 its facilities under Title 16B, Section 16B.03.090, shall be deferred for the  
15 Continuation Period. Within 30 days of the date the City passes the ordinance  
16 requiring continuation of service, or 30 days after the effective date of the  
17 termination, whichever is earlier, Franchisee shall provide the City with an  
18 inventory of all its property in the City, and in addition, such other property as may  
19 be used and useful by it in providing service within the City. Any property on the  
20 list that is essential to providing service to other communities must be clearly  
21 identified. Property on the list that is not within the City must be clearly identified,  
22 and its location stated.  
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1 B. In the event the City has declared a forfeiture for cause or  
2 otherwise validly revoked this Franchise as provided herein, or in the event of  
3 expiration of the initial term of this Franchise without this Franchise being renewed  
4 or extended (referred to below collectively as a "termination"), the City shall have  
5 an option upon termination of the Franchise to purchase that portion of the  
6 Telecommunications System located in the Right-of-Way owned by the  
7 Franchisee, whether termination is, or is not, for cause. This option requires  
8 Franchisee to convey the Telecommunications System or such portion thereof as  
9 the City may choose to purchase, provided, that nothing herein shall require the  
10 City to accept or pay for any contract that it does not wish to assume. Franchisee  
11 is not required to convey portions of the Telecommunications System not located  
12 in the Right-of-Way, located outside the City, or that is leased or used (but not  
13 owned) by Franchisee from a third party pursuant to a tariff or contract. The  
14 foregoing option also requires Franchisee to sell the Telecommunications System  
15 owned by the Franchisee and located in the Right-of-Way, or such portion thereof  
16 as the City may choose to purchase, at a fair market price if the Franchise is  
17 terminated for cause. If Franchisee's request for a Franchise renewal is denied,  
18 the option requires Franchisee to sell the Telecommunications System owned by  
19 the Franchisee and located in the Right-of-Way, or such portion thereof as the City  
20 may choose to purchase, at fair market value, determined on the basis of the value  
21 of the Telecommunications System as a going concern (taking into account such  
22 property used and useful in providing service within the City that is not to be  
23 conveyed) and with no value allocated to the Franchise itself.  
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1 C. The City may exercise its Section 2.6.B option rights in the  
2 following manner: the City will have up to 180 days after receiving the inventory  
3 required by Section 2.6.A to notify Franchisee that it intends to exercise its right to  
4 purchase the Telecommunications System or a portion of the Telecommunications  
5 System. Within 90 days of the date the City notifies Franchisee of its intent to  
6 exercise the option, or by such other time as the parties may separately agree, the  
7 parties shall meet to establish a price that comports with the requirements of  
8 Section 2.6.B. If the parties are unable to agree to a price within 180 days after the  
9 City notifies Franchisee that the City intends to exercise its purchase option, either  
10 party may require the price to be set by appraisal by sending the other party notice  
11 that it wishes to have the price set by appraisal. Within 45 days of the date that  
12 notice is submitted, each party may appoint one appraiser. If each party appoints  
13 an appraiser, the two appraisers shall appoint a third appraiser; if only a single  
14 appraiser is appointed (whether by mutual agreement or because of the failure of a  
15 party to timely nominate an appraiser) that appraiser shall be the sole appraiser.  
16 The appraiser or appraisers shall establish a price for the System or portion thereof  
17 that the City desires to purchase in accordance with Section 2.6.B. This appraisal  
18 determination shall be final and non-appealable. The City shall have 120 days  
19 after the decision of the appraisers to notify Franchisee that it wishes to conclude  
20 the transaction; if it does not so notify the Franchisee, the option shall be deemed  
21 terminated.  
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25 If the City gives the notice required by the preceding paragraph, the  
26 parties will thereafter promptly sign all necessary documents required to close the



1 transaction; provided, however, that the City may make conclusion of the  
2 transaction conditional upon any necessary voter approval of any bond funding for  
3 acquisition of all or a part of the System and, if applicable, the successful sale of  
4 the bonds.

5 The City and Franchisee will share equally the costs associated with  
6 any appraiser that is jointly appointed (by them or by the appraisers each selects);  
7 the City will bear costs associated with any appraiser that it separately appoints  
8 and Franchisee will bear costs associated with any appraiser that it separately  
9 appoints.  
10

11 D. (1) Nothing in this section or in any other section of this  
12 Franchise shall prevent the City's exercise of its rights under the Tacoma City  
13 Charter. Included within the rights granted under Tacoma's Charter is the right to  
14 purchase or condemn Franchisee's property within the Franchised Area at any  
15 time, which right is expressly set out in Section 8.1(c) of the Charter as follows:  
16 "to acquire by purchase or condemnation, for the use of the City itself or its  
17 inhabitants, all of the property of the grantee within the public streets, alleys, or  
18 places at a fair and just value, which shall not include any valuation of the  
19 franchise, right, or privilege, which shall thereupon be terminated."  
20

21 (2) Likewise, nothing in this section or in any other section  
22 of this Franchise shall be read to limit the City's right to acquire the  
23 Telecommunications System through exercise of any right of eminent domain  
24 under state law.  
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1 (3) Nothing in this section shall be read to limit the City's  
right to acquire the Telecommunications System as a result of abandonment.

2 E. In the event the City purchases, acquires, takes over, or holds  
3 all or parts of the System, the City shall have the right without limitation to assign,  
4 sell, lease, or otherwise transfer its interest in all or parts of such System to any  
5 other Person or entity, including any other Franchisee of a Telecommunications  
6 System, on whatever terms the City deems appropriate.  
7

8 2.7 Right to Require Removal of Property/Right to Remove Property.

9 A. Upon termination of this Franchise, Franchisee may be  
10 required to remove its property from any Public Rights-of-Way and restore such  
11 Rights-of-Way to the condition required by the Tacoma Municipal Code and City  
12 Right-of-Way Restoration Policy, subject to any rights Franchisee may have to  
13 abandon property in place as set out in Title 16B. If Franchisee fails to remove  
14 property that the City requires it to remove, the City may perform the work and  
15 collect the actual cost thereof from Franchisee. The actual cost thereof, including  
16 direct and indirect administrative costs, shall be a lien upon all plant and property  
17 of Franchisee effective upon filing of the lien with the Pierce County Auditor. In the  
18 event that Franchisee is permitted to abandon its Facilities in place, the City  
19 acknowledges that any ownership it takes in the Facilities thereafter is taken on an  
20 AS-IS, WHERE-IS basis.  
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24 B. To the extent any portion of the System in the Public  
25 Rights-of-Way or on any other public property of the City is not removed by the  
26 Operator within 12 months of the later of the end of the Franchise term, the



1 property will be deemed abandoned in its AS-IS, WHERE-IS condition and shall  
2 become the property of the City if the City wishes to own it.

