



# ORDINANCE NO. 28214

1 AN ORDINANCE renewing a non-exclusive franchise to Level 3 Communications,  
 2 LLC, a Delaware limited liability company, to construct, operate, and repair a  
 3 telecommunications system throughout the City of Tacoma; setting forth  
 4 provisions, terms and conditions of the renewed grant of franchise; specifically  
 5 making such grant subject to the provisions of Title 16B of the Tacoma Municipal  
 6 Code and the Tacoma City Charter; providing for City regulation of the  
 7 Telecommunications System; prescribing liquidated damages and certain other  
 8 remedies for violation of franchise provisions in addition to those specified  
 9 pursuant to the Municipal Code and the City of Tacoma Charter.

10 WHEREAS, Level 3 Communications, LLC (“Level 3”) is a  
 11 telecommunications company currently involved in the business of operating a  
 12 telecommunications network utilizing fiber optic technology, and

13 WHEREAS, as part of such network, Level 3 currently operates a system of  
 14 fiber optic cable, a portion of which passes through the City as result of Level 3  
 15 having been previously granted a non-exclusive franchise for the use of City  
 16 right-of-way in 1999 pursuant to City Ordinance No. 26465, and

17 WHEREAS, Level 3’s prior franchise expired in 2009 and has been in  
 18 holdover status since that time, and

19 WHEREAS, Level 3 has applied to the City to renew its franchise to install  
 20 and operate fiber optic cable within the City streets and public rights-of-way, and

21 WHEREAS, the City Council has determined to grant a renewed franchise to  
 22 Level 3 upon those certain terms and conditions which the Council deems  
 23 necessary due to the unique nature of fiber optic cable, and

24 WHEREAS this City of Tacoma Telecommunications Franchise Ordinance  
 25 contains the following sections:  
 26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SECTION 1. DEFINITIONS.

1.1 City ..... 4

1.2 City Manager ..... 4

1.3 Communications facility ..... 4

1.4 Communications system ..... 4

1.5 Construction, operation, or repair ..... 4

1.6 Customer ..... 5

1.7 Facilities or Installations ..... 5

1.8 Franchise ..... 5

1.9 Franchise area ..... 5

1.10 Franchisee ..... 5

1.11 Gross receipts ..... 5

1.12 Operator ..... 6

1.13 Overhead facilities ..... 6

1.14 Person ..... 6

1.15 Public rights-of-way ..... 6

1.16 System ..... 7

1.17 Telecommunications ..... 7

1.18 Telecommunications system ..... 7

1.19 Telephone service ..... 8

1.20 Title ..... 8

1.21 Underground facilities ..... 8

SECTION 2. FRANCHISE.

2.1 Grant of Franchise ..... 8

2.2 Franchise Term and Termination ..... 10

2.3 Franchise Non-exclusive ..... 10

2.4 Transfers, Generally ..... 10

2.5 Change in Control-Notice and Affiliate Exception ..... 12

2.6 Revocation ..... 13

2.7 Continuity of Service and Right to Purchase the System ... 16

2.8 Right to Require Removal of Property/Right  
to Remove Property ..... 20

2.9 Customers' Right to Obtain Service ..... 22

2.10 Responsibility for Costs ..... 22

2.11 Work of Contractors and Subcontractors ..... 23

2.12 Survival of Terms ..... 23



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**SECTION 3. OPERATION IN STREETS AND RIGHTS-OF-WAY.**

3.1 Use of Public Rights-of-Way ..... 24

3.2 Construction, Operation, or Repair..... 24

3.3 Right to Inspect and Order Corrections ..... 31

3.4 Information Regarding Ongoing Work..... 32

**SECTION 4. REGULATORY PROVISIONS.**

4.1 Intent ..... 32

4.2 Remedies for Franchise Violations..... 32

4.3 Procedure for Remediating Franchise Violations ..... 33

4.4 Failure to Enforce ..... 35

4.5 Force Majeure ..... 36

4.6 Alternative Remedies ..... 36

4.7 Compliance with the Laws..... 37

**SECTION 5. REPORTING REQUIREMENTS.**

5.1 Quarterly Reports ..... 37

5.2 Annual Report ..... 38

5.3 Additional Reports ..... 39

5.4 Preservation of Confidential Information ..... 39

**SECTION 6. COMPENSATION AND FINANCIAL PROVISIONS.**

6.1 Fees; Taxes ..... 39

6.2 Auditing and Financial Records..... 42

6.3 Performance Bond ..... 44

6.4 Indemnification by Franchisee..... 44

6.5 Franchisee Insurance..... 46

6.6 Security Fund ..... 49

**SECTION 7. MISCELLANEOUS PROVISIONS.**

7.1 Posting and Publication..... 49

7.2 Guarantee of Performance..... 49

7.3 Governing Law and Venue..... 50

7.4 No Recourse ..... 50

7.5 Notice ..... 50

7.6 Execution ..... 51

Now, Therefore,



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

BE IT ORDAINED BY THE CITY OF TACOMA:

Section DEFINITIONS. For the purposes of this Franchise, the following terms, phrases, words, and their derivations shall have the meaning given herein; words not defined herein which are defined in Title 16B, shall have the same meaning or be interpreted as provided in Title 16B. Words not defined here or in Title 16B shall be construed consistently with Title 47 of the United States Code, and if not therein, they shall have their common and ordinary meaning. A reference to Title 16B or to the City's Charter refers to the same as may be amended from time to time.

1.1 "City" means the City of Tacoma, a municipal corporation of the State of Washington, and all departments, divisions, and agencies thereof, including Tacoma Public Utilities.

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

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

1.4 "Communications system" refers to a telecommunications system.

1.5 "Construction, operation, or repair" and similar formulations of these terms mean the named actions interpreted broadly, encompassing, among other things, installation, extension, maintenance, replacement, or components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, and excavation.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1.6 "Customer" means any Person or entity who legally receives within the corporate limits of the City any one or more of the services provided by the Telecommunications System.

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 within the rights-of-way necessary for the transmission and distribution of communications service where such facilities are located.

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 Level 3 Communications, LLC, a Delaware Limited Liability Company, with its home office at 1025 Eldorado Boulevard, Broomfield, Colorado, 80021, Telephone, (303) 926-3000. Franchisee is a subsidiary of Level 3 Communications, Inc. whose home office is located at 1025 Eldorado Boulevard, Broomfield, Colorado, 80021, Telephone, (303) 926-3000.

1.11 "Gross Receipts" shall have the meaning ascribed in Article VIII of the City Charter or the meaning given to the phrase "Gross Revenue" as set forth in Title 16 of the Tacoma Municipal Code.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

1.13 “Overhead Facilities” refers to electric utility and Communications Facilities located above the surface of the ground, including the underground supports and foundations for such Facilities.

1.14 “Person” includes any individual corporation, partnership, association, joint stock company, trust, or any other legal entity, but not the City.

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



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1.16 “System” means the Telecommunications System.

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

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



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1.19. "Telephone Service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone service, or providing telephonic, video, data, or similar communication or transmission for hire via a local telephone network, toll line, channel, cable, microwave, or similar communication or transmission system. Telephone Service includes intrastate or interstate service, including toll service, originating from, or received on, communications equipment or apparatus in this State if the charge for the service is billed to a person in this State. Telephone Service does not include the providing of competitive Telephone Service as defined in Tacoma Municipal Code § 6A.30.030, the providing of cable television service, or the providing of broadcast services by radio or television stations.

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

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

Section 2. FRANCHISE.

