



ORDINANCE NO. 28464

1 AN ORDINANCE granting a non-exclusive franchise to ExteNet Systems, Inc., a
2 Delaware corporation, to construct, operate, and maintain a
3 telecommunications system in the City of Tacoma; setting forth provisions,
4 terms, and conditions of the grant of franchise; specifically making such
5 grant subject to the provisions of Title 16B, Title 9 and Title 10 of the
6 Tacoma Municipal Code, as well as the Tacoma City Charter; providing for
7 City regulation of the Telecommunications System; prescribing liquidated
8 damages and certain other remedies for violation of franchise provisions in
9 addition to those specified pursuant to the Tacoma Municipal Code and
10 Tacoma City Charter.

11 WHEREAS ExteNet Systems, Inc., a Delaware corporation registered to do
12 business in the state of Washington (“ESI” or “Franchisee”) is a
13 telecommunications company currently involved in the business of operating a
14 telecommunications network utilizing fiber optic and wireless technology, and

15 WHEREAS, as part of expanding such network, ESI desires to obtain a
16 franchise to operate its telecommunications network in City of Tacoma
17 right-of-way, and

18 WHEREAS ESI has applied to the City to install and operate fiber optic
19 cable within the City streets and public rights-of-way, and also intends, with
20 appropriate, additional City authorization and subject to City zoning and land use
21 regulations, to place above-ground transmission facilities in certain locations in City
22 right-of-way, and

23 WHEREAS the City Council has determined to grant such a franchise to ESI
24 upon those certain terms and conditions which the Council deems necessary due
25 to the unique nature of fiber optic cable and wireless transmission facilities as set
26 forth herein, and

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



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Now, Therefore,

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BE IT ORDAINED BY THE CITY OF TACOMA:

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Section 1. 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 of the Tacoma Municipal Code (“TMC”), 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 any Title of the TMC or to the Tacoma City Charter refers to the same as may be amended from time to time. Any reference to a “party” hereunder shall mean the City or Franchisee, as applicable, and a reference to the “parties” shall mean collectively the City and Franchisee.

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 system” refers to a telecommunications system.

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



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1.5 "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. The definition of "Customer" shall also include Persons who use Franchisee's Facilities, whether as lessees or through other arrangement.

1.6 "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 Franchisee, such as antennae, 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, encompass both Overhead Facilities/Installations and Underground Facilities/Installations. Nothing in this definition or anything else in this Franchise shall be interpreted as authorizing Franchisee to construct its own support system for Overhead Facilities or any other above-ground Facilities in the Franchise Area without the additional authorizations required herein below and as proscribed by City zoning and land use regulation ordinances.

1.7 "Franchise" means the rights expressly granted by this Franchise and conditioned as set forth herein and under the TMC and Tacoma City Charter.

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



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1.9 "Franchisee" means ExteNet Systems, Inc., a Delaware corporation registered to do business in the state of Washington with its principal office located at 3030 Warrenton Road, Suite 340, Lisle, IL 60532.

1.10 "Gross Receipts," for purposes of this Franchise, means any and all receipts or income received directly or indirectly by Franchisee, which is derived from the operation of its System in the City, less uncollectibles. Gross Receipts 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 shall not include any taxes on services furnished by Franchisee imposed by any municipality, state, or other governmental unit and collected by Franchisee for such governmental unit, nor shall the term include any wholesale services provided by Franchisee upon which fees or taxes have already been levied within the City of Tacoma.

1.11 "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.



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1.12 "Overhead Facilities" refers to existing electric utility and communications Facilities located above the surface of the ground, including the underground supports and foundations for such Facilities.

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

1.14 "Personal Wireless Facilities" are Facilities which are above-ground such as transmitters, antenna structures and other types of installations, whether related to wireless or fiber/optic transmission, now or hereafter used for the provision of personal wireless services as that term is defined in Section 704 of the 1996 Telecommunications Act.

1.15 "Public Rights-of-Way" mean the public streets and easements over which, under the Tacoma City Charter, the TMC, City ordinances, and applicable laws, the City has authority to grant Franchises, permits, or Licenses for use thereof or has regulatory authority there over, but expressly excluding railroad rights-of-way/crossings, airport, and harbor areas. Public Rights-of-Way, for the purpose of this Franchise, also 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.

1.16 "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,



1 video, or data, whether or not the transmission medium is owned by the provider
2 itself. Telecommunications Service includes telephone service, but does not
3 include cable TV or commercial video service or over-the-air broadcasts to the
4 public-at-large from facilities licensed by the Federal Communications Commission
5 or any successor thereto.

6 1.18 "Telecommunications System" means a tangible facility that is used to
7 provide one or more Telecommunications Services, any portion of which occupies
8 Public Right-of-Way. The term Telecommunications System by way of example,
9 and not limitation, includes antennae, wires, equipment cabinets, guys, conduit,
10 radio transmitting towers, poles, other supporting structures, and associated and
11 appurtenant facilities used to transmit telecommunications signals. The term
12 Telecommunications System includes all devices mounted on light poles (where
13 separately authorized by an attachment agreement) in the Public Rights-of-Way
14 through which Telecommunications Services are originated or terminated. An
15 Open Video System is not a Telecommunications System to the extent that it
16 provides only video services; a Cable System is not a Telecommunications System
17 to the extent that it provides only Cable Service. The term Telecommunications
18 System includes any of the tangible components of a Telecommunications System
19 which occupies Public Rights-of-Way, but poles and other structures to which
20 Franchisee's Facilities are attached shall not be deemed to be part of Franchisee's
21 Telecommunications System unless such poles or other structures are owned by
22 Franchisee.
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1 1.19. "Telephone Service" means the provision of access to a local
2 telephone network, local telephone network switching service, intrastate toll
3 service, or coin telephone service, or providing telephonic, video, data, or similar
4 communication or transmission for hire via a local telephone network, toll line,
5 channel, cable, microwave, or similar communication or transmission system by
6 any person. Telephone Service includes intrastate or interstate service, including
7 toll service, originating from, or received on, communications equipment or
8 apparatus in this state if the charge for the service is billed to a person in this state.
9 Telephone Service does not include the providing of Competitive telephone service
10 as defined in Tacoma Municipal Code § 6A.40.030, the providing of cable
11 television service, or the providing of broadcast services by radio or television
12 stations.
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14 1.20 "Underground Facilities" refers to electric utility and Communications
15 Facilities located under the surface of the ground, excluding the underground
16 foundations or supports for Overhead Facilities.
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18 Section 2. Franchise.