3 C. Any order by the City issued pursuant to Section 2.7.A to  
4 remove Facilities shall be sent by registered or certified mail, postage prepaid,  
5 return receipt requested, to Franchisee not later than 24 months following the date  
6 of Franchise termination. Removal shall be completed (except with respect to  
7 property that Franchisee is permitted to abandon in place) not later than 12 months  
8 following the date of notification to remove the Facilities.

9 D. Franchisee shall file a written removal plan with the City not  
10 later than 30 calendar days following the date of the receipt of any orders directing  
11 removal, or any consent to removal describing the work that will be performed, the  
12 manner in which it will be performed, and a schedule for removal by location. The  
13 removal plan shall be subject to approval and regulation by the City, including,  
14 without limitation, the City's Right-of-Way Restoration Policy. The affected  
15 property must be restored in compliance with City's Right-of-Way Restoration  
16 Policy; and any damage caused by Franchisee's removal must be  
17 addressed/compensated to the reasonable satisfaction of the City.

18 E. The purchase option provided for in Section 2.6 does not  
19 affect the City's authority to require Franchisee to remove its Telecommunications  
20 System upon Franchise termination, as provided in this section and Title 16B, nor  
21 does it affect the City's right to assume ownership of any portion of the  
22 Telecommunications System that is abandoned. Within 60 days of a request by  
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1 the City, the Franchisee shall execute such documents as may be required to  
2 convey such abandoned property to the City free and clear of all encumbrances.

3           2.8 Customers' Right to Obtain Service. It shall be the right of all  
4 Customers to receive all available services insofar as their financial and other  
5 obligations to Franchisee are honored during the term of the Franchise. In addition  
6 to the obligations established under the other provisions of this Franchise, in the  
7 event that Franchisee elects to overbuild, rebuild, modify, or sell the System,  
8 Franchisee shall make its best effort to ensure that all Customers receive  
9 continuous uninterrupted service subject to the terms and conditions of the service  
10 contract then in effect between the respective Customer and Franchisee.

11           2.9 Responsibility for Costs. Except as expressly provided otherwise,  
12 any act that Franchisee is required to perform under this Franchise shall be  
13 performed at its cost. If Franchisee fails to perform work that it is required to  
14 perform within the time provided for performance, the City, after first providing  
15 notice and an opportunity to cure as herein provided, may perform the work and bill  
16 the Franchisee the actual cost thereof. The Franchisee shall pay the amounts  
17 billed within 30 days of receipt of itemized bill. The parties agree that any amounts  
18 paid pursuant to this section or Title 16B are not franchise fees.

19           2.10 Work of Contractors and Subcontractors. Work by contractors and  
20 subcontractors is subject to the same restrictions, limitations, and conditions as if  
21 the work were performed by Franchisee. Franchisee shall be responsible for all  
22 work performed by its contractors and subcontractors, and others performing work  
23 on its behalf as if the work were performed by it and shall ensure that all such work  
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1 is performed in compliance with this Franchise and Title 16B, and other applicable  
2 laws, including, without limitation, the City's Right-of-Way Restoration Policy. A  
3 copy of the presently effective policy has been provided to the Franchisee, and the  
4 City agrees to provide a current copy of the policy upon subsequent request from  
5 the Franchisee. Franchisee and its contractors and subcontractors shall be jointly  
6 and severally liable for all damages and correcting all damages caused by them. It  
7 is Franchisee's responsibility to ensure that contractors, subcontractors, or other  
8 Person(s) performing work on Franchisee's behalf are familiar with the  
9 requirements of this Franchise, Title 16B, the City's Right-of-Way Restoration  
10 Policy, and other applicable laws governing the work performed by them.  
11

12       2.11 Survival of Terms. Upon the termination or forfeiture of the  
13 Franchise, Franchisee shall no longer have the right to occupy the Public  
14 Rights-of-Way for the purpose of providing Telecommunications Service.  
15 However, Franchisee's obligations to the City (other than the obligation to provide  
16 service to Customers) survive the expiration of these rights according to their  
17 terms. By way of illustration and not limitation, Sections 2.6, 2.7, 2.9, and 4 of this  
18 Franchise shall continue in effect as to Franchisee notwithstanding any expiration,  
19 forfeiture, or revocation of the Franchise, except to the extent that a City-approved  
20 Transfer, sale, or assignment of the Telecommunications System is completed,  
21 and another entity has assumed full and complete responsibility for the  
22 Telecommunications System or for the relevant acts or omissions.  
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SECTION 3 - OPERATION IN STREETS AND RIGHTS-OF-WAY.

1           3.1     Use of Public Rights-of-Way. Franchisee may, subject to the terms  
2 of this Franchise and Title 16B, the City's Right-of-Way Restoration Policy, and  
3 other applicable laws, construct, operate and maintain a fiber optic  
4 Telecommunications System in Public Rights-of-Way within the Franchise Area, to  
5 provide Telecommunications Services. Without limiting the foregoing, Franchisee  
6 expressly agrees that it will construct, operate, and maintain its System in  
7 compliance with the requirements of Title 16B, including those governing the  
8 placement of its Telecommunications System, and with other applicable City  
9 codes; and will obtain and maintain all bonds and billable work orders required by  
10 the same.  
11

12  
13           3.2     Construction, Operation, or Repair. Franchisee shall, in all cases,  
14 comply with all lawful City ordinances and regulations now in effect or hereinafter  
15 enacted regarding the acquisition of permits and such other items as may be  
16 required by the City in connection with the construction, operation, or repair of the  
17 Telecommunications System, including, without limitation, the City's Right-of-Way  
18 Restoration Policy.  
19

20           Without limiting the foregoing, Franchisee agrees that it shall, in the course  
21 of constructing, operating and maintaining its Telecommunications System comply  
22 with the requirements of Title 16B and among other things:  
23

24           A.     (1)     Franchisee shall, by a time specified by the City,  
25 protect, support, temporarily disconnect, relocate, or remove any of its property  
26 when required by the City by reason of traffic conditions; public safety; Public



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Rights-of-Way construction; Public Rights-of-Way repair (including resurfacing or widening); change of Public Rights-of-Way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned Communications System, public work, public project, public facility, or improvement or any government-owned utility; Public Rights-of-Way vacation; or for any other purpose where the work involved would be aided by the removal or relocation of the Telecommunications System. Collectively, such matters are referred to below as the “public work.”

(2) In the event of an emergency, or where the Telecommunications System creates or is contributing to an imminent danger to health, safety, or property, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the Telecommunications System without prior notice, and charge the Franchisee for actual costs incurred.