2.1 Grant of Franchise. The City hereby grants to Franchisee a non-exclusive Franchise which, once it becomes effective, shall authorize Franchisee, to use the City's Public Rights-of-Way within the Franchise Area to





1 construct, repair, and operate a fiber optic Telecommunication System to provide  
2 Telecommunication Service.

3           Such grant is subject to and must be exercised in strict accordance with and  
4 subject to this Franchise Agreement, Title 16B of the Tacoma Municipal Code, and  
5 the Tacoma City Charter including but not limited to the provisions set forth in  
6 Article VIII of the Charter, and this Franchise may be revoked if it is not so  
7 exercised. Provided further, that the exercise of any rights pursuant to this  
8 Franchise is subject to the exercise of the City's police powers, and other  
9 regulatory powers as the City may have or obtain in the future, and all rights  
10 granted herein must be exercised in strict accordance with applicable law, including  
11 by way of example and not limitation, zoning codes and permitting requirements.  
12 No rights shall pass to the Franchisee by implication. Said Franchise shall  
13 constitute both a right and an obligation to provide the services of the  
14 Telecommunications System as required by the provisions of this Franchise.

15           The grant of this Franchise is limited to the purpose of Franchisee providing  
16 Telecommunications Service. This Franchise does not include permission to  
17 provide cable service, as defined in 47 U.S.C. § 522, multichannel video  
18 programming, open video systems, or uses other than Telecommunications  
19 Service.

20           Notwithstanding the above grant to use Public Rights-of-Way, no Public  
21 Rights-of-Way shall be used by Franchisee if the City, in its sole opinion,  
22 determines that such use is inconsistent with the terms, conditions or provisions by  
23



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

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

8 2.2 Franchise Term and Termination. The term of the Franchise shall be  
9 ten years unless terminated sooner in accordance with this Franchise, Title 16(B),  
10 or the City Charter. Franchisee may terminate this Franchise at any time upon 180  
11 days' prior written notice to the City. Upon such termination, the Franchisee shall  
12 remove or abandon its System pursuant to the terms of this Franchise.

13  
14 2.3 Franchise Non-Exclusive. The Franchise granted herein shall be  
15 non-exclusive.

16  
17 2.4 Transfers, Generally.

18 A. Every Transfer shall be subject to the prior written approval of  
19 the City except as provided herein. A "Transfer" is any transaction in which: (1) all  
20 or a majority portion (i.e. 51% or more) of the Telecommunications System is sold  
21 or assigned (2) there is any change, acquisition, or direct or indirect transfer of  
22 control of the Franchisee; or (3) the rights and/or obligations held by the Franchisee  
23 under the Franchise are transferred, sold, assigned, or leased, in whole or in part,  
24 directly or indirectly, to another party. The term "control" in subsection (2) above  
25 refers to actual working control, in whatever manner exercised. It will be presumed  
26



1 that a change in working control within the meaning of subsection (2) has occurred  
2 in any case where there is a change in voting interest of 25 percent or more; or a  
3 change in voting interest that results in a Person obtaining a 50 percent or greater  
4 interest in Franchisee; or a change in voting interest that results in a Person that  
5 held 50 percent or greater interest reducing their interest to below 50 percent. A  
6 Transfer without the prior written approval of the City is a substantial violation of  
7 this Franchise and shall make the Franchise subject to termination by the City as  
8 provided herein and in Title 16B.  
9  
10

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

13 C. Franchisee, shall within 60 days of the closing date of any  
14 Transfer, file with the City Clerk a copy of the deed, agreement, contract, mortgage,  
15 lease, or other written instrument evidencing such sale, lease, contractual  
16 agreement, mortgage, assignment or Transfer, certified and sworn to as correct by  
17 Franchisee. Every such Transfer, whether voluntary or involuntary, may be deemed  
18 void and of no effect as it relates to this Franchise by the City unless Franchisee  
19 files the required copy within the 60-day period.  
20

21 D. The requirements of this section shall not be deemed to  
22 prohibit the use of Franchisee's property as collateral for security in financing the  
23 construction or acquisition of all or part of the Telecommunications System  
24 franchised hereunder provided that no such security shall purport to attach the  
25 City's real property interest in the Public Right-of-Way. In addition, no such  
26



1 arrangement may be made if it would in any respect under any condition prevent  
2 the Operator or any successor from complying with the Franchise and applicable  
3 law, nor may any such arrangement permit a third party to succeed to the interest  
4 of the Operator, or to own or control the Telecommunications System, without the  
5 prior consent of the City. Any mortgage, pledge or lease shall be subject to and  
6 subordinate to the rights of the City under this Franchise, and other applicable law.

8       2.5    Change in Control-Notice and Affiliate Exception. Franchisee shall  
9 promptly notify the City of any change in, transfer of, or acquisition by any other  
10 Person of an ownership interest in Franchisee that results in a change in control of  
11 Franchisee within the meaning of Section 2.4.A. In the event that Franchisee does  
12 not provide the City with prior written notice of any such Transfer, the City may take  
13 all reasonable steps, after actually receiving notice, to ascertain the viability of the  
14 transferee in complying with the provisions of this Franchise. If the City reasonably  
15 determines that the transferee is not a viable Franchise holder, the City may give  
16 the transferee notice of revocation and invoke the steps set forth in Section 2.6  
17 below. The foregoing notwithstanding, if the proposed change in control merely  
18 results in a Transfer of control from Franchisee to another entity that is 100 percent  
19 owned by a direct parent of Franchisee, and such parent provided an unconditional  
20 guaranty of performance of the Transferee Affiliate at the time the Franchise was  
21 issued, then such Transfer shall not require the prior approval of the City so long as  
22 all the conditions on affiliate Transfers set forth in Title 16B are satisfied (including,  
23 without limitation, the notice requirements).



1           2.6    Revocation. In addition to any rights set out elsewhere in this  
2 Franchise, the City Charter or Title 16, the City reserves the right to declare a  
3 forfeiture or otherwise revoke this Franchise, and all rights and privileges pertaining  
4 thereto, as provided in Title 16(B) or in the event that:

5  
6           A.     Franchisee is in substantial non-compliance with this  
7 Franchise; or

8           B.     Franchisee is found to have engaged in any actual or  
9 attempted fraud or deceit upon the City, Persons or Customers; or

10           C.    Franchisee fails to obtain and maintain any permit required by  
11 any federal or state regulatory body or by the City, relating to the construction,  
12 repair and operation of the System; or

13           D.    At any time during the term of the Franchise, Franchisee fails  
14 to provide and maintain all of the securities required under this Franchise including,  
15 but not limited to, the performance bond and letter of credit (if elected); fails to  
16 maintain the insurance required by this Franchise; or fails to satisfy the indemnity  
17 set out in this Franchise; or fails to satisfy the indemnity  
18 set out in this Franchise; or if Franchisee's guarantor revokes its guarantee or fails  
19 to satisfy or becomes unable to satisfy its obligations thereunder.