19 2.1 Grant of Franchise. The City hereby grants to Franchisee a
20 non-exclusive Franchise which, once it becomes effective, shall authorize
21 Franchisee to use the City's Public Rights-of-Way within the Franchise Area to
22 construct, maintain, and operate a fiber optic/wireless Telecommunication System
23 to provide Telecommunication Service and internet access service, and to use the
24 City's Public Rights-of-Way as authorized herein. This grant of Franchise does
25 not, by itself, grant any right to construct new, above-ground Facilities without prior
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1 City approval, which will require additional permitting and/or an additional site
2 specific or master siting agreement, in conformance with City zoning and land use
3 ordinances and applicable state laws.

4 This 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 TMC and Tacoma City Charter, including, but not limited to, the provisions set
7 forth in Article VIII of the Charter, and TMC Title 13, and this Franchise may be
8 revoked under Section 2.5 if it is not so exercised. The exercise of any rights
9 pursuant to this Franchise is subject to the exercise of the City's police powers,
10 and other regulatory powers as the City may have or obtain in the future, and all
11 rights granted herein must be exercised in strict accordance with applicable laws,
12 including, by way of example and not limitation, zoning codes and permitting
13 requirements. No rights shall pass to Franchisee by implication. This Franchise
14 shall constitute both a right and an obligation to provide the services of the
15 Telecommunications System 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 and internet access service. This Franchise does not
20 include permission to provide cable service, as defined in 47 U.S.C. § 522,
21 multichannel video programming, open video systems, or uses other than
22 Telecommunications 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 opinion, determines
26 that such use is inconsistent with the terms, conditions or provisions by which such



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

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

7 2.2 Franchise Term. The term of the Franchise shall be ten years unless
8 terminated sooner in accordance with this Franchise, Title 16B, or the Tacoma City
9 Charter. At the expiration of the term, Franchisee may apply to extend or renew the
10 Franchise as provided in Title 16B.02.100.

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

13 2.4 Transfers, Generally.

14 A. Any transfer of this Franchise, as the term "Transfer" is defined in
15 TMC Title 16B.01.030.Y, shall be accomplished in accordance with
16 TMC Title 16B.02.120. Any intra-company Transfer of this Franchise shall be
17 excepted from the requirements of TMC Title 16B.02.120.A-B if such Transfer and
18 the Transferee Affiliate meet all of the requirements of TMC Title 16B.02.120.F (or
19 any successor ordinance). Any Transfer not made in accordance with TMC Title
20 16B.02.120, may be considered a substantial violation of this Franchise by the City
21 and may subject the Franchise to termination proceedings by the City as provided
22 herein and in Title 16B.
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B. Applications for approval of any Transfer shall be filed in accordance with procedures set out in Title 16B of the TMC.

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

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

2.5 Revocation. In addition to any rights set out elsewhere in this Franchise, the Tacoma City Charter or Title 16, subject to the notice and cure provisions contained in Title 16B, Section 16B.05.100, the City reserves the right to



1 declare a forfeiture or otherwise revoke this Franchise, and all rights and privileges
2 pertaining thereto, as provided in Title 16B or in the event that:

3 A. Franchisee is in non-compliance with a material provision of this
4 Franchise; or

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

7 C. Franchisee fails to obtain and maintain any permit required by
8 any federal or state regulatory body or by the City, relating to the construction,
9 maintenance, and operation of the Facilities within the Public Rights-of-Way within
10 the Franchise Area; or

11 D. At any time during the term of the Franchise, Franchisee fails to
12 provide and maintain all of the securities required under this Franchise, including,
13 but not limited to, the performance bond required under this Franchise; fails to
14 maintain the insurance required by this Franchise; or fails to satisfy the indemnity
15 set out in this Franchise; or if any guarantor of Franchisee revokes its guarantee or
16 fails to satisfy or becomes unable to satisfy its obligations under such guarantee.
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18 E. The procedures for revocation and forfeiture shall be governed by
19 Title 16B, Section 16B.05.100. Before the Franchise is revoked, Franchisee shall
20 be given notice and opportunity to cure at least equivalent to that required by
21 Title 16B as of the effective date of this Franchise (except in those cases where
22 notice and opportunity to cure are not required or would be futile), and shall be
23 accorded at least an opportunity to be heard that provides at least the due process
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1 protections required by Title 16B as of the effective date of this Franchise, which
2 opportunities and protections are set out in Section 2.5.F, below.

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

16 (2) Notwithstanding the foregoing, the City may declare a
17 Franchise forfeited without opportunity to cure when Franchisee: (a) fails to begin
18 to exercise its rights hereunder within 180 calendar days of Franchisee's
19 acceptance of this Franchise, (b) stops providing all Service it is required to
20 provide under the Franchise, (c) Transfers without the prior consent of the City as
21 and when required in the Franchise, or (d) is found by a court or regulatory body
22 with appropriate jurisdiction to have defrauded or attempted to defraud the City or
23 Franchisee's customers within the City. Notwithstanding the provisions of
24 Title 16B.05.100.C.2, if Franchisee fails to timely pay any undisputed Franchise
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1 application/administrative fees or other undisputed fees owed hereunder or under
2 Title 16B, before the City can initiate any termination or forfeiture of rights,
3 Franchisee shall be provided with ten (10) business days' prior written notice and
4 an opportunity to cure the failure to pay. However, Franchisee shall have the right
5 to receive 30 days' prior notice of an intent to declare a Franchise forfeited, and
6 shall have the opportunity to show cause why the Franchise should not be
7 forfeited.