(3) In the case of non-public work, if any Person that is authorized to place Facilities in the Rights-of-Way requests Franchisee to protect, support, temporarily disconnect, remove, or relocate Franchisee’s facilities to accommodate the construction, operation, or repair of the facilities of such other Person, the Franchisee shall, after 30 days’ advance written notice, take action to effect the necessary changes requested. In the case of non-public work or non-public projects, unless, and to the extent, the matter is governed by a valid contract between Franchisee and such Person requesting Franchisee to take action under this subsection (3) or governed by a valid state or federal law or regulation, or unless the Franchisee’s Telecommunications System was not properly installed,





1 the reasonable cost of the same shall be borne by the Person requesting the  
2 protection, support, temporary disconnection, removal, or relocation and at no  
3 charge to the City, even if the City makes the request for such action.

4 (4) Franchisee shall, on the request of any Person holding  
5 a valid permit issued by a governmental authority, temporarily raise or lower its  
6 wires to permit the moving of buildings or other objects. The expense of such  
7 temporary removal or raising or lowering of wires shall be paid by the Person  
8 requesting the same.

9 B. The Franchisee's obligation to construct, operate, and repair  
10 its Telecommunications System in compliance with all applicable laws, ordinances,  
11 departmental rules and regulations and practices affecting such System, includes,  
12 by way of example and not limitation, the obligation to construct, operate and  
13 repair in accordance with zoning codes, safety codes and City construction  
14 standards, including the most current version of the *Standard Specifications for*  
15 *Road, Bridge and Municipal Construction*, as prepared by the Washington State  
16 Department of Transportation ("WSDOT") and the Washington State Chapter of  
17 American Public Works Association ("APWA"); the most current version of the  
18 APWA Amendments to Division One, and the most current version of the City of  
19 Tacoma Amendments thereto. In addition, the construction, operation, and repair  
20 shall be performed in a manner consistent with industry standards. The  
21 Franchisee shall exercise reasonable care in the performance of all its activities  
22 and shall use commonly accepted methods and devices for preventing failures and  
23 accidents that are likely to cause damage, injury, or nuisance to the public or to  
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1 property. In the event that Franchisee's work or other use of the Public Right-of-  
2 Way causes damage to any City facility, Franchisee shall bear the cost of  
3 repairing, or replacing as necessary, such City facility.

4 C. Franchisee's construction, operation, or repair of its  
5 Telecommunications System shall not commence until all required permits have  
6 been properly filed for and obtained from the proper City officials and all required  
7 permits and associated fees paid. In any permit so issued, the City may impose,  
8 as a condition of the granting of the permit, such conditions and regulations as may  
9 be necessary to the management of the Public Rights-of-Way, including, by way of  
10 example and not limitation, for the purpose of protecting any structures in the  
11 Public Rights-of-Way, maintaining proper distance from other utilities, for the  
12 proper restoration of such Public Rights-of-Way and structures, and for the  
13 protection of the City and the public and the continuity of pedestrian and vehicular  
14 traffic.  
15

16 D. Franchisee must follow City-established requirements for  
17 placement of Facilities in Public Rights-of-Way, including the specific location of  
18 Facilities in the Public Rights-of-Way, and must in any event install Facilities in a  
19 manner that minimizes interference with the use of the Public Rights-of-Way by  
20 others, including others that may be installing Communications Facilities. The City  
21 may require that Facilities be installed at a particular time, at a specific place, or in  
22 a particular manner as a condition of access to a particular Public Right-of-Way  
23 area; may deny access if Franchisee is not willing to comply with the City's  
24 requirements; and may remove, or require removal of, any Facility that is not  
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1 installed in compliance with the requirements established by the City, or which is  
2 installed without prior City approval of the time, place, or manner of installation and  
3 charge the Franchisee for all the costs associated with removal; and may require  
4 Franchisee to cooperate with others to minimize adverse impacts on the Public  
5 Rights-of-Way through joint trenching and other arrangements.

6 E. Franchisee agrees that, as a condition of a permit for  
7 installation of conduit, the City may require it to install conduit in excess of its  
8 reasonably foreseeable requirements for the purpose of accommodating the City  
9 and/or other Franchisees and Licensees where the City Manager determines it is  
10 appropriate to do so to minimize disruption of public passage or infrastructure, to  
11 forestall or relieve exhaustion of Right-of-Way capacity, or to protect  
12 environmentally sensitive areas; provided that the City will be responsible for the  
13 additional costs associated with installing such excess conduit.

14 F. To the extent possible and technically and operationally  
15 feasible, Franchisee shall use conduit existing at the time of permitting in installing  
16 its System.

17 G. Whenever all existing utilities are located underground in an  
18 area in the City, the Franchisee must also locate its Telecommunication System  
19 underground, including Telecommunication System Facilities, such as drops,  
20 which cross private property.

21 1. Whenever the owners of poles locate or relocate  
22 underground within an area of the City, the Franchisee shall concurrently relocate  
23 its Facilities underground at its own cost.



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2. Whenever an electric utility opens a trench for the purpose of installing or relocating Facilities underground, the Franchisee shall concurrently relocate its Facilities underground and, if it uses the same trench, be responsible for its pro-rated share of the cost.

3. The City Manager may, for good cause shown, exempt a particular portion of the Telecommunication System from the obligation to locate or relocate Facilities underground, where relocation is impractical, or where the interest in protecting against visual blight can be protected in another manner. Nothing in this Section 3.2.G prevents the City from ordering the Franchisee to locate or relocate its Telecommunication System underground under other provisions of the Tacoma Municipal Code, it being the intent that the number and extent of Overhead Facilities and the visual pollution resulting therefrom will, over time, be reduced and eventually, to the extent feasible, be eliminated.

H. The Franchisee shall participate in conversion to underground Local Improvement Districts ("LIDs"). The Franchisee, at no cost to the City or abutting property owners, shall share fairly with other utilities the cost of undergrounding when done through the LID process. As part of its obligations under the Tacoma Municipal Code, the Franchisee shall provide the preliminary cost estimate, facility conversion designs, and final cost estimates to any LID project coordinator in a timely manner. At the request of an LID project coordinator, the Franchisee shall perform underground construction and movement of Customer connections underground (overhead reclaim), in coordination with the



1 undergrounding services provided by other LID utilities, at no cost to the City or  
2 abutting property owners.

3 I. Franchisee shall promptly repair any and all Public  
4 Rights-of-Way, public property, or private property that is disturbed or damaged  
5 during the construction, operation, or repair of its Telecommunications System.  
6 Public property and Public Rights-of-Way must be restored in conformance with  
7 the City's Right-of-Way Restoration Policy.