20           E.    The procedures for revocation and forfeiture shall be governed  
21 by Title 16B, Section 16B.05.100. Before the Franchise is revoked, Franchisee  
22 shall be given notice and opportunity to cure at least equivalent to that required by  
23 Title 16B as of the effective date of this Franchise (except in those cases where  
24 notice and opportunity to cure are not required), and shall be accorded at least an  
25  
26



1 opportunity to be heard that provides at least the due process protections required  
2 by Title 16B as of the effective date of this Franchise, which opportunities and  
3 protections are set out in Section 2.6.F., below.  
4

5 F. (1) Where, after notice and providing the Franchisee an  
6 opportunity to be heard (if such opportunity is timely requested by Franchisee), the  
7 City finds that there has been an act or omission that would justify revocation of the  
8 Franchise, the City may make an appropriate reduction in the remaining term of the  
9 Franchise or revoke the Franchise. However, the Franchise may only be revoked if  
10 the Franchisee (a) was given written notice of the default; and (b) 30 days to cure  
11 the default; and (c) the Franchisee failed to cure the default, or to propose a  
12 schedule for curing the default acceptable to the City where it is impossible to cure  
13 the default in 30 days. The required written notice may be given before the City  
14 conducts the proceeding required by this paragraph. No opportunity to cure is  
15 required for repeated violations, and fraud shall be deemed incurable.  
16  
17

18 (2) Notwithstanding the foregoing, the City may declare a  
19 Franchise forfeited without opportunity to cure when the Franchisee: (a) has  
20 elected to discontinue providing services within the City of Tacoma for a period of  
21 six (6) months or more, (b) Transfers without the prior consent of the City as  
22 required in the Franchise and the City determines, as provided in Section 2.5, that  
23 the transferee is not a viable Franchise holder; (c) fails to pay the Franchise  
24 application fees owed hereunder; or (d) defrauds or attempts to defraud the City or  
25 Franchisee's customers. However, Franchisee shall have the right to receive  
26



30 days' prior notice of an intent to declare a Franchise forfeited, and shall have the opportunity to show cause why the Franchise should not be forfeited.

(3) Notwithstanding the foregoing, the Franchise will automatically terminate by force of law 120 calendar days after an assignment for the benefit of creditors or the appointment of a receiver or trustee to take over the business of the Franchisee, whether in a receivership, reorganization, bankruptcy assignment for the benefit of creditors, or other action or proceeding. However, the Franchise may be reinstated within that 120-day period, if: (a) such assignment, receivership or trusteeship has been vacated; or (b) such assignee, receiver or trustee has fully complied with the terms and conditions of Title 16B and this Franchise and has executed an agreement, approved by any court having jurisdiction, assuming and agreeing to be bound by the terms and conditions of Title 16B and this Franchise. However, in the event of foreclosure or other judicial sale of any of the facilities, equipment or property of a Franchisee, the City may revoke this Franchise, following a public hearing before the City Council, by serving notice upon the Franchisee and the successful bidder at the sale, in which event the Franchise and all rights and privileges of this Franchise will be revoked and will terminate 30 calendar days after serving such notice, unless: (a) the City has approved the Transfer of the Franchise to the successful bidder; and (b) the successful bidder has covenanted and agreed with the City to assume and be bound by the terms and conditions of this Franchise and Title 16B.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

2.7 Continuity of Service and Right to Purchase the System.

A. In the event the City has declared a forfeiture for cause or otherwise revoked for cause this Franchise as provided herein, or in the event of expiration of the initial term of this Franchise without this Franchise being renewed or extended (referred to below collectively as a “termination”), Franchisee shall, at the direction of the City expressed by ordinance, continue its operations for such reasonable period (the “Continuation Period”) as the City may determine is necessary to permit transition to another provider, which period may be established taking into account any appeal of the termination. During such Continuation Period, Franchisee shall continue to be bound by all its obligations under this Franchise and Title 16B. Additionally, during this Continuation Period, Franchisee shall not Transfer any portion of its Telecommunications System to any other Person, including parts of the System rented, leased, or lease-purchased; or significantly alter the Telecommunications System or remove Facilities from the City, or otherwise encumber the Telecommunications System in any manner, without prior written consent of the City. Notwithstanding the foregoing, Franchisee may continue to conduct normal business operations and enter into contracts with its customers without obtaining consent from the City. Franchisee acknowledges and accepts any and all risk inherent in such continuation of its normal business conduct. The Franchisee’s obligations to remove its Facilities under Title 16B, Section 16B.03.090 shall be deferred for the Continuation Period. Within 30 days of the date the City passes the ordinance requiring continuation of service, or 30





1 days after the effective date of the termination, whichever is earlier, Franchisee  
2 shall provide the City with an inventory of all its Facilities in the City, and in addition,  
3 such other property located in the rights-of-way as may be used and useful by it in  
4 providing service within the City. Any property on the list that is essential to  
5 providing service to other communities must be clearly identified. Property on the  
6 list that is not within the City must be clearly identified, and its location stated.  
7

8           B. The City shall have an option to purchase the  
9 Telecommunications System upon termination of the Franchise, whether  
10 termination is, or is not, for cause. This option requires Franchisee to convey the  
11 Telecommunications System or such portion thereof as the City may choose to  
12 purchase along with (1) all equipment within the rights-of-way, Facilities, and real  
13 property interests necessary for the Telecommunications System's operation;  
14 (2) Customer lists and billing records; (3) all repair records, maps, and equipment  
15 and Facilities records (including records identifying equipment that is being used in  
16 the field, warranties with respect to such equipment and the like); and (4) such  
17 other properties, contract rights or intangibles as may be normally conveyed in  
18 order to permit a buyer to take over and continue the operations of a seller with  
19 minimal disruption to Customers; provided, that nothing herein shall require the City  
20 to accept or pay for any contract that it does not wish to assume. Franchisee is not  
21 required to convey portions of the Telecommunications System located outside the  
22 City which are essential to Franchisee's operations in other communities, and  
23 which were so identified on the inventory provided pursuant to Section 2.7.A. This  
24  
25  
26



1 option also requires Franchisee to sell the Telecommunications System, or such  
2 portion thereof as the City may choose to purchase at fair market value, if the  
3 Franchise is terminated for cause. If Franchisee's request for a Franchise renewal  
4 is denied, the option requires Franchisee to sell the Telecommunications System,  
5 or such portion thereof as the City may choose to purchase, at fair market value,  
6 determined on the basis of the value of the Telecommunications System as a going  
7 concern (taking into account such property used and useful in providing service  
8 within the City that is not to be conveyed) and with no value allocated to the  
9 Franchise itself.  
10  
11

12 C. The City may exercise its Section 2.7.B option rights in the  
13 following manner: the City will have up to 180 days after receiving the inventory  
14 required by Section 2.7.A to notify Franchisee that it intends to exercise its right to  
15 purchase the Telecommunications System or a portion of the Telecommunications  
16 System. Within 90 days of the date the City notifies Franchisee of its intent to  
17 exercise the option, or by such other time as the parties may separately agree, the  
18 parties shall meet to establish a price that comports with the requirements of  
19 Section 2.7.B. If the parties are unable to agree to a price within 180 days after the  
20 City notifies Franchisee that the City intends to exercise its purchase option, either  
21 party may require the price to be set by appraisal by sending the other party notice  
22 that it wishes to have price set by appraisal. Within 45 days of the date that notice  
23 is submitted, each party may appoint one appraiser. If each party appoints an  
24 appraiser, the two appraisers shall appoint a third appraiser; if only a single  
25  
26



1 appraiser is appointed (whether by mutual agreement or because of the failure of a  
2 party to timely nominate an appraiser) that appraiser shall be the sole appraiser.  
3  
4 The appraiser or appraisers shall establish a price for the System or portion thereof  
5 that the City desires to purchase in accordance with Section 2.7.B. This appraisal  
6 determination shall be final and non-appealable. The City shall have 120 days after  
7 the decision of the appraisers to notify Franchisee that it wishes to conclude the  
8 transaction; if it does not so notify the Franchisee, the option shall be deemed  
9 terminated.  
10

11                 If the City gives the notice required by the preceding paragraph, the  
12 parties will thereafter promptly sign all necessary documents required to close the  
13 transaction; provided, however, that the City may make conclusion of the  
14 transaction conditional upon any necessary voter approval of any bond funding for  
15 acquisition of all or a part of the System and, if applicable, the successful sale of  
16 the bonds.  
17

18                 The City and Franchisee will share equally the costs associated with  
19 any appraiser that is jointly appointed (by them or by the appraisers each selects);  
20 the City will bear costs associated with any appraiser that it separately appoints  
21 and Franchisee will bear costs associated with any appraiser that it separately  
22 appoints.  
23

24                 D.     (1)     Nothing in this section or in any other section of this  
25 Franchise shall prevent the City's exercise of its rights under the Tacoma City  
26 Charter. Included within the rights granted under Tacoma's Charter is the right to



1 purchase or condemn Franchisee's property within the Franchised Area at any  
2 time, which right is expressly set out in Section 8.1(c) of the Charter as follows:

3 "to acquire by purchase or condemnation, for the use of the City  
4 itself or its inhabitants, all of the property of the grantee within  
5 the public streets, alleys, or places at a fair and just value, which  
6 shall not include any valuation of the franchise, right, or  
7 privilege, which shall thereupon be terminated."