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

5 2.6 Continuity of Service and Right to Purchase the System.

6 A. In the event the City has declared a forfeiture for cause or
7 otherwise validly revoked this Franchise as provided herein, or in the event of
8 expiration of the initial term of this Franchise without this Franchise being renewed
9 or extended as provided in Section 2.2 (referred to below collectively as a
10 "termination"), Franchisee shall remove its Facilities from the Public Rights-of-Way
11 under Section 2.7, unless the City elects to purchase the Facilities as provided in
12 Section 2.6 B.

13 B. In the event the City has declared a forfeiture for cause or
14 otherwise validly revoked this Franchise as provided herein, or in the event of
15 expiration of the initial term of this Franchise without this Franchise being renewed
16 or extended as provided in Section 2.2 (referred to below collectively as a
17 "termination"), the City shall have an option upon termination of the Franchise to
18 purchase that portion of the Telecommunications System located in the
19 Right-of-Way owned by Franchisee, whether termination is, or is not, for cause.
20 This option requires Franchisee to convey the Telecommunications System or such
21 portion thereof as the City may choose to purchase, provided, that nothing herein
22 shall require the City to accept or pay for any contract that it does not wish to
23 assume. Franchisee is not required to convey portions of the Telecommunications
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1 System not located in the Right-of-Way, located outside the City, or that is leased
2 or used (but not owned) by Franchisee from a third party pursuant to a tariff or
3 contract. The foregoing option also requires Franchisee to sell the
4 Telecommunications System owned by Franchisee and located in the Right-of-Way
5 or such portion thereof as the City may choose to purchase at a fair market price, if
6 the Franchise is terminated for cause. If Franchisee's request for a Franchise
7 renewal is denied, the option requires Franchisee to sell the Telecommunications
8 System owned by Franchisee and located in the Right-of-Way, or such portion
9 thereof as the City may choose to purchase, at fair market value, determined on the
10 basis of the value of the Telecommunications System as a going concern (taking
11 into account such property used and useful in providing service within the City that
12 is not to be conveyed) and with no value allocated to the Franchise itself.

14 C. The City may exercise its Section 2.6.B option rights in the
15 following manner: the City will have up to 180 days after receiving the inventory
16 required by Section 2.6.A to notify Franchisee that it intends to exercise its right to
17 purchase the Telecommunications System or a portion of the Telecommunications
18 System. Within 90 days of the date the City notifies Franchisee of its intent to
19 exercise the option, or by such other time as the parties may separately agree, the
20 parties shall meet to establish a price that comports with the requirements of
21 Section 2.6.B. If the parties are unable to agree to a price within 180 days after the
22 City notifies Franchisee that the City intends to exercise its purchase option, either
23 party may require the price to be set by appraisal by sending the other party notice
24 that it wishes to have the price set by appraisal. Within 45 days of the date that
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1 notice is submitted, each party may appoint one appraiser. If each party appoints
2 an appraiser, the two appraisers shall appoint a third appraiser; if only a single
3 appraiser is appointed (whether by mutual agreement or because of the failure of a
4 party to timely nominate an appraiser) that appraiser shall be the sole appraiser.

5 The appraiser or appraisers shall establish a price for the System or portion thereof
6 that the City desires to purchase in accordance with Section 2.6.B. This appraisal
7 determination shall be final and non-appealable. The City shall have 120 days
8 after the decision of the appraisers to notify Franchisee that it wishes to conclude
9 the transaction; if it does not so notify Franchisee, the option shall be deemed
10 terminated.
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12 If the City gives the notice required by the preceding paragraph, the
13 parties will thereafter promptly sign all necessary documents required to close the
14 transaction; provided, however, that the City may make conclusion of the
15 transaction conditional upon any necessary voter approval of any bond funding for
16 acquisition of all or a part of the System and, if applicable, the successful sale of
17 the bonds.
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19 The City and Franchisee will share equally the costs associated with
20 any appraiser that is jointly appointed (by them or by the appraisers each selects);
21 the City will bear costs associated with any appraiser that it separately appoints
22 and Franchisee will bear costs associated with any appraiser that it separately
23 appoints.
24

25 D. (1) Nothing in this section or in any other section of this
26 Franchise shall prevent the City's exercise of its rights under the Tacoma City



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

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

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

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

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

21 2.7 Right to Require Removal of Property/Right to Remove Property.

22 A. Upon termination of this Franchise, Franchisee may be required
23 to remove its property from any Public Rights-of-Way and restore such
24 Rights-of-Way to the condition required by the TMC and City's Right-of-Way
25 Restoration Policy, subject to any rights Franchisee may have to abandon property
26



1 in place, as set out in Title 16B. If Franchisee fails to remove property that the City
2 requires it to remove, the City may perform the work and collect the actual cost
3 thereof from Franchisee. The actual cost thereof, including direct and indirect
4 administrative costs, shall be a lien upon all plant and property of Franchisee
5 effective upon filing of the lien with the Pierce County Auditor. In the event that
6 Franchisee is permitted to abandon its Facilities in place, the City acknowledges
7 that any ownership it takes in the Facilities thereafter is taken on an AS-IS,
8 WHERE-IS basis.

9
10 B. To the extent any portion of the System in the Public
11 Rights-of-Way or on any other public property of the City is not removed by the
12 Operator within 12 months of the end of the Franchise term, the property will be
13 deemed abandoned in its AS-IS, WHERE-IS condition and shall become the
14 property of the City if the City wishes to own it.

15
16 C. Any order by the City issued pursuant to Section 2.7.A to remove
17 Facilities shall be sent by registered or certified mail, postage prepaid, return
18 receipt requested, to Franchisee not later than 24 months following the date of
19 Franchise termination. Removal shall be completed (except with respect to
20 property that Franchisee is permitted to abandon in place) not later than 12 months
21 following the date of notification to remove the Facilities.