8 J. No tree trimming shall be performed without the permission of  
9 the City and other affected authorities, and any tree trimming must be performed in  
10 strict accordance with the Tacoma Municipal Code. Even if tree trimming is  
11 authorized by the City, Franchisee is liable for any damage it causes during the  
12 course of tree trimming.

13 K. In any dispute over the adequacy of a restoration relative to  
14 this section, the Tacoma Department of Public Works Director shall, in his/her sole  
15 discretion, make the final determination.

16 L. Franchisee shall not remove any Facilities except as  
17 hereinafter provided.

18 (1) Franchisee shall not remove any Facilities which  
19 require trenching or other opening of the Rights-of-Way along the extension of the  
20 Facilities to be removed without the express permission of the City, which  
21 permission shall not be unreasonably withheld, conditioned or delayed.  
22 Franchisee must request permission from the City to remove the Facilities at least  
23 30 days in advance of the date Franchisee proposes to begin removal.  
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1 (2) Franchisee shall remove such Facilities as the City  
2 orders it to remove; provided, that the City may not order removal where such  
3 removal is primarily to give economic benefit or advantage to a competing provider  
4 of Telecommunications Service.

5 (3) Where trenching or other opening of the Rights-of-Way  
6 along the extension of Facilities to be removed is required, Franchisee must post  
7 bonds as the City may require to ensure that the property is promptly removed,  
8 with minimum disruption. Franchisee must restore the affected property in  
9 conformance with the City's Right-of-Way Restoration Policy; and Franchisee must  
10 compensate those whose property it damages for the damage.  
11

12 (4) Subject to the City's rights to purchase the  
13 Telecommunications System, Franchisee may voluntarily remove any Facilities  
14 from the streets which have been installed in such a manner that they can be  
15 removed without trenching or other opening of the Rights-of-Way.  
16

17 3.3 Right To Inspect and Order Corrections. The City may inspect the  
18 Telecommunications System at any time reasonable under the circumstances to  
19 ensure compliance with this Franchise and applicable law, including to ensure that  
20 Franchisee's Telecommunications System is constructed and maintained in a safe  
21 condition. If an unsafe condition is found to exist, the City, in addition to taking any  
22 other action permitted under applicable law, may order Franchisee, in writing, to  
23 make the necessary repairs and alterations specified therein forthwith to correct  
24 the unsafe condition on a timetable established by the City which is reasonable in  
25 light of the unsafe condition. The City has the right to correct, inspect, administer,  
26



and repair the unsafe condition if Franchisee fails to do so in a timely manner, and  
1 to charge the Franchisee therefor.

2           3.4    Information Regarding Ongoing Work. In addition to providing notice  
3 to the public of ongoing work as may be required under applicable law, Franchisee  
4 shall make available information regarding any ongoing construction, operation, or  
5 installation of its Telecommunications System sufficient to show (1) the nature of  
6 the work being performed; (2) where it is performed; (3) its estimated completion  
7 date; and (4) progress to completion.  
8

9           SECTION 4 - REGULATORY PROVISIONS.  
10

11           4.1    Intent. The City shall have the right to administer and regulate  
12 activities of this Franchise up to the fullest extent of the law. The failure to reserve  
13 a particular right to regulate, or reference a particular regulation, shall not be  
14 interpreted by negative implication or otherwise to prevent the application of a  
15 regulation to Franchisee.  
16

17           4.2    Remedies for Franchise Violations. The City has the right to exercise  
18 any and all of the following remedies, singly or in combination, in the event  
19 Franchisee violates any provision of this Franchise:

20                   A.    Draw upon the performance bond or other security provided  
21 under this Franchise; provided, however, such drawing shall be only in such a  
22 manner and in such amount as the City reasonably determines is necessary to  
23 remedy the default. Should the City take this action, Franchisee shall be  
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responsible for all direct and actual costs related to such action, including, but not limited to, actual legal and administrative costs:

- B. Commencing an action at law for monetary damages;
- C. Commencing an action for equitable or other relief;
- D. Declaring the Franchise to be revoked; and/or
- E. Seeking specific performance of any provision, which

reasonably lends itself to such remedy.

In determining which remedy or remedies for Franchisee's violation are appropriate, the City may take into consideration the nature and extent of the violation, the remedy needed to prevent such violations in the future, whether Franchisee has a history of previous violations of the same or similar kind, and such other considerations as are appropriate under the circumstances. Remedies are cumulative; the exercise of one shall not foreclose the exercise of others.

4.3 Procedure for Remedying Franchise Violations. Before imposing liquidated damages, or drawing upon the performance bond, or any other security set out in Section 6, the City shall follow the procedure below.

A. Notice of Violation. In the event that the City believes that Franchisee has not complied with the terms of this Franchise, the City shall notify Franchisee in writing, by certified mail, of the nature of the alleged noncompliance.

B. Franchisee's Right to Cure or Respond. Except as provided in Section 4.3.D, Franchisee shall have 30 days from the receipt of notice described above to (a) respond to the City contesting the assertion of noncompliance, or (b) to cure such default or, in the event that by the nature of the default such





1 default cannot be cured within the 30-day period, initiate steps to remedy such  
2 default as promptly as possible and complete the cure within a reasonable time.

3 The duty to cure includes the duty to cure all harms caused by the acts or  
4 omissions of Franchisee which gave rise to the alleged non-compliance. At the  
5 end of the 30-day period, Franchisee shall notify the City in writing of the steps it  
6 has taken to cure the default, if any; if the cure is not complete, the reason it is not  
7 complete and the projected date for completion; and if the default is disputed, the  
8 complete basis for that contention.

9  
10 C. Public Hearing. The City may schedule a public hearing to  
11 investigate any alleged default. The City shall give Franchisee 20 calendar days'  
12 notice of the time and place of the hearing and provide Franchisee with an  
13 opportunity to be heard.