8 (2) Likewise, nothing in this section or in any other section  
9 of this Franchise shall be read to limit the City's right to acquire the  
10 Telecommunications System through exercise of any right of eminent domain  
11 under state law.

12 (3) Nothing in this section shall be read to limit the City's  
13 right to acquire the Telecommunications System as a result of abandonment.

14 E. In the event the City purchases, acquires, takes over, or holds  
15 all or parts of the System, the City shall have the right without limitation to assign,  
16 sell, lease, or otherwise transfer its interest in all or parts of the System to any other  
17 Person or entity, including any other Franchisee of a Telecommunications System,  
18 on whatever terms the City deems appropriate.

19  
20 2.8 Right to Require Removal of Property/Right to Remove Property.

21 A. Upon termination of this Franchise, Franchisee may be  
22 required to remove its property from any Public Rights-of-Way, and restore such  
23 Rights-of-Way to the same or better condition as existed just prior to such removal,  
24 subject to any rights Franchisee may have to abandon property in place, as set out  
25 in Title 16B. If Franchisee fails to remove property that the City requires it to  
26



1 remove, the City may perform the work and collect the cost thereof from  
2 Franchisee. The actual cost thereof, including direct and indirect administrative  
3 costs, shall be a lien upon all plant and property of Franchisee effective upon filing  
4 of the lien with the Pierce County Auditor.

5 B. To the extent any portion of the System in the Public  
6 Rights-of-Way or on any other public property is not removed by the Operator  
7 within 12 months of the later of the end of the Franchise term or any Continuation  
8 Period, the property will be deemed abandoned and shall become the property of  
9 the City if the City wishes to own it.

10 C. Any order by the City issued pursuant to Section 2.8.A to  
11 remove Installations shall be sent by registered or certified mail to Franchisee not  
12 later than 24 months following the date of Franchise termination. Removal shall be  
13 completed (except with respect to property that Franchisee is permitted or required  
14 to abandon in place) not later than 12 months following the date of notification to  
15 remove the Facilities.  
16

17 D. Franchisee shall file a written removal plan with the City not  
18 later than 30 calendar days following the date of the receipt of any orders directing  
19 removal, or any consent to removal describing the work that will be performed, the  
20 manner it will be performed, and a schedule for removal by location. The removal  
21 plan shall be subject to approval and regulation by the City. The affected property  
22 must be restored to as good or better condition than existed immediately prior to  
23 removal; and those damaged by removal must be compensated for the damage.  
24  
25  
26



1                   E.       Nothing in this Franchise Agreement shall affect the City's  
2 authority to require Franchisee to remove its Telecommunications System upon  
3 Franchise termination, as provided in this section and Title 16B, nor does it affect  
4 the City's right to assume ownership of any portion of the Telecommunications  
5 System that is abandoned. Within 60 days of a request by the City, the Franchisee  
6 shall execute such documents as may be required to convey such abandoned  
7 property to the City.  
8

9                   2.9     Customers Right to Obtain Service. It shall be the right of all  
10 Customers to receive all available services insofar as their financial and other  
11 obligations to Franchisee are honored during the term of the Franchise or any  
12 Continuation Period. In addition to the obligations established under the other  
13 provisions of this Franchise, in the event that Franchisee elects to overbuild,  
14 rebuild, modify, or sell the system, Franchisee shall make its best effort to ensure  
15 that all Customers receive continuous uninterrupted service at rates which are fair  
16 and reasonable, regardless of the circumstance.  
17

18                   2.10   Responsibility for Costs. Except as expressly provided otherwise,  
19 any act that Franchisee is required to perform under this Franchise shall be  
20 performed at its cost. If Franchisee fails to perform work that it is required to  
21 perform within the time provided for performance, the City may perform the work  
22 and bill the Franchisee. The Franchisee shall pay the amounts billed within 30  
23 days of receipt of the bill. The parties agree that any amounts paid pursuant to this  
24 section or Title 16B are not franchise fees.  
25  
26



1           2.11 Work of Contractors and Subcontractors. Work by contractors and  
2 subcontractors is subject to the same restrictions, limitations and conditions as if  
3 the work were performed by Franchisee. Franchisee shall be responsible for all  
4 work performed by its contractors and subcontractors, and others performing work  
5 on its behalf as if the work were performed by it and shall ensure that all such work  
6 is performed in compliance with this Franchise and Title 16B, and other applicable  
7 law, and shall be jointly and severally liable for all damages and correcting all  
8 damage caused by them. It is Franchisee's responsibility to ensure that  
9 contractors, subcontractor or other Person performing work on Franchisee's behalf  
10 are familiar with the requirements of this Franchise, Title 16B, the City's Right-of-  
11 Way Restoration Policy, and other applicable laws governing the work performed  
12 by them.

14           2.12 Survival of Terms. Upon the termination or forfeiture of the  
15 Franchise, Franchisee shall no longer have the right to occupy the Public  
16 Rights-of-Way for the purpose of providing Telecommunications Service. However,  
17 Franchisee's obligations to the City (other than the obligation to provide service to  
18 Customers) survive the expiration of these rights according to their terms. By way  
19 of illustration and not limitation, Sections 2.7, 2.8, 2.10, and 4 of this Franchise shall  
20 continue in effect as to Franchisee notwithstanding any expiration, forfeiture, or  
21 revocation of the Franchise, except to the extent that a City-approved Transfer,  
22 sale, or assignment of the Telecommunications System is completed, and another  
23 entity has assumed full and complete responsibility for the Telecommunications  
24 System or for the relevant acts or omissions.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SECTION 3. OPERATION IN STREETS AND RIGHTS-OF-WAY.