22
23 D. Franchisee shall file a written removal plan with the City not later
24 than 30 calendar days following the date of the receipt of any orders directing
25 removal, or any consent to removal describing the work that will be performed, the
26 manner in which it will be performed, and a schedule for removal by location. The



1 removal plan shall be subject to approval and regulation by the City, including,
2 without limitation, the City's Right-of-Way Restoration Policy. The affected
3 property must be restored in compliance with the City's Right-of-Way Restoration
4 Policy; and any damage caused by Franchisee's removal must be
5 addressed/compensated to the reasonable satisfaction of the City.

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

14
15 2.8 Customers' Right to Obtain Service. It shall be the right of all
16 Customers to receive all available services insofar as their financial and other
17 obligations to Franchisee are honored during the term of the Franchise. In addition
18 to the obligations established under the other provisions of this Franchise, in the
19 event that Franchisee elects to overbuild, rebuild, modify, or sell the System,
20 Franchisee shall make its best effort to ensure that all Customers receive service
21 subject to the terms and conditions of the service contract then in effect between
22 the respective Customer and Franchisee.

23
24
25 2.9 Responsibility for Costs. Except as expressly provided otherwise, any
26 act that Franchisee is required to perform under this Franchise shall be performed



1 at its cost. If Franchisee fails to perform work that it is required to perform within
2 the time provided for performance, the City, after first providing notice and an
3 opportunity to cure as herein provided, may perform the work and bill Franchisee
4 the actual cost thereof. Franchisee shall pay the amounts billed within 30 days of
5 receipt of an itemized bill. The parties agree that any amounts paid pursuant to
6 this section or Title 16B are not franchise fees.

7 2.10 Work of Contractors and Subcontractors. Work by contractors and
8 subcontractors is subject to the same restrictions, limitations, and conditions as if
9 the work were performed by Franchisee. Franchisee shall be responsible for all
10 work performed by its contractors and subcontractors, and others performing work
11 on its behalf as if the work were performed by it and shall ensure that all such work
12 is performed in compliance with this Franchise and Title 16B, and other applicable
13 laws, including without limitation, the City's Right-of-Way Restoration Policy.
14 Franchisee and its contractors and subcontractors shall be jointly and severally
15 liable for all damages and correcting all damages they cause. It is Franchisee's
16 responsibility to ensure that contractors, subcontractor or other Person(s)
17 performing work on Franchisee's behalf are familiar with the requirements of this
18 Franchise, Title 16B, the City's Right-of-Way Restoration Policy, and other
19 applicable laws governing the work performed by them.
20
21
22

23 2.11 Survival of Terms. Upon the termination or forfeiture of the Franchise,
24 Franchisee shall no longer have the right to occupy the Public Rights-of-Way for
25 the purpose of providing Telecommunications Service. However, Franchisee's
26 obligations to the City (other than the obligation to provide service to Customers)



1 survive the expiration of these rights according to their terms. By way of illustration
2 and not limitation, Sections 2.6, 2.7, 2.9, 2.10, and 4 of this Franchise shall
3 continue in effect as to Franchisee notwithstanding any expiration, forfeiture, or
4 revocation of the Franchise, except to the extent that a City-approved Transfer,
5 sale, or assignment of the Telecommunications System is completed and another
6 entity has assumed full and complete responsibility for the Telecommunications
7 System or for the relevant acts or omissions.

8 Section 3. Operation in Streets and Rights-of-Way.

9 3.1 Use of Public Rights-of-Way. Franchisee may, subject to the terms of
10 this Franchise and TMC Titles 16B and 13, the City's Right-of-Way Restoration
11 Policy, and other applicable laws, enter onto and use the Public Rights-of-Way to
12 construct, operate, and maintain a fiber optic Telecommunications System in
13 Public Rights-of-Way within the Franchise Area to provide, or cause to be
14 provided, Telecommunications Services and internet access services. Under this
15 Franchise, Franchisee may also construct Personal Wireless Facilities, but may
16 only do so after obtaining an additional site-specific or master siting agreement
17 from the City for such Personal Wireless Facilities. Without limiting the foregoing,
18 Franchisee expressly agrees that it will construct, operate, and maintain its System
19 in compliance with the requirements of Title 16B and TMC Title 13 zoning and land
20 use regulation ordinances, including those governing the placement of its
21 Telecommunications System, and with other applicable City codes; and will obtain
22 and maintain all bonds and billable work orders required by the same.
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1 3.2 Construction, Operation, or Maintenance. Franchisee shall, in all
2 cases, comply with all lawful City ordinances and regulations now in effect or
3 hereinafter enacted regarding the acquisition of permits and such other items as
4 may be required by the City in connection with the construction, operation, or
5 maintenance of the Telecommunications System, including, without limitation, the
6 City's Right-of-Way Restoration Policy.

7 Without limiting the foregoing, Franchisee agrees that it shall, in the course
8 of constructing, operating, and maintaining its Telecommunications System comply
9 with the requirements of Titles 16B and 13, and among other things:
10

11 A. (1) Franchisee shall, by a time specified by the City, protect,
12 support, temporarily disconnect, relocate, or remove any of its property when
13 required by the City by reason of traffic conditions; public safety; Public
14 Rights-of-Way construction; Public Rights-of-Way repair (including resurfacing or
15 widening); change of Public Rights-of-Way grade; construction, installation or
16 repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other
17 type of government-owned Communications System, public work, public project,
18 public facility, or improvement or any government-owned utility; Public Rights-of-
19 Way vacation; or for any other purpose where the work involved would be aided by
20 the removal or relocation of the Telecommunications System. Collectively, such
21 matters are referred to below as the "public work."
22

23
24 (2) In the event of an emergency, or where the
25 Telecommunications System creates or is contributing to an imminent danger to
26 health, safety, or property, the City may protect, support, temporarily disconnect,



1 remove, or relocate any or all parts of the Telecommunications System without
2 prior notice, and charge Franchisee for actual costs incurred.