14 D. Action after Hearing. If the City determines after such hearing  
15 that the Franchisee did not timely cure, or initiate steps to cure the default in a  
16 timely manner satisfactory to the City, after the notice required by Section 4.3.A  
17 was provided, then the City may draw upon any performance bond, security fund,  
18 or other security, including requiring performance under the guarantee; and impose  
19 liquidated damages. However, notice and opportunity to cure are not required for  
20 repeat violations, or for a failure to correct a default where Franchisee knew or  
21 should have known it was in default; in such cases, the performance bond, letter of  
22 credit, or other security may be drawn upon, the guarantor required to perform and  
23 liquidated damages imposed after the hearing required by Section 4.3.C.  
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1 E. Liquidated Damage Amounts. Because Franchisee's failure to  
2 comply with the provisions of this Franchise will result in injury to the City, and  
3 because it may be difficult to estimate the extent of each such injury, Franchisee  
4 and the City agree to the following liquidated damages, which provisions represent  
5 the best estimate of the damages resulting from injuries of specific types. The  
6 amounts of the liquidated damages set forth in this Franchise are in 2014 dollars  
7 and shall be increased each year by the increase in the U. S. Department of Labor,  
8 Bureau of Labor Statistics, Consumer Price Index for Pacific Cities and U. S. City  
9 Average for the greater Seattle area. The amount of liquidated damages for all  
10 material violations of this Franchise for which actual damages may not be  
11 ascertainable shall be: \$500 per day for each violation for each day the violation  
12 continues. It is provided, however, that the City shall allow the Franchisee a  
13 minimum of 30 days after notice to the Franchisee of such neglect, failure, or  
14 refusal to comply within which to meet compliance or correct performance, prior to  
15 the assessment of any liquidated damages.  
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18 4.4 Failure to Enforce. Franchisee shall not be relieved of any of its  
19 obligations to comply promptly with any provision of this Franchise by reason of  
20 any failure of the City to enforce prompt compliance, and the City's failure to  
21 enforce shall not constitute a waiver of rights or acquiescence in Franchisee's  
22 conduct.  
23

24 4.5 Force Majeure. The Franchisee shall not be deemed in default with  
25 provisions of this Franchise where performance was rendered impossible by war or  
26 riots, civil disturbances, floods, or other natural catastrophes beyond the



1 Franchisee's control; the unforeseeable unavailability of labor or materials; or  
2 power outages exceeding back-up power supplies. The acts or omissions of  
3 Affiliates shall not be deemed to be beyond the Franchisee's control, and the  
4 knowledge of Affiliates shall be imputed to Franchisee. This Franchise shall not be  
5 revoked or the Franchisee penalized for such noncompliance, provided that the  
6 Franchisee takes immediate and diligent steps to bring itself back into compliance  
7 and to comply as soon as possible under the circumstances with this Franchise  
8 without unduly endangering the health, safety, and integrity of the Franchisee's  
9 employees or property, or the health, safety, and integrity of the public, Public  
10 Rights-of-Way, public property, or private property.  
11

12 4.6 Alternative Remedies. No provision of this Franchise shall be  
13 deemed to bar the right of the City or Franchisee to seek or obtain judicial relief  
14 from a violation of any provision of the Ordinance or any rule, regulation,  
15 requirement or directive promulgated thereunder. Neither the existence of other  
16 remedies identified in this Franchise nor the exercise thereof shall be deemed to  
17 bar or otherwise limit the right of the City or Franchisee to recover monetary  
18 damages for such violation by Franchisee, or to seek and obtain judicial  
19 enforcement of Franchisee's or City's obligations by means of specific  
20 performance, injunctive relief or mandate, or any other judicial remedy at law or in  
21 equity.  
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24 4.7 Compliance with the Laws. Franchisee shall comply with all  
25 applicable federal and state laws and regulations, including regulations of any  
26 administrative agency thereof, as well as all applicable City ordinances,



1 resolutions, rules, policies, and regulations heretofore or hereafter adopted or  
2 established during the entire term of the Franchise; provided that, nothing herein  
3 shall prevent Franchisee from challenging a provision of laws that applies only to it  
4 as an impairment of contract. Nothing in this Franchise shall limit the City's right of  
5 eminent domain under state law. Nothing in this Franchise shall be deemed to  
6 waive the requirements of any lawful code or resolution of the City regarding  
7 permits, fees to be paid, or manner of construction.

8 SECTION 5 - REPORTING REQUIREMENTS.

9 5.1 Quarterly Reports. Within 30 days after the end of each of  
10 Franchisee's fiscal quarters, Franchisee shall submit a written report to the City,  
11 which shall contain a listing of all categories of Gross Revenues earned and Gross  
12 Receipts collected by Franchisee for its business activities as identified in  
13 Section 2.1, which are activities specifically taxable as a telephone business under  
14 Tacoma Municipal Code Title 6. Said written report shall be in sufficient detail and  
15 with sufficient explanation to enable the City to understand the report and to verify  
16 the accuracy of the report. In addition, Franchisee shall provide such other reports  
17 as may be required by Title 16B.

18 5.2 Annual Report. No later than 120 days following the end of  
19 Franchisee's fiscal year each year, Franchisee shall present a written report to the  
20 City which shall include:

21 A. Audited financial statements for (1) Franchisee and (2) any  
22 Affiliate which is involved in any way with the operation or ownership of the  
23 System; and a financial statement for Franchisee that includes Gross Revenues  
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1 from all sources, gross Subscriber revenues from each category of service, as well  
2 as an income statement and a balance sheet. In the event any audited financial  
3 report has not been published by the date due under this section, then the audited  
4 financial report shall be deemed presented on time if presented within 30 days  
5 after publication.

6 All financial reports required under this section shall be presented to  
7 the City accompanied by such notes and explanations as are required to fully  
8 understand the reports. Such notes and explanations shall include, but not be  
9 limited to, an explanation of any and all deductions made from Gross Revenues in  
10 order to arrive at Gross Receipts for the calculation of Fees or taxes to be paid to  
11 the City, as well as:

- 12 1. A summary of the previous year's activities for the Franchise  
13 Area, including, but not limited to, the total number of Customers, miles of  
14 Facilities, any services added or dropped, and any technological changes  
15 occurring in the system;  
16
- 17 2. Plans for the future; and
- 18 3. Such other information as is required by Title 16B.

19 5.3 Additional Reports. Franchisee shall prepare and furnish to the City  
20 within 60 days of written request, to the person and address specified in the City's  
21 request, in a form reasonably prescribed by the City, such additional reports with  
22 respect to Franchisee's operation, affairs, transactions, or property, as may be  
23 reasonably necessary and appropriate to ensure compliance with the material  
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provisions of this Franchise, or to permit the performance of any of the rights,  
1 functions or duties of the City in connection with the Franchise.

2           5.4    Preservation of Confidential Information. Trade secrets and  
3 confidential information designated as such by Franchisee shall be subject to such  
4 protection as provided in Title 16B or under chapter 42.56 RCW, or as otherwise  
5 provided by applicable laws. Franchisee shall be responsible for clearly and  
6 conspicuously identifying the work as confidential or proprietary, and shall provide  
7 a brief written explanation regarding its position on the protected status of the  
8 information under state or federal law. In the event that the City receives a public  
9 records request under chapter 42.56 RCW or similar law for the disclosure of  
10 information Franchisee has designated as confidential, trade secret, or proprietary,  
11 the City shall promptly provide notice of such disclosure so that Franchisee can  
12 take appropriate steps to protect its interests. Nothing in this Section prohibits the  
13 City from complying with chapter 42.56 RCW, or any other applicable law or court  
14 order requiring the release of public records, and the City shall not be liable to  
15 Franchisee for compliance with any law or court order requiring the release of  
16 public records. The City shall comply with any injunction or court order obtained by  
17 Franchisee which prohibits the disclosure of any such confidential records.