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

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

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

A. (1) Franchisee shall, by a time specified by the City, protect, support, temporarily disconnect, relocate, or remove any of its property





1 when required by the City by reason of traffic conditions; public safety; Public  
2 Rights-of-Way construction; Public Rights-of-Way repair (including resurfacing or  
3 widening); change of Public Rights-of-Way grade; construction, installation or repair  
4 of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of  
5 government-owned Communications System, public work, public facility, or  
6 improvement or any government-owned utility; Public Rights-of-Way vacation; or  
7 for any other purpose where the work involved would be aided by the removal or  
8 relocation of the Telecommunications System. Collectively, such matters are  
9 referred to below as the "public work."  
10  
11

12 (2) In the event of an emergency, or where the  
13 Telecommunications System creates or is contributing to an imminent danger to  
14 health, safety, or property, the City may protect, support, temporarily disconnect,  
15 remove, or relocate any or all parts of the Telecommunications System without  
16 prior notice, and charge the Franchisee for costs incurred.  
17

18 (3) In the case of non-public work, if any Person that is  
19 authorized to place Facilities in the Rights-of-Way requests Franchisee to protect,  
20 support, temporarily disconnect, remove, or relocate Franchisee's facilities to  
21 accommodate the construction, operation, or repair of the facilities of such other  
22 Person, the Franchisee shall, after 30 days' advance written notice, take action to  
23 effect the necessary changes requested. In the case of non-public work, unless the  
24 matter is governed by a valid contract or a state or federal law or regulation, or  
25 unless the Franchisee's Telecommunications System was not properly installed,  
26



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

5 (4) Franchisee shall, on the request of any Person holding  
6 a valid permit issued by a governmental authority, temporarily raise or lower its  
7 wires to permit the moving of buildings or other objects. The expense of such  
8 temporary removal or raising or lowering of wires shall be paid by the Person  
9 requesting the same.  
10

11 B. The Franchisee's obligation to construct, operate, and repair its  
12 Telecommunications System in compliance with all laws, ordinances, departmental  
13 rules and regulations and practices affecting such System, includes, by way of  
14 example, and not limitation, the obligation to construct, operate and repair in  
15 accordance with zoning codes, safety codes and City construction standards,  
16 including the most current version of the Standard Specifications for Road, Bridge  
17 and Municipal Construction, as prepared by the Washington State Department of  
18 Transportation (WSDOT) and the Washington State Chapter of American Public  
19 Works Association (APWA); the most current version of the APWA Amendments to  
20 Division One, and the most current version of the City of Tacoma Amendments  
21 thereto. In addition, the construction, operation, and repair shall be performed in a  
22 manner consistent with high industry standards. The Franchisee shall exercise  
23 reasonable care in the performance of all its activities and shall use commonly  
24 accepted methods and devices for preventing failures and accidents that are likely  
25  
26



1 to cause damage, injury, or nuisance to the public or to property. In the event that  
2 Franchisee's work or other use of the Public Right-of-Way causes damage to any  
3 City facility, Franchisee shall bear the cost of repairing, or replacing as necessary,  
4 such City facility.  
5

6 C. Franchisee's construction, operation, or repair of its  
7 Telecommunications System shall not commence until all required permits have  
8 been properly filed for and obtained from the proper City officials and all required  
9 permits and associated fees paid. In any permit so issued, the City may impose, as  
10 a condition of the granting of the permit, such conditions and regulations as may be  
11 necessary to the management of the Public Rights-of-Way, including, by way of  
12 example and not limitation, for the purpose of protecting any structures in the Public  
13 Rights-of-Way, maintaining proper distance from other utilities, for the proper  
14 restoration of such Public Rights-of-Way and structures, and for the protection of  
15 the City and the public and the continuity of pedestrian and vehicular traffic.  
16  
17

18 D. Franchisee must follow City-established requirements for  
19 placement of Facilities in Public Rights-of-Way, including the specific location of  
20 Facilities in the Public Rights-of-Way, and must in any event install Facilities in a  
21 manner that minimizes interference with the use of the Public Rights-of-Way by  
22 others, including others that may be installing Communications Facilities. The City  
23 may require that Facilities be installed at a particular time, at a specific place, or in  
24 a particular manner as a condition of access to a particular Public Right-of-Way  
25 area; may deny access if Franchisee is not willing to comply with the City's  
26



1 requirements; and may remove, or require removal of, any Facility that is not  
2 installed in compliance with the requirements established by the City, or which is  
3 installed without prior City approval of the time, place, or manner of installation and  
4 charge the Franchisee for all the costs associated with removal; and may require  
5 Franchisee to cooperate with others to minimize adverse impacts on the Public  
6 Rights-of-Way through joint trenching and other arrangements.  
7

8           E. Franchisee agrees that, as a condition of a permit for  
9 installation of conduit, the City may require it to install conduit in excess of its  
10 reasonably foreseeable requirements for the purpose of accommodating the City  
11 and/or other Franchisees and Licensees where the City Manager determines it is  
12 appropriate to do so to minimize disruption of public passage or infrastructure, to  
13 forestall or relieve exhaustion of Right-of-Way capacity, or to protect  
14 environmentally sensitive areas.  
15

16           F. To the extent possible, Franchisee shall use conduit existing at  
17 the time of permitting in installing its System.  
18

19           G. Whenever all existing utilities are located underground in an  
20 area in the City, the Franchisee must also locate its Telecommunication System  
21 underground, including Telecommunication System Facilities, such as drops, which  
22 cross private property.  
23

24           1. Whenever the owners of poles locate or relocate  
25 underground within an area of the City, the Franchisee shall concurrently relocate  
26 its Facilities underground.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

1. 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



1 (overhead reclaim), in coordination with the undergrounding services provided by  
2 other LID utilities, at no cost to the City or 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 the  
7 City's Right-of-Way Restoration Policy.  
8

9 J. No tree trimming shall be performed without the permission of  
10 the City and other affected authorities, and any tree trimming must be performed in  
11 strict accordance with the City Code. Even if tree trimming is authorized by the  
12 City, Franchisee is liable for any damage it causes during the course of tree  
13 trimming.  
14

15 K. In any dispute over the adequacy of a restoration relative to  
16 this section, the Tacoma Department of Public Works Director shall in his/her sole  
17 discretion, make the final determination.  
18

19 L. Franchisee shall not remove any Facilities except as  
20 hereinafter provided.

21 (1) Franchisee shall not remove any Facilities which require  
22 trenching or other opening of the Rights-of-Way along the extension of the Facilities  
23 to be removed without the express permission of the City. Franchisee must  
24 request permission from the City to remove the Facilities at least 30 days in  
25 advance of the date Franchisee proposes to begin removal.  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

(2) Franchisee shall remove such Facilities as the City orders it to remove; provided, that the City may not order removal where such removal is primarily to give economic benefit or advantage to a competing provider of Telecommunications Service.

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

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

3.3 Right To Inspect and Order Corrections. The City may inspect the Telecommunications System at any time reasonable under the circumstances to ensure compliance with this Franchise and applicable law, including to ensure that the Telecommunications System of Franchisee is constructed and maintained in a safe condition. If an unsafe condition is found to exist, the City, in addition to taking any other action permitted under applicable law, may order Franchisee, in writing, to make the necessary repairs and alterations specified therein forthwith to correct the unsafe condition on a time table established by the City which is reasonable in



1 light of the unsafe condition. The City has the right to correct, inspect, administer,  
2 and repair the unsafe condition if Franchisee fails to do so, and to charge the  
3 Franchisee therefor.  
4

5       3.4    Information Regarding Ongoing Work. In addition to providing notice  
6 to the public of ongoing work as may be required under applicable law, Franchisee  
7 shall make available information regarding any ongoing construction, operation or  
8 installation of its Telecommunications System sufficient to show (1) the nature of  
9 the work being performed; (2) where it is performed; (3) its estimated completion  
10 date; and (4) progress to completion.  
11

12       SECTION 4. REGULATORY PROVISIONS.

13       4.1    Intent. The City shall have the right to administer and regulate  
14 activities of this Franchise up to the fullest extent of the law. The failure to reserve  
15 a particular right to regulate, or reference a particular regulation, shall not be  
16 interpreted by negative implication or otherwise to prevent the application of a  
17 regulation to Franchisee.  
18

19       4.2    Remedies for Franchise Violations. The City has the right to exercise  
20 any and all of the following remedies, singly or in combination, in the event  
21 Franchisee violates any provision of this Franchise:  
22

23           A.     Draw upon or foreclose all or any part of any letter of credit,  
24 security fund, performance bond or other security provided under this Franchise;  
25 provided, however, such drawing or foreclosure shall be only in such a manner and  
26 in such amount as the City reasonably determines is necessary to remedy the





1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

default. Should the City take this action, Franchisee shall be responsible for all direct and actual costs related to such action, including, but not limited to, legal and administrative costs;

- B. Commence an action at law for monetary damages;
- C. Commence an action for equitable or other relief;
- D. Declare the Franchise to be revoked; and/or
- E. Seek 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, letter of credit, security fund, 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.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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 default cannot be cured within the 30-day period, initiate steps to remedy such default as promptly as possible. The duty to cure includes the duty to cure all harms caused by the acts or omissions of Franchisee. At the end of the 30-day period, Franchisee shall notify the City in writing of the steps it has taken to cure the default, if any; if the cure is not complete, the reason it is not complete and the projected date for completion; and if the default is disputed, the complete basis for that contention.