3 (3) In the case of non-public work, if any Person that is
4 authorized to place Facilities in the Rights-of-Way requests Franchisee to protect,
5 support, temporarily disconnect, remove, or relocate Franchisee's facilities to
6 accommodate the construction, operation, or maintenance of the facilities of such
7 other Person, Franchisee shall, after 30 days' advance written notice, take action
8 to effect the necessary changes requested. In the case of non-public work or non-
9 public projects, unless, and to the extent, the matter is governed by a valid contract
10 between Franchisee and such Person requesting Franchisee to take action under
11 this subsection (3) or governed by a valid state or federal law or regulation, or
12 unless Franchisee's Telecommunications System was not properly installed, the
13 reasonable cost of the same shall be borne by the Person requesting the
14 protection, support, temporary disconnection, removal, or relocation and at no
15 charge to the City, even if the City makes the request for such action.
16
17

18 (4) Franchisee shall, on the request of any Person holding a
19 valid permit issued by a governmental authority, temporarily raise or lower its wires
20 to permit the moving of buildings or other objects. The expense of such temporary
21 removal or raising or lowering of wires shall be paid by the Person requesting the
22 same.
23

24 B. Franchisee's obligation to construct, operate, and maintain its
25 Telecommunications System in compliance with all applicable laws, ordinances,
26 departmental rules and regulations, and published or otherwise readily available



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

19 C. Franchisee's construction, operation, or maintenance of its
20 Telecommunications System shall not commence until all required permits or
21 agreements have been properly filed for and obtained from the proper City officials
22 and all required permits and agreements obtained and associated fees paid. In
23 any permit so issued, the City may impose, as a condition of the granting of the
24 permit, such conditions and regulations as may be necessary to the management
25 of the Public Rights-of-Way, including, by way of example and not limitation, for the
26



1 purpose of protecting any structures in the Public Rights-of-Way, maintaining
2 proper distance from other utilities, for the proper restoration of such Public
3 Rights-of-Way and structures, and for the protection of the City and the public and
4 the continuity of pedestrian and vehicular traffic.

5 D. Franchisee must follow City-established requirements for
6 placement of Facilities in Public Rights-of-Way, including the specific location of all
7 Facilities, which includes, without limitation, Personal Wireless Facilities, in the
8 Public Rights-of-Way, and must in any event install Facilities in a manner that
9 minimizes interference with the use of the Public Rights-of-Way by others,
10 including others that may be installing Communications Facilities.
11

12 The City may require that Facilities be installed at a particular time, at a
13 specific place, or in a particular manner as a condition of access to a particular
14 Public Right-of-Way area; may deny access if Franchisee is not willing to comply
15 with the City's requirements; and may remove, or require removal of, any Facility
16 that is not installed in compliance with the requirements established by the City, or
17 which is installed without prior City approval of the time, place, or manner of
18 installation and charge Franchisee for all the costs associated with removal; and
19 may require Franchisee to cooperate with others to minimize adverse impacts on
20 the Public Rights-of-Way through joint trenching and other arrangements
21 consistent with requirements the City imposes on other similarly situated
22 franchisees or users of the Public Rights-of-Way.
23
24

25 E. Franchisee agrees that, as a condition of a permit for installation
26 of conduit, the City may require it to install conduit in excess of its reasonably



foreseeable requirements for the purpose of accommodating the City where the
1 City Manager determines it is appropriate to do so to minimize disruption of public
2 passage or infrastructure, to forestall or relieve exhaustion of Right-of-Way
3 capacity, or to protect environmentally sensitive areas; provided, that the City will
4 be responsible for the additional costs, including material and labor, associated
5 with installing such excess conduit if installed for City use; and provided further,
6 that City's use of any such excess conduit is limited to non-commercial,
7 governmental uses.
8

9
10 F. To the extent possible and technically and operationally feasible,
11 Franchisee shall use conduit existing at the time of permitting in installing its
12 System.

13 G. Whenever all existing utilities are located underground in an area
14 in the City, Franchisee, at its own cost, must also locate its Telecommunication
15 System underground, including Telecommunication System Facilities, such as
16 drops, which cross private property.
17

18 (1) Whenever the owners of poles locate or relocate
19 underground within an area of the City, Franchisee shall concurrently relocate its
20 Facilities underground at its own cost.
21

22 (2) Whenever an electric utility opens a trench for the purpose
23 of installing or relocating Facilities underground, Franchisee shall concurrently
24 relocate its Facilities underground and, if it uses the same trench, be responsible
25 for its pro-rated share of the cost.
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(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 Franchisee to locate or relocate its Telecommunication System underground in areas where other existing utilities are ordered to locate or relocate their facilities underground under other provisions of the TMC, 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. Subject to subsection G(3) above, Franchisee shall participate in conversion to underground Local Improvement Districts (“LIDs”) at the same time as other utilities are required to participate in conversion to underground LIDs. 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 TMC, 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, Franchisee shall perform underground construction and movement of Customer connections underground (overhead reclaim), in coordination with the undergrounding services provided by other LID utilities, at no cost to the City or abutting property owners.



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

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

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

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

17 (1) Franchisee shall not remove any Facilities which require
18 trenching or other opening of the Rights-of-Way along the extension of the
19 Facilities to be removed without the express permission of the City, which
20 permission shall not be unreasonably withheld, conditioned, or delayed.
21 Franchisee must request permission from the City to remove the Facilities at least
22 30 days in advance of the date Franchisee proposes to begin removal.
23

24 (2) Franchisee shall remove such Facilities as the City orders
25 it to remove; provided, that the City may not order removal where such removal is
26



1 primarily to give economic benefit or advantage to a competing provider of
2 Telecommunications Service.

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

9 (4) Subject to the City's rights to purchase the
10 Telecommunications System under Section 2, Franchisee may voluntarily remove
11 any Facilities from the streets which have been installed in such a manner that
12 they can be removed without trenching or other opening of the Rights-of-Way.