21           SECTION 6 - COMPENSATION AND FINANCIAL PROVISIONS.

22           6.1    Fees; Taxes.

23           A.    State Prohibition of Franchise Fee. The parties understand  
24 that RCW 35.21.860 currently prohibits a municipal franchise fee. Franchisee  
25 agrees that if this statutory prohibition is removed, the City may assess a  
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1 reasonable franchise fee, to be agreed to by the parties if the statutory prohibition  
2 is removed. The parties agree that this Section 6.1.A does not limit the right of the  
3 Franchisee to challenge the franchise fee pursuant to 47 USC § 253.

4 B. Franchisee Subject to the City Telephone Business Tax.

5 Franchisee agrees that its activities in the City of Tacoma identified in Section 2.1,  
6 but excluding internet access service, are activities specifically taxable as a  
7 telephone business under Tacoma Municipal Code Chapter 6A, and are taxable at  
8 the 6 percent rate specified in Tacoma Municipal Code Chapter 6A.40.050.D now  
9 in effect or as amended, which at the time of the execution of this Franchise  
10 agreement is 6 percent of the Franchisee's Gross Receipts but excluded any  
11 Gross Receipts from the provision of internet access service. It is agreed that the  
12 amount of Gross Receipts to be taxed will include the amount of tax imposed on  
13 Franchisee by City ordinance. This Franchise does not limit the City's power of  
14 taxation.  
15

16 C. Franchisee Obligated to Pay Administrative Costs. In accord

17 with RCW 35.21.860 as presently effective and as it may be later amended,  
18 Franchisee must pay the City an amount sufficient to recover administration  
19 expenses incurred in receiving and approving this Franchise, including, but not  
20 limited to, the reasonable costs of outside consultants retained by the City to assist  
21 in the City's consideration and processing of this Franchise application. The first  
22 \$5,000 of said expenses will be covered by the \$5,000 application fee deposited  
23 with the City. To the extent not prohibited by applicable laws, Franchisee will also  
24 pay the reasonable costs of enforcing, or, as necessary, reviewing, the provisions of  
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1 this Franchise, as well as costs involved with the modification, amendment, renewal,  
2 or Transfer of this Franchise, as ordered by the Franchise Services Manager,  
3 whether such costs result from accrued in-house staff time or out-of-pocket expenses  
4 or administrative costs, as well as the actual expenses of retaining independent  
5 technical, legal, or financial consultants or advisors, or whether relating to costs  
6 incurred due to initial System development or to future System expansion. The  
7 amount of payment to be made by Franchisee to cover these administrative costs is  
8 an amount determined to be reasonable by the Franchise Services Manager. Such  
9 obligation further includes municipal fees related to receiving and approving permits  
10 or licenses, inspecting plans, and construction, or relating to the preparation of a  
11 detailed statement pursuant to Chapter 43.21C RCW. Said fees must be paid within  
12 30 days of receipt of the City's billing therefor.  
13

14 D. Manner of Payment; Audit. Franchisee will pay the City  
15 Telephone Business Tax specified in Section 6.1.B on a monthly basis accompanied  
16 by Franchisee's standard remittance form which specifies the net taxable charges,  
17 the local tax rate, and the local tax due, plus penalties and/or interest, if any is due.  
18 Franchisee shall make all other required fee payments in the form, at the intervals,  
19 and in the manner requested by the City Treasurer, and furnish him/her any  
20 information related to his/her revenue collection functions reasonably requested. In  
21 case of audit, the City Treasurer may require Franchisee to furnish a verified  
22 statement of compliance with Franchisee's obligations or in response to any  
23 questions. Said certificate may be required from an independent, certified public  
24 accountant, at Franchisee's expense. All audits will take place on Franchisee's  
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1 premises or offices furnished by Franchisee, which shall be a location within the City  
2 of Tacoma or other mutually agreeable place; however, the Franchisee must agree to  
3 pay the associated costs. Franchisee agrees, within 30 days of written request of the  
4 City Treasurer, to provide, to the person and address specified in the City  
5 Treasurer's request, copies of all documents filed with any federal, state, or local  
6 regulatory agency, to be mailed to the City Treasurer on the same day as filed,  
7 postage prepaid, affecting any of Franchisee's Facilities or business operations in the  
8 City of Tacoma.

9  
10 E. No Other Deductions. No deductions, including current or  
11 previously paid fees, shall be subtracted from the Gross Revenue amount, except  
12 as allowed under state or federal law, upon which payments are calculated and  
13 due for any period, nor shall copyright fees or other license fees paid by  
14 Franchisee be subtracted from Gross Revenues for purposes of calculating  
15 payments.

16  
17 F. Late Payments. Any fees owing which remain unpaid more  
18 than 10 days after the dates specified herein shall be delinquent and shall  
19 thereafter accrue interest at the maximum allowable rate pursuant to  
20 RCW 19.52.020.

21  
22 G. Period of Limitations. The period for commencing an action  
23 for the recovery of any fee payable hereunder shall be six years from the date on  
24 which payment by Franchisee is due, subject to tolling as provided as a matter of  
25 law or equity. Unless within six years from and after the due date for a particular  
26 payment, the City makes written request to review Franchisee's records with



1 respect to such fee payment (either individually or as part of a broader request),  
2 recovery shall be barred with respect to such payment and the Franchising  
3 Authority shall be estopped from asserting any claims whatsoever against  
4 Franchisee relating to any alleged deficiencies in that particular payment.

5       6.2    Auditing and Financial Records. Franchisee shall manage all of its  
6 operations in accordance with a policy of keeping books and records open and  
7 accessible to the City. Without limiting its obligations under this Franchise,  
8 Franchisee agrees that it will collect and make books and records available for  
9 inspection and non-confidential books and records for copying by the City in  
10 accordance with Title 16B. Franchisee shall be responsible for collecting the  
11 information and producing it. Books and records shall be made available for  
12 inspection to the City at the Tacoma Municipal Building, or such other location as  
13 the parties may agree. Notwithstanding any provision of Title 16B or this  
14 Franchise, if documents are too voluminous or for security reasons cannot be  
15 produced at the Tacoma Municipal Building or mutually agreeable location within  
16 the City, then the Franchisee may produce the material at another central location,  
17 provided it also agrees to pay the additional reasonable costs incurred by the City  
18 in reviewing the materials.