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

D. Action after Hearing. If the City determines after such hearing that the Franchisee did not cure, or initiate steps to cure satisfactory to the City, after the notice required by Section 4.3.A. was provided, then the City may draw upon any performance bond, letter of credit, security fund or other security, including requiring performance under the guarantee; and impose liquidated damages. However, notice and opportunity to cure are not required for repeat violations, or for a failure to correct a default where Franchisee knew or should



1 have known it was in default; in such cases, the performance bond, security fund,  
2 letter of credit or other security may be drawn upon, the guarantor required to  
3 perform and liquidated damages imposed after the hearing required by  
4  
5 Section 4.3.C.

6 E. Liquidated Damage Amounts. Because Franchisee's failure to  
7 comply with the provisions of this Franchise will result in injury to the City, and  
8 because it may be difficult to estimate the extent of each such injury, Franchisee  
9 and the City agree to the following liquidated damages, which provisions represent  
10 the best estimate of the damages resulting from injuries of specific types. The  
11 amounts of the liquidated damages set forth in this Franchise are in 2014 dollars  
12 and shall be increased each year by the increase in the U. S. Department of Labor,  
13 Bureau of Labor Statistics, Consumer Price Index for Pacific Cities and U. S. City  
14 Average for the greater Seattle area. The amount of liquidated damages for all  
15 material violations of this Franchise for which actual damages may not be  
16 ascertainable shall be: \$500 per day for each violation for each day the violation  
17 continues. It is provided, however, that the City shall allow the Franchisee a  
18 minimum of 30 days after notice to the Franchisee of such neglect, failure, or  
19 refusal to comply within which to meet compliance or correct performance, prior to  
20 the assessment of any liquidated damages.  
21  
22  
23

24 4.4 Failure to Enforce. Franchisee shall not be relieved of any of its  
25 obligations to comply promptly with any provision of this Franchise by reason of any  
26



1 failure of the City to enforce prompt compliance, and the City's failure to enforce  
2 shall not constitute a waiver of rights or acquiescence in Franchisee's conduct.

3  
4 4.5 Force Majeure. The Franchisee shall not be deemed in default with  
5 provisions of this Franchise where performance was rendered impossible by war or  
6 riots, civil disturbances, floods, or other natural catastrophes beyond the  
7 Franchisee's control; the unforeseeable unavailability of labor or materials; or  
8 power outages exceeding back-up power supplies. The acts or omissions of  
9 Affiliates are not beyond the Franchisee's control, and the knowledge of Affiliates  
10 shall be imputed to Franchisee. This Franchise shall not be revoked or the  
11 Franchisee penalized for such noncompliance, provided that the Franchisee takes  
12 immediate and diligent steps to bring itself back into compliance and to comply as  
13 soon as possible under the circumstances with this Franchise without unduly  
14 endangering the health, safety, and integrity of the Franchisee's employees or  
15 property, or the health, safety, and integrity of the public, Public Rights-of-Way,  
16 public property, or private property.

17  
18  
19 4.6 Alternative Remedies. No provision of this Franchise shall be  
20 deemed to bar the right of the City to seek or obtain judicial relief from a violation of  
21 any provision of the Ordinance or any rule, regulation, requirement or directive  
22 promulgated thereunder. Neither the existence of other remedies identified in this  
23 Franchise nor the exercise thereof shall be deemed to bar or otherwise limit the  
24 right of the City to recover monetary damages for such violation by Franchisee, or  
25 to seek and obtain judicial enforcement of Franchisee's obligations by means of  
26



1 specific performance, injunctive relief or mandate, or any other judicial remedy at  
2 law or in equity.

3           4.7 Compliance with the Laws. Franchisee shall comply with all federal  
4 and state laws and regulations, including regulations of any administrative agency  
5 thereof, as well as all City ordinances, resolutions, rules policies and regulations  
6 heretofore or hereafter adopted or established during the entire term of the  
7 Franchise; provided that, nothing herein shall prevent Franchisee from challenging  
8 a provision of laws that applies only to it as an impairment of contract. Nothing in  
9 this Franchise shall limit the City's right of eminent domain under state law.  
10 Nothing in this Franchise shall be deemed to waive the requirements of any lawful  
11 code or resolution of the City regarding permits, fees to be paid or manner of  
12 construction.  
13

14  
15           SECTION 5. REPORTING REQUIREMENTS.

16           5.1 Quarterly Reports. Within 30 days after the end of each of  
17 Franchisee's fiscal quarters, Franchisee shall submit a written report to the City,  
18 which shall contain a listing of all categories of Gross Revenues earned and Gross  
19 Receipts collected by Franchisee for its business activities as identified in Section  
20 2.1, which are activities specifically taxable as a telephone business under Tacoma  
21 Municipal Code Title 6. Said written report shall be in sufficient detail and with  
22 sufficient explanation, to enable the City to understand the report and to verify the  
23 accuracy of the report. In addition, Franchisees shall provide such other quarterly  
24 reports as may be required by Title 16B.  
25  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

A. Audited financial statements for (1) Franchisee and (2) any Affiliate which signed the guarantee for the previous fiscal year; and a financial statement for Franchisee that includes Gross Revenues from all sources, gross Subscriber revenues from each category of service, as well as an income statement and a balance sheet. In the event any audited financial report has not been published by the date due under this section, then the audited financial report shall be deemed presented on time if presented within 30 days after publication.

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

1. A summary of the previous year's activities for the Franchise Area, including, but not limited to, the total number of Customers, miles of Facilities, any services added or dropped;
2. Such other information as is required by Title 16B.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

5.3 Additional Reports. Franchisee shall prepare and furnish to the City, upon request, at the times and in the form prescribed by the City, such additional reports with respect to Franchisee's operation, affairs, transactions, or property, as may be reasonably necessary and appropriate to ensure compliance with the material provisions of this Franchise, or to permit the performance of any of the rights, functions or duties of the City or such other regulatory entity in connection with the Franchise.

5.4 Preservation of Confidential Information. Trade secrets and confidential information designated as such by Franchisee shall be subject to such protection as provided in Title 16B.

SECTION 6. COMPENSATION AND FINANCIAL PROVISIONS.

6.1 Fees; Taxes.

A. State Prohibition of Franchise Fee. The parties understand that RCW 35.21.860 currently prohibits a municipal franchise fee. Franchisee agrees that if this statutory prohibition is removed, the City may assess a reasonable franchise fee in accordance with the City Charter and Tacoma Municipal Code. The parties agree that this Section 6.1(A) herein does not limit the right of the Franchisee to challenge the franchise fee pursuant to 47 USC § 253.