13
14 3.3 Right To Inspect and Order Corrections. The City may, at its cost,
15 inspect the Telecommunications System at any time reasonable under the
16 circumstances to ensure compliance with this Franchise and applicable law,
17 including to ensure that Franchisee's Telecommunications System is constructed
18 and maintained in a safe condition. If Franchisee's representatives are not on-site
19 performing work on the Telecommunications System, whenever feasible, the City
20 shall give reasonable advance notice of its intent to inspect so that Franchisee may
21 have a representative present during the inspection. If an unsafe condition is
22 found to exist, the City, in addition to taking any other action permitted under
23 applicable law, may order Franchisee in writing to make the necessary repairs and
24 alterations specified therein forthwith to correct the unsafe condition on a time table
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1 established by the City which is reasonable in light of the unsafe condition. The
2 City has the right to correct, inspect, administer, and repair the unsafe condition if
3 Franchisee fails to do so in a timely manner, and to charge Franchisee therefor.

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

10
11 Section 4. Regulatory Provisions.

12 4.1 Intent. The City shall have the right to administer and regulate activities
13 of this Franchise up to the fullest extent of the law. The failure to reserve a
14 particular right to regulate, or reference a particular regulation, shall not be
15 interpreted by negative implication or otherwise to prevent the application of a
16 regulation to Franchisee.
17

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

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

- 3 B. Commencing an action at law for monetary damages;
- 4 C. Commencing an action for equitable or other relief;
- 5 D. Declaring the Franchise to be revoked; and/or
- 6 E. Seeking specific performance of any provision which reasonably
7 lends itself to such remedy.

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

14
15 4.3 Procedure for Remedying Franchise Violations. Before imposing
16 liquidated damages, or drawing upon the performance bond or any other security
17 set out in Section 6, the City shall follow the procedure below.

18
19 A. Notice of Violation. In the event that the City believes that
20 Franchisee has not complied with the terms of this Franchise, the City shall notify
21 Franchisee in writing, by certified mail, of the nature of the alleged noncompliance.
22

23 B. Franchisee's Right to Cure or Respond. Except as provided in
24 Section 4.3.D, Franchisee shall have 30 days from the receipt of notice described
25 above to (a) respond to the City contesting the assertion of noncompliance, or
26 (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 Franchisee did not timely cure, or initiate steps to cure the default in a timely
16 manner satisfactory to the City, after the notice required by Section 4.3.A was
17 provided, then the City may draw upon any performance bond, security fund, or
18 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.
24
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1 E. Liquidated Damage Amounts. Because any material failure to
2 comply with the provisions of this Franchise by Franchisee will result in injury to the
3 City, and because it may be difficult to estimate the extent of each such injury,
4 Franchisee and the City agree to the following liquidated damages, which
5 provisions represent the best estimate of the damages resulting from injuries of
6 specific types. The amounts of the liquidated damages set forth in this Franchise
7 are in 2017 dollars and shall be increased each year by the increase in the
8 U. S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for
9 Pacific Cities and U. S. City Average for the greater Seattle area. The amount of
10 liquidated damages for all material violations of this Franchise for which actual
11 damages may not be ascertainable shall be: \$500 per day for each violation, for
12 each day the violation continues. It is provided, however, that the City shall allow
13 Franchisee a minimum of 30 days after notice to Franchisee of such neglect,
14 failure, or refusal to comply within which to meet compliance or correct
15 performance, prior to the assessment of any liquidated damages.
16
17

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. 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 Franchisee's



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

12 4.6 Alternative Remedies. No provision of this Franchise shall be deemed
13 to bar the right of the City or Franchisee to seek or obtain judicial relief from a
14 violation of any provision of this Ordinance or any rule, regulation, requirement or
15 directive promulgated thereunder. Neither the existence of other remedies
16 identified in this Franchise nor the exercise thereof shall be deemed to bar or
17 otherwise limit the right of the City or Franchisee to recover monetary damages for
18 such violation by Franchisee, or to seek and obtain judicial enforcement of
19 Franchisee's or City's obligations by means of specific performance, injunctive
20 relief or mandate, or any other judicial remedy at law or in equity.
21
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23 4.7 Compliance with the Laws. Franchisee shall comply with all applicable
24 federal and state laws and regulations, including regulations of any administrative
25 agency thereof, as well as all applicable City ordinances, resolutions, rules,
26 policies, and regulations heretofore or hereafter adopted or established during the



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

7 Section 5. Reporting Requirements.

8 5.1 Quarterly Reports. Within 30 days after the end of each of Franchisee's
9 fiscal quarters, Franchisee shall submit a written report to the City which shall
10 contain a listing of all categories of Gross Receipts collected by Franchisee for its
11 business activities as identified in Section 2.1, which are activities specifically
12 taxable as a telephone business under TMC Title 6. Said written report shall be in
13 sufficient detail and with sufficient explanation to enable the City to understand the
14 report and to verify the accuracy of the report. In addition, Franchisee shall
15 provide such other reports as may be required by Title 16B.

16
17
18 5.2 Annual Reports. In the event that changes in applicable laws allow the
19 City to require a franchise fee as referenced at section 6 below, then no later than
20 120 days following the end of Franchisee's fiscal year each year after the
21 imposition of franchise fees, Franchisee shall present a written report to the City
22 which shall include:

23
24 A. Audited financial statements for (1) Franchisee and (2) any
25 affiliate which is involved in any way with the operation or ownership of the
26 System; and a financial statement for Franchisee that includes Gross Receipts



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 Receipts for
10 the calculation of fees or taxes to be paid to the City, as well as:
11

12 (1) A summary of the previous year's activities for the
13 Franchise Area, including, but not limited to, the total number of Customers, miles
14 of Facilities, any services added or dropped, and any technological changes
15 occurring in the system;

16 (2) Plans for the future; and

17 (3) Such other information as is required by Title 16B.