19       Franchisee shall take all steps reasonably required, if any, to ensure that it  
20 is able to provide the City all information which must be provided or may be  
21 requested under Title 16B or this Franchise, including by providing appropriate  
22 Subscriber privacy notices. Nothing in this section shall be read to require a  
23 Franchisee to violate 47 U.S.C. §§ 222 or 551 or to disclose or make available to  
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1 the City any books and records protected from disclosure under other applicable  
2 law. Franchisee shall be responsible for redacting any data that federal law  
3 prevents it from providing to the City. Records shall be kept for at least six years.  
4 In addition to maintaining all records as required by Title 16B, Franchisee shall  
5 maintain records sufficient to show its compliance with the requirements of this  
6 Franchise, and shall produce those records within 30 days of a City request.

7 Franchisee agrees to meet with a representative of the City upon request to  
8 review its methodology of record-keeping, financial reporting, computing fee  
9 obligations, and other procedures, the understanding of which the City deems  
10 necessary for understanding the meaning of reports and records.  
11

12 The City agrees to request access to only those books and records, in  
13 exercising its rights under this section, which it deems reasonably necessary as  
14 part of a bona fide exercise of its authority over the Telecommunications System  
15 under this Franchise, Title 16B, or other applicable law. The City further agrees  
16 that it will withhold from public disclosure those books and records made available  
17 to it pursuant to this Section 6.2, but only to the extent that the City believes that it  
18 has the discretion to do so under state law. The City will, however, provide notice  
19 to Franchisee of any request for such books and records so that Franchisee can  
20 engage whatever protective measures are available to it.  
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23 6.3 Performance Bond. At the same time it provides its Franchise  
24 acceptance to the City, Franchisee shall provide a performance bond to ensure the  
25 faithful performance of its responsibilities under this Franchise and applicable law,  
26 including, by way of example and not limitation, its obligations to relocate and



remove its facilities,; and to restore City Rights-of-Way and other property. The  
1 initial amount of the performance bond shall be \$50,000. The amount of the bond  
2 may be changed from time to time to reflect changed risks to the City or to the  
3 public. The Franchisee may be required to obtain additional bonds in accordance  
4 with the City's ordinary practices and/or pursuant to applicable Tacoma Municipal  
5 Code provisions. The bond shall be in a form and with a surety (authorized to do  
6 business in the state of Washington) reasonably acceptable to the City's Risk  
7 Manager and in a form reasonably acceptable to the City Attorney. Franchisee  
8 shall pay all premiums or costs associated with maintaining the bond, and shall  
9 keep the same in full force and effect at all times during the Franchise Term.  
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12           6.4    Indemnification by Franchisee.

13           A.     Franchisee, by accepting this Franchise, agrees to release the  
14 City from and against any and all liability and responsibility in or arising out of, or  
15 by reason of, or resulting from or of the negligent acts, errors, or omissions of the  
16 Franchisee during the construction, operation, or maintenance of the  
17 Telecommunications System, and, without limiting the provisions of Section 7.4,  
18 agrees not to sue or seek any money or damages from City. The foregoing  
19 notwithstanding, Franchisee shall not be required to indemnify the City for any  
20 negligent act, errors, or omissions of the City.  
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23           B.     Franchisee agrees to indemnify and hold harmless the City, its  
24 trustees, elected and appointed officers, agents, and employees, from and against  
25 any and all claims, demands, or causes of action of whatever kind or nature, and  
26 the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities,



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damages, orders, judgments, or decrees, sustained by the City or any third party arising out of, or by reason of, or resulting from or of the acts, errors, or omissions of the Franchisee or its agents, independent contractors, or employees related to or in any way arising out of the construction, operation, repair, or relocation of the Telecommunications System. Franchisee waives immunity under Title 51 RCW and affirms that the City and Franchisee have specifically negotiated this provision, as required by RCW 4.24.115, to the extent it may apply.

C. Franchisee agrees that the covenants and representations relating to the indemnity provided in Sections A and B above shall survive the term/expiration/termination of this Franchise and continue in full force and effect as to the Franchisee's responsibility to indemnify.

6.5 Franchisee Insurance.

A. Franchisee shall maintain, throughout the term of the Franchise, adequate insurance to protect the City, its trustees, elected and appointed officers, agents, and employees against claims and damages that may arise as a result of the construction, operation, or repair of the Telecommunications System. This obligation shall require Franchisee to maintain insurance at least in the following amounts:

- (1) COMPREHENSIVE GENERAL LIABILITY insurance to cover liability, bodily injury, and property damage. Exposures to be covered are: premises, operations, products/completed operations, and certain contracts.



Coverage must be written on an occurrence basis, with the following limits of liability:

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- (a) Bodily Injury
  - 1. Each Occurrence \$2,000,000
  - 2. Annual Aggregate \$ 5,000,000
- (b) Property Damage
  - 1. Each Occurrence \$2,000,000
  - 2. Annual Aggregate \$5,000,000
- (c) Personal Injury
  - Annual Aggregate \$5,000,000

(2) COMPLETED OPERATIONS AND PRODUCTS

LIABILITY shall be maintained for six years after the termination of the Franchise or License (in the case of the Communications System owner or Operator) or completion of the work for the Communications System owner or Operator (in the case of a contractor or subcontractor).

(3) PROPERTY DAMAGE LIABILITY INSURANCE shall

include Coverage for the following hazards: X - explosion, C - collapse, U - underground.

(4) WORKERS' COMPENSATION insurance shall be

maintained during the life of this contract to comply with statutory limits for all employees, and in the case any work is sublet, Franchisee shall require its contractors and subcontractors similarly to provide workers' compensation insurance for all the latter's employees, unless such employees are covered by the protection afforded by the Franchisee. Franchisee shall also maintain during the life of this policy employers liability insurance. The following minimum limits must



be maintained:

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- (a) Workers' Compensation                      Statutory
- (b) Employer's Liability                              \$500,000  
per occurrence

(5)      COMPREHENSIVE AUTO LIABILITY coverage shall include owned, hired, and non-owned vehicles.

- (a) Bodily Injury
  - 1. Each Occurrence      \$ 1,000,000
  - 2. Annual Aggregate      \$ 3,000,000
- (b) Property Damage
  - 1. Each Occurrence      \$ 1,000,000
  - 2. Annual Aggregate      \$ 3,000,000.

(6)      Franchisee may utilize primary and umbrella or excess liability policies to satisfy the preceding policy limit requirements.

B.      The required insurance must be obtained and maintained for the entire period the Franchisee has facilities in the Public Rights-of-Way and for six years thereafter. If the Franchisee, its contractors, or subcontractors do not have the required insurance, the City may order such entities to stop operations until the insurance is obtained and approved.

C.      Certificates of insurance, reflecting evidence of the required insurance and naming the City as an additional insured with all required endorsements on the GENERAL LIABILITY and AUTOMOTIVE policies described above, shall be filed with the City's Risk Manager. The certificate shall be filed with the acceptance of the Franchise, and annually thereafter, and as provided in E below.