B. Franchisee Subject to the City Telephone Business Tax.

Franchisee agrees that all of its activities in the City of Tacoma, as identified in Section 2.1, are activities specifically taxable as a telephone business under Tacoma Municipal Code Chapter 6A, and are taxable at the rate specified in



1 Tacoma Municipal Code Chapter 6A now in effect or as amended, which at the  
2 time of the execution of this Franchise agreement is 6 percent of the Franchisee's  
3 Gross Receipts. The City recognizes that its ability to impose taxes on Franchisee  
4 is subject to continued lawfulness and that its imposition of the same is subject to  
5 standards of equal application and equal protection. It is agreed that the amount of  
6 Gross Receipts to be taxed will include the amount of tax imposed on Franchisee  
7 by City ordinance. This Franchise does not limit the City's power of taxation.  
8

9  
10 C. Franchisee Obligated to Pay Administrative Costs. In accord  
11 with RCW 35.21.860 as presently effective, as it may be later amended, Franchisee  
12 must pay the City an amount sufficient to recover the actual administration  
13 expenses incurred in receiving and approving this Franchise, including, but not  
14 limited to, the actual costs of outside consultants retained by the City to assist in  
15 the City's consideration and processing of this Franchise application. The first  
16 \$5,000 of said expenses will be covered by the \$5,000 application fee deposited  
17 with the City. Franchisee will also pay the reasonable actual costs of enforcing, or,  
18 as necessary, reviewing, the provisions of this Franchise as well as costs involved  
19 with the modification, amendment, renewal, or Transfer of this Franchise, as ordered  
20 by the Franchise Services Manager, whether such costs result from accrued in-house  
21 staff time, or out-of-pocket expenses or administrative costs, as well as expenses of  
22 retaining independent technical, legal, or financial consultants or advisors, or whether  
23 relating to costs incurred due to initial System development or to future System  
24 expansion. The amount of payment to be made by Franchisee to cover these  
25  
26





1 administrative costs is an amount determined to be reasonable by the Franchise  
2 Services Manager. Such obligation further includes municipal fees related to  
3 receiving and approving permits or licenses, inspecting plans and construction, or  
4 relating to the preparation of a detailed statement pursuant to Chapter 43.21C RCW.  
5 Said fees must be paid within 30 days of receipt of the City's billing therefor.

6 D. Manner of Payment; Audit. Franchisee shall make all required fee  
7 payments in the form, intervals and manner requested by the City Treasurer, and  
8 furnish him/her any information related to his/her revenue collection functions  
9 reasonably requested. In case of audit, the City Treasurer may require Franchisee to  
10 furnish a verified statement of compliance with Franchisee's obligations or in  
11 response to any questions. Said certificate may be required from an independent,  
12 certified public accountant, at Franchisee's expense. All audits will take place on  
13 Franchisee's premises or offices furnished by Franchisee, which shall be a location  
14 within the City of Tacoma or other mutually agreeable place; however, the Franchisee  
15 must agree to pay the associated costs. Franchisee agrees, upon request of the City  
16 Treasurer, to provide copies of all documents filed with any federal, state, or local  
17 regulatory agency, to be mailed to the City Treasurer on the same day as filed,  
18 postage prepaid, affecting any of Franchisee's Facilities or business operations in the  
19 City of Tacoma.  
20  
21  
22

23 E. No Other Deductions. Subject to federal law and regulation, no  
24 deductions including current or previously paid fees shall be subtracted from the  
25 Gross Revenue amount upon which payments are calculated and due for any  
26



1 period. Nor shall copyright fees or other license fees paid by Franchisee be  
2 subtracted from Gross Revenues for purposes of calculating payments.

3 F. Late Payments. Any fees owing which remain unpaid more than  
4 10 days after the dates specified herein shall be delinquent and shall thereafter  
5 accrue interest at 12 percent per annum or 2 percent above highest prime lending  
6 rate published daily in the Wall Street Journal, during the period the payment is due  
7 but unpaid, whichever is greater.

8 G. Period of Limitations. The period of limitation for recovery of any  
9 fee payable hereunder shall be six years from the date on which payment by  
10 Franchisee is due, subject to tolling as provided as a matter of law or equity.  
11 Unless within six years from and after the due date for a particular payment, the  
12 City makes written request to review Franchisee's records with respect to such fee  
13 payment (either individually or as part of a broader request) recovery shall be  
14 barred with respect to such payment and the Franchising Authority shall be  
15 estopped from asserting any claims whatsoever against Franchisee relating to any  
16 alleged deficiencies in that particular payment.

17  
18  
19 6.2 Auditing and Financial Records. Franchisee shall manage all of its  
20 operations in accordance with a policy of keeping books and records open and  
21 accessible to the City. Without limiting its obligations under this Franchise,  
22 Franchisee agrees that it will collect and make available books and records for  
23 inspection and copying by the City in accordance with Title 16B. Franchisee shall  
24 be responsible for collecting the information and producing it. Books and records  
25  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

shall be produced to the City at the Tacoma Municipal Building, or such other location as the parties may agree. Notwithstanding any provision of Title 16B or this Franchise, if documents are too voluminous or for security reasons cannot be produced at the Tacoma Municipal Building or mutually agreeable location within the City, then the Franchisee may produce the material at another central location, provided it also agrees to pay the additional reasonable costs incurred by the City in reviewing the materials.

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

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

The City agrees to request access to only those books and records, in exercising its rights under this section, which it deems reasonably necessary as



1 part of a bona fide exercise of its authority over the Telecommunications System  
2 under this Franchise, Title 16B or other applicable law. The City further agrees that  
3 it will withhold from public disclosure those books and records made available to it  
4 pursuant to this section 6.2, but only to the extent that the City believes that it has  
5 the discretion to do so under state law.

6       6.3 Performance Bond. At the same time it provides its Franchise  
7 acceptance to the City, Franchisee shall provide a performance bond to ensure the  
8 faithful performance of its responsibilities under this Franchise and applicable law,  
9 including by way of example and not limitation, its obligations to relocate and  
10 remove its facilities; and to restore City Rights-of-Way and other property. The  
11 initial amount of the performance bond shall be \$250,000. The amount of the bond  
12 may be changed from time to time to reflect changed risks to the City or to the  
13 public. The Franchisee may be required to obtain additional bonds in accordance  
14 with the City's ordinary practices. The bond shall be, in a form and with a surety  
15 (authorized to do business in the state of Washington) reasonably acceptable to the  
16 City's Risk Manager and in a form acceptable to the City Attorney. Franchisee  
17 shall pay all premiums or costs associated with maintaining the bond, and shall  
18 keep the same in full force and effect at all times during the Franchise Term.

19  
20  
21       6.4 Indemnification by Franchisee.

22           A. Franchisee, by accepting this Franchise, agrees to release the  
23 City from and against any and all liability and responsibility in or arising out of the  
24 construction, operation or maintenance of the Telecommunications System, unless  
25  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

and to the extent caused by the negligence or willful misconduct of the City or any of its agents or representatives, and, without limiting the provisions of Section 7.4, agrees not to sue or seek any money or damages from City in connection with the above mentioned matters.

B. Franchisee agrees to indemnify and hold harmless the City, its trustees, elected and appointed officers, agents, and employees, from and against any and all claims, demands, or causes of action of whatsoever kind or nature, and the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities, 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 or repair of the Telecommunications System, unless and to the extent caused by the gross negligence of the City or any of its agents or representatives. 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 A-B above shall survive the term of its Franchise and continue in full force and effect as to the Franchisee's responsibility to indemnify.