18
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
24 provisions of this Franchise, or to permit the performance of any of the rights,
25 functions, or duties of the City in connection with the Franchise.
26



1 5.4 Preservation of Confidential Information. Trade secrets and confidential
2 information designated as such by Franchisee shall be subject to such protection
3 as provided in Title 16B or under chapter 42.56 RCW, or as otherwise provided by
4 applicable laws. Franchisee shall be responsible for clearly and conspicuously
5 identifying the work as confidential or proprietary, and shall provide a brief written
6 explanation regarding its position on the protected status of the information under
7 state or federal law. In the event that the City receives a public records request
8 under chapter 42.56 RCW or similar law for the disclosure of information
9 Franchisee has designated as confidential, trade secret, or proprietary, the City
10 shall promptly provide notice of such disclosure so that Franchisee can take
11 appropriate steps to protect its interests. Nothing in this section prohibits the City
12 from complying with chapter 42.56 RCW, or any other applicable law or court order
13 requiring the release of public records, and the City shall not be liable to
14 Franchisee for compliance with any law or court order requiring the release of
15 public records. The City shall comply with any injunction or court order obtained by
16 Franchisee which prohibits the disclosure of any such confidential records.
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19 Section 6. Compensation and Financial Provisions.

20 6.1 Fees; Taxes.

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

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

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

13 C. Franchisee Obligated to Pay Administrative Costs. In accord with

14 RCW 35.21.860 as presently effective, and as it may be later amended,
15 Franchisee must pay the City an amount sufficient to recover administration
16 expenses incurred in receiving and approving this Franchise, including, but not
17 limited to, the reasonable costs of outside consultants retained by the City to assist
18 in the City's consideration and processing of this Franchise application. The first
19 \$5,000 of said expenses will be covered by the \$5,000 application fee deposited
20 with the City. To the extent allowed by RCW 35.21.860 or other applicable laws,
21 Franchisee may be required to pay other costs applicable to this Franchise and
22 Franchisee's activities hereunder. The amount of payment to be made by
23 Franchisee to cover these administrative costs shall be determined by the
24 Franchise Services Manager in conformance with applicable laws. Such obligation
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1 further includes municipal fees related to receiving and approving permits or
2 licenses, inspecting plans and construction, or relating to the preparation of a
3 detailed statement pursuant to Chapter 43.21C RCW. Said fees must be paid
4 within 30 days of receipt of the City's billing therefor.

5 D. Manner of Payment; Audit. Franchisee will pay the City
6 Telephone Business Tax specified in Section 6.1.B on a monthly basis
7 accompanied by Franchisee's standard remittance form which specifies the net
8 taxable charges, the local tax rate, and the local tax due, plus penalties and/or
9 interest, if any is due. Franchisee shall make all other required fee payments in
10 the form, at the intervals, and in the manner requested by the City Treasurer, and
11 furnish him/her any information related to his/her revenue collection functions
12 reasonably requested. In case of audit, the City Treasurer may require Franchisee
13 to furnish a verified statement of compliance with Franchisee's obligations or in
14 response to any questions. Said certificate may be required from an independent,
15 certified public accountant, at Franchisee's expense. All audits will take place on
16 Franchisee's premises or offices furnished by Franchisee, which shall be a location
17 within the City of Tacoma or other mutually agreeable place; however, Franchisee
18 must agree to pay the associated costs of travel. Franchisee agrees, within
19 30 days of written request of the City Treasurer, to provide, to the person and
20 address specified in the City Treasurer's request, copies of all documents filed with
21 any federal, state, or local regulatory agency, to be mailed to the City Treasurer on
22 the same day as filed, postage prepaid, affecting any of Franchisee's Facilities or
23 business operations in the City of Tacoma.
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1 E. No Other Deductions. No deductions, including current or
2 previously paid fees, shall be subtracted from the Gross Receipts amount except
3 as allowed under state or federal law, upon which payments are calculated and
4 due for any period, nor shall copyright fees or other license fees paid by
5 Franchisee be subtracted from Gross Receipts for purposes of calculating
6 payments.

7 F. Late Payments. Any fees owing which remain unpaid more than
8 10 business days after the dates specified herein shall be delinquent and shall
9 thereafter accrue interest at the maximum allowable rate pursuant to
10 RCW 19.52.020.

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

20 6.2 Auditing and Financial Records. Franchisee shall manage all of its
21 operations in the City of Tacoma in accordance with a policy of keeping books and
22 records open and accessible to the City. Without limiting its obligations under this
23 Franchise, Franchisee agrees that it will collect and make books and records for
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operations in the City of Tacoma available for inspection and non-confidential books and records for operations in the City of Tacoma for copying by the City in accordance with Title 16B. Franchisee shall be responsible for collecting the information and producing it. Books and records shall be made available for inspection 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 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 reasonably 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, or causing to be provided, appropriate Subscriber privacy notices. Nothing in this section shall be read to require Franchisee to violate 47 U.S.C. §§ 222 or 551 or to disclose or make available to the City any books and records protected from disclosure under other applicable law. Franchisee shall be responsible for redacting any data that federal law prevents it from providing to the City; provided, that the City shall promptly return or destroy upon Franchisee's written request any data prohibited by federal law to be provided to the City and erroneously provided 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



1 compliance with the requirements of this Franchise, and shall produce those
2 records within 30 days of a City request.

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

7 The City agrees to request access to only those books and records, in
8 exercising its rights under this section, which it deems reasonably necessary as
9 part of a bona fide exercise of its authority over the Telecommunications System
10 under this Franchise, Title 16B, or other applicable law. The City further agrees
11 that it will withhold from public disclosure those books and records made available
12 to it pursuant to this Section 6.2, but only to the extent that the City believes that it
13 has the discretion to do so under state law. The City will, however provide notice
14 to Franchisee of any request for such books and records so that Franchisee can
15 engage whatever protective measures are available to it.
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18 6.3 Performance Bond. At the same time it provides its Franchise
19 acceptance to the City, Franchisee shall provide a performance bond to ensure the
20 faithful performance of its responsibilities under this Franchise and applicable law,
21 including, by way of example and not limitation, its obligations to relocate and
22 remove its facilities, and to restore City Rights-of-Way and other property. The
23 initial amount of the performance bond shall be \$250,000. The amount of the bond
24 may be changed from time to time to reflect changed risks to the City or to the
25 public. Franchisee may be required to obtain additional bonds in accordance with
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1 the City's ordinary practices and/or pursuant to applicable TMC provisions. The
2 bond shall be in a form and with a surety (authorized to do business in the state of
3 Washington) reasonably acceptable to the City's Risk Manager and in a form
4 reasonably acceptable to the City Attorney. Franchisee shall pay all premiums or
5 costs associated with maintaining the bond, and shall keep the same in full force
6 and effect at all times during the Franchise Term.