1 D. The certificates shall contain a provision that coverages  
2 afforded under these policies will not be canceled until at least 30 days' prior  
3 written notice has been given to the City. Policies shall be issued by companies  
4 authorized to do business under the laws of the state of Washington. Financial  
5 Ratings must be no less than "A" in the latest edition of *Bests Key Rating Guide*,  
6 published by A.M. Best Guide.

7 E. In the event that the insurance certificate provided indicates  
8 that the insurance shall terminate or lapse during the period of the Franchise, the  
9 Franchisee shall furnish, at least 30 days prior to the expiration of the date of such  
10 insurance, a renewed certificate of insurance as proof that equal and like coverage  
11 has been or will be obtained prior to any such lapse or termination during the  
12 balance of the period of the Franchise.

14 F. The City shall reserve the right to require any other insurance  
15 coverage it deems necessary during the term of the Franchise, depending upon  
16 the exposures.

18 6.6 Security Fund. Franchisee shall establish a cash security fund or  
19 provide the City an irrevocable letter of credit in the amount of \$50,000.00, to  
20 secure the payment of fees owed; to secure any other performance promised in  
21 this Franchise; and to pay any taxes, fees, or liens owed to the City. The letter of  
22 credit shall be in a form and with an institution acceptable to the City's Director of  
23 Finance and in a form acceptable to the City Attorney. Should the City draw upon  
24 the cash security fund or letter of credit, it shall promptly notify the Franchisee, and  
25 the Franchisee shall promptly restore the fund or the letter of credit to the full  
26





1 required amount. The City may, from time to time, change the amount of the  
2 required security fund/letter of credit to reflect changes in the risks to the City and  
3 to the public, including delinquencies in taxes or other payments to the City.

#### 4 SECTION 7 - MISCELLANEOUS PROVISIONS.

5 7.1 Posting and Publication. Franchisee shall assume the cost of posting  
6 and publication of this Franchise, as such posting and publication is required by  
7 law, and such is payable upon Franchisee's filing of acceptance of the Franchise.

8 7.2 Guarantee of Performance. Franchisee acknowledges that it enters  
9 into the Franchise voluntarily in order to secure and in consideration of the grant  
10 from the City of a ten-year Franchise. Performance pursuant to the terms and  
11 conditions of this Franchise agreement is guaranteed by Franchisee.

12 7.3 Governing Law and Venue. The Franchise shall be governed by and  
13 construed in accordance with the laws of the state of Washington without recourse  
14 to any principles of Conflicts of Laws, except that where federal law applies it shall  
15 control. Any litigation between the City and Franchisee arising under or regarding  
16 this Franchise shall occur, if in the state courts, in the Superior Court of Pierce  
17 County having jurisdiction thereof, and if in the federal courts, in the United States  
18 District Court for the Western District of Washington.

19 7.4 No Recourse. Without limiting such immunities as the City or other  
20 Persons may have under applicable law, Franchisee shall have no monetary  
21 recourse whatsoever against the City or its officials, boards, commissions, agents  
22 or employees for any loss, costs, expense, or damage arising out of any provision  
23 or requirement of Title 16B or because of the enforcement of Title 16B or the City's  
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1 exercise of its authority pursuant to Title 16B, this Franchise or other applicable  
2 law.

3 7.5 Notice. Unless expressly otherwise agreed between the parties,  
4 every notice, billing, or response required by this Franchise to be served upon the  
5 City or Franchisee shall be in writing, and shall be deemed to have been duly given  
6 to the required upon actual receipt or refusal of delivery and shall be sent by a  
7 nationally recognized overnight courier or by U.S. certified mail, return receipt  
8 requested, postage prepaid. The notices or responses to the City shall be  
9 addressed as follows:  
10

11 City of Tacoma  
12 Municipal Services Building  
13 1224 MLK Jr Way  
14 Tacoma, WA 98405  
15 Attn: Franchise Services Manager

16 The notices or responses to Franchisee shall be addressed as follows:

17 tw telecom of washington llc  
18 Attn: Sr. VP & General Counsel  
19 10475 Park Meadows Drive  
20 Littleton, CO 80124

21 With a copy to:

22 tw telecom of washington llc  
23 Attn: VP- Regulatory  
24 10475 Park Meadows Drive  
25 Littleton, CO 80124

26 The City and Franchisee may designate such other address, from time to  
time, by giving written notice to the other, but notice cannot be required to more  
than two addresses.



1           7.6   Execution. Franchisee shall execute and return to the City three  
2 original countersigned copies of this Ordinance and a signed acceptance of the  
3 Franchise granted hereunder within 30 days after the date of passage of the  
4 Ordinance by the City Council. The acceptance shall be submitted in the form  
5 attached hereto or other form acceptable to the City Attorney and in accepting the  
6 Franchise, Franchisee warrants that it has carefully read the terms and conditions  
7 of this Franchise and unconditionally accepts all of the terms and conditions of this  
8 Franchise and agrees to abide by the same and acknowledges that it has relied  
9 upon its own investigation of all relevant facts, that it has had the assistance of  
10 counsel, that it was not induced to accept a Franchise, that this Franchise  
11 represents the entire agreement between Franchisee and the City, and that  
12 Franchisee accepts all risks related to the interpretation of this Franchise. The  
13 countersigned Ordinance and acceptance shall be returned to the City  
14 accompanied by: evidence of insurance; a payment for publication costs; billable  
15 work order deposit; and the security fund deposit and performance bond.  
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18           The Franchise rights granted herein shall not become effective until all of  
19 the foregoing is received in acceptable form. In the event Franchisee fails to  
20 submit the countersigned Ordinance and acceptance as provided for herein, or  
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1 fails to provide the required accompanying documents and payments, within the  
2 time limits set forth in this section, the grant of the Franchise shall be null and void.

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4 Passed \_\_\_\_\_

Mayor: \_\_\_\_\_

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6 Attest: City Clerk

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10 Approved as to form

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13 Deputy City Attorney

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**EXHIBIT "A"**

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**ACCEPTANCE OF CITY FRANCHISE**

Ordinance No. \_\_\_\_\_, effective \_\_\_\_\_, 2014.

I, \_\_\_\_\_, am the \_\_\_\_\_ of tw telecom holdings inc., sole member of tw telecom of washington llc, and am the authorized representative to accept the above referenced City franchise ordinance on behalf of tw telecom of washington llc.

I certify that this franchise and all terms and conditions thereof are accepted by tw telecom of washington llc.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

tw telecom of washington llc  
by: tw telecom holdings inc., its sole member

By \_\_\_\_\_  
Its \_\_\_\_\_