6.5 Franchisee Insurance.

1           A. Franchisee shall maintain, throughout the term of the  
2 Franchise, adequate insurance to protect the City, its trustees, elected and  
3 appointed officers, agents, and employees against claims and damages that may  
4 arise as a result of the construction, operation or repair of the Telecommunications  
5 System. This obligation shall require Franchisee to maintain insurance at least in  
6 the following amounts:  
7

8                           (1) **COMPREHENSIVE GENERAL LIABILITY** insurance to  
9 cover liability bodily injury and property damage. Exposures to be covered are:  
10 premises, operations, products/completed operations, and certain contracts.  
11 Coverage must be written on an occurrence basis, with the following limits of  
12 liability:

13  
14   (a) Bodily Injury

- 15   1. Each Occurrence   \$2,000,000  
16   2. Annual Aggregate   \$ 3,000,000  
17

18   (b) Property Damage

- 19   1. Each Occurrence   \$2,000,000  
20   2. Annual Aggregate   \$3,000,000  
21

22   (c) Personal Injury

23   Annual Aggregate       \$ 3,000,000

24                           (2) **COMPLETED OPERATIONS AND PRODUCTS**

25 **LIABILITY** shall be maintained for two years after the termination of the Franchise  
26



1 or License (in the case of the Communications System owner or Operator) or  
 2 completion of the work for the Communications System owner or Operator (in the  
 3 case of a contractor or subcontractor).

4 (3) PROPERTY DAMAGE LIABILITY INSURANCE shall  
 5 include Coverage for the following hazards: X - explosion, C - Collapse,  
 6 U - underground.

7 (4) WORKERS' COMPENSATION insurance shall be  
 8 maintained during the life of this contract to comply with statutory limits for all  
 9 employees, and in the case any work is sublet, Franchisee must require its  
 10 contractors and subcontractors similarly to provide workers' compensation  
 11 insurance for all the latter's employees unless such employees are covered by the  
 12 protection afforded by the Franchisee. Franchisee shall also maintain during the  
 13 life of this policy employers liability insurance. The following minimum limits must  
 14 be maintained:  
 15

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

19 (5) COMPREHENSIVE AUTO LIABILITY Coverage shall  
 20 include owned, hired, and non-owned vehicles.  
 21

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



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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.

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

E. In the event that the insurance certificate provided indicates that the insurance shall terminate or lapse during the period of the Franchise then in that event, the Franchisee shall furnish, no later than the expiration of the date of such insurance, a renewed certificate of insurance as proof that equal and like





1 coverage has been or will be obtained prior to any such lapse or termination during  
2 the balance of the period of the Franchise.

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

6 6.6 Security Fund. Franchisee shall establish a cash security fund or  
7 provide the City an irrevocable letter of credit in the amount of \$50,000, to secure  
8 the payment of fees owed, to secure any other performance promised in this  
9 Franchise, and to pay any taxes, fees or liens owed to the City. The letter of credit  
10 shall be in a form and with an institution acceptable to the City's Director of Finance  
11 and in a form acceptable to the City Attorney. Should the City draw upon the cash  
12 security fund or letter of credit, it shall promptly notify the Franchisee, and the  
13 Franchisee shall promptly restore the fund or the letter of credit to the full required  
14 amount. The City may from time to time change the amount of the required  
15 security fund/letter of credit to reflect changes in the risks to the City and to the  
16 public, including delinquencies in taxes or other payments to the City.  
17  
18

19 SECTION 7. MISCELLANEOUS PROVISIONS.

20 7.1 Posting and Publication. Franchisee shall assume the cost of posting  
21 and publication of this Franchise as such posting and publication is required by law  
22 and such is payable upon Franchisee's filing of acceptance of the Franchise.  
23

24 7.2 Guarantee of Performance. Franchisee acknowledges that it enters  
25 into the Franchise voluntarily in order to secure and in consideration of the grant  
26



1 from the City of a ten-year Franchise. Performance pursuant to the terms and  
2 conditions of this Franchise agreement is guaranteed by Franchisee.

3 7.3 Governing Law and Venue. The Franchise shall be governed by and  
4 construed in accordance with the laws of the State of Washington without recourse  
5 to any principles of Conflicts of Laws, and Franchisee agrees that any action  
6 brought relative to enforcement of this Franchise shall be initiated in the Superior  
7 Court of Pierce County, and shall not be removed to a federal court.

8 7.4 No Recourse. Without limiting such immunities as the City or other  
9 Persons may have under applicable law, except to the extent allowed by any  
10 preempting Federal, state, or local law, regulation or order, Franchisee shall have  
11 no monetary recourse whatsoever against the City or its officials, boards,  
12 commissions, agents or employees for any loss, costs, expense or damage arising  
13 out of any provision or requirement of Title 16B or because of the enforcement of  
14 Title 16B or the City's exercise of its authority pursuant to Title 16B, this Franchise  
15 or other applicable law.  
16  
17

18 7.5 Notice. Unless expressly otherwise agreed between the parties,  
19 every notice, billing, or response required by this Franchise to be served upon the  
20 City or Franchisee shall be in writing, and shall be deemed to have been duly given  
21 to the required party five business days after having been posted in a properly  
22 sealed and correctly addressed envelope when hand delivered or  
23 sent by mail, postage prepaid. The notices or responses to the City shall be  
24 addressed as follows:  
25  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

City of Tacoma  
Municipal Services Building  
1224 MLK Jr Way  
Tacoma, WA 98405  
Attn: Franchise Services Manager

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

Level 3 Communications, LLC  
1025 Eldorado Boulevard  
Broomfield, Colorado, 80021  
Attn: Director, Network Infrastructure Services  
Attn: General Counsel

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 one address, and the address must be within the City, except by mutual agreement.

7.6 Execution. Franchisee shall execute and return to the City three original countersigned copies of this Ordinance and a signed acceptance of the Franchise granted hereunder within 30 days after the date of passage of the Ordinance by the City Council. The acceptance shall be submitted in the form attached hereto or other form acceptable to the City Attorney and in accepting the Franchise, Franchisee warrants that it has carefully read the terms and conditions of this Franchise and unconditionally accepts all of the terms and conditions of this Franchise and agrees to abide by the same and acknowledges that it has relied upon its own investigation of all relevant facts, that it has had the assistance of counsel, that it was not induced to accept a Franchise, that this Franchise represents the entire agreement between Franchisee and the City, and that



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Franchisee accepts all risks related to the interpretation of this Franchise. The countersigned Ordinance and acceptance shall be returned to the City accompanied by: evidence of insurance; a payment for publication costs; billable work order deposit, and security deposit (or the letter of credit). The Franchise rights granted herein shall not become effective until all of the foregoing is received in acceptable form. In the event Franchisee fails to submit the countersigned Ordinance and acceptance as provided for herein, or fails to provide the required accompanying documents and payments, within the time limits set forth in this section, the grant of the Franchise shall be null and void.

Passed \_\_\_\_\_

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

Attest: City Clerk

\_\_\_\_\_

Approved as to form

\_\_\_\_\_  
Deputy City Attorney



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**ACCEPTANCE OF CITY FRANCHISE**

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

I, \_\_\_\_\_, am the \_\_\_\_\_ of Level 3 Communications, LLC, a Delaware limited liability company, and am the authorized representative to accept the above-referenced City franchise ordinance on behalf of Level 3 Communications, LLC.

I certify that this franchise and all terms and conditions thereof are accepted by Level 3 Communications, LLC without qualification or reservation.

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

By: \_\_\_\_\_

Its: \_\_\_\_\_

Witness: \_\_\_\_\_