7 6.4 Indemnification by Franchisee.

8 A. Franchisee, by accepting this Franchise, agrees to release the
9 City from and against any and all liability and responsibility in or arising out of, or
10 by reason of, or resulting from or of the negligent acts, errors, or omissions of
11 Franchisee during the construction, operation, or maintenance of the
12 Telecommunications System, and, without limiting the provisions of Section 7.4,
13 agrees not to sue or seek any money or damages from City, except to the extent
14 Franchisee's Telecommunication System is damaged by the negligent acts or
15 omissions or willful misconduct of the City or its agents.
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18 B. Franchisee agrees to indemnify and hold harmless the City, its
19 trustees, elected and appointed officers, agents, and employees, from and against
20 any and all claims, demands, or causes of action of whatever kind or nature, and
21 the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities,
22 damages, orders, judgments, or decrees, sustained by any third party arising out
23 of, or by reason of, or resulting from or of the acts, errors, or omissions of
24 Franchisee or its agents, independent contractors, or employees related to or in
25 any way arising out of the construction, operation, maintenance, or relocation of
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1 the Telecommunications System, Franchisee waives immunity under Title 51 RCW
2 and affirms that the City and Franchisee have specifically negotiated this provision,
3 as required by RCW 4.24.115, to the extent it may apply.

4 C. Franchisee agrees that the covenants and representations
5 relating to the indemnity provided in Sections A and B above shall survive the
6 term/expiration/termination of this Franchise and continue in full force and effect as
7 to Franchisee's responsibility to indemnify, subject to the applicable statute of
8 limitations.

9
10 6.5 Franchisee Insurance.

11 A. Franchisee shall maintain, throughout the term of the Franchise,
12 adequate insurance, in Franchisee's reasonable judgment, to protect the City, its
13 trustees, elected and appointed officers, agents, and employees against claims
14 and damages that may arise as a result of the construction, operation, or
15 maintenance of the Telecommunications System. The City makes no
16 representation as to what constitutes adequate insurance for Franchisee's
17 operations. The foregoing notwithstanding, Franchisee must maintain at least the
18 minimum insurance coverages and amounts set forth in TMC 16B.05.090.

19
20 B. The required insurance must be obtained and maintained for the
21 entire period Franchisee has facilities in the Public Rights-of-Way, and for six years
22 thereafter. If Franchisee, its contractors, or subcontractors do not have the
23 required insurance, the City may order such entities to stop operations until the
24 insurance is obtained and approved.
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C. Certificates of insurance, reflecting evidence of the required insurance and naming the City as an additional insured with all required endorsements on the Commercial General Liability and Automotive policies/coverages hereby required, 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 Section E below.

D. 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-VII" 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, Franchisee shall furnish, at least 30 days prior to the expiration of the date of such insurance, a renewed certificate of insurance as proof that equal and like coverage has been or will be obtained prior to any such lapse or termination during the balance of the period of the Franchise.

F. The City reserves the right to require any other insurance coverage it deems necessary during the term of the Franchise, depending upon the exposures; provided that such requirement(s) conforms with TMC 16B.

G. It is Franchisee's responsibility to ensure that each subcontractor obtains and maintains adequate liability insurance coverage, and upon request of the City, Franchisee shall provide evidence of such insurance.



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

Section 7. Miscellaneous Provisions.

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

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

7.3 Governing Law and Venue. The Franchise shall be governed by and construed in accordance with the laws of the state of Washington without recourse



1 to any principles of Conflicts of Laws, except that where federal law preemptively
2 applies, it shall control. Any litigation between the City and Franchisee arising
3 under or regarding this Franchise shall occur, if in the state courts, in the Superior
4 Court of Pierce County, and if in the federal courts, in the United States District
5 Court for the Western District of Washington.

6 7.4 No Recourse. Without limiting such immunities as the City or other
7 Persons may have under applicable law, Franchisee shall have no monetary
8 recourse whatsoever against the City or its officials, boards, commissions, agents,
9 or employees for any loss, costs, expense, or damage arising out of any provision
10 or requirement of Title 16B or because of the enforcement of Title 16B or the City's
11 exercise of its authority pursuant to Title 16B, this Franchise, or other applicable law,
12 except to the extent Franchisee's Telecommunication System is damaged by the
13 negligent acts or omissions or willful misconduct of the City or its representatives.

14 7.5 Notice. Unless expressly otherwise agreed between the parties, every
15 notice, billing, or response required by this Franchise to be served upon the City or
16 Franchisee shall be in writing, and shall be deemed to have been duly given to the
17 required recipient upon actual receipt or refusal of delivery and shall be sent by a
18 nationally recognized overnight courier or by U.S. certified mail, return receipt
19 requested, postage prepaid. The notices or responses to the City shall be
20 addressed as follows:
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23
24 City of Tacoma
25 Municipal Services Building
26 1224 MLK Jr Way
Tacoma, WA 98405
Attn: Franchise Services Manager



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

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ExteNet Systems, Inc.
Attn: CFO
3030 Warrenville Road, Suite 340
Lisle, Illinois 60532

with copies to "General Counsel" at the same address.

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.

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 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 the security fund deposit and performance bond.



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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



ACCEPTANCE OF CITY FRANCHISE

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Ordinance No. _____, effective _____, 2017.

I, _____, am the _____ of ExteNet Systems, Inc., a Delaware corporation, and am the authorized representative to accept the above-referenced City franchise ordinance on behalf of ExteNet Systems, Inc.

I certify that this franchise and all terms and conditions thereof are accepted by ExteNet Systems, Inc.

DATED this ____ day of _____, 2016.

EXTENET SYSTEMS, INC.

By _____

Its _____