



## ORDINANCE NO. 28375

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

11 WHEREAS Mashell Telecom, Inc., a Washington corporation, d/b/a Rainier  
12 Connect (“Rainier Connect” or “Franchisee”) is a telecommunications company  
13 currently involved in the business of operating a telecommunications network  
14 utilizing fiber optic technology, and

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

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

20 WHEREAS the City Council has determined to grant such a franchise to  
21 Rainier Connect upon those certain terms and conditions which the City Council  
22 deems necessary due to the unique nature of fiber optic cable as set forth herein,  
23 and

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



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Now; Therefore,



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, 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 Tacoma Municipal Code ("City Code") 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 Intentionally omitted.

1.4 "Communications system" refers to a telecommunications system.

1.5 "Construction, operation, or maintenance" and similar formulations of this term 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.



1 1.6 "Customer" means any Person or entity who legally receives within the  
2 corporate limits of the City any one or more of the services provided by the  
3 Telecommunications System.

4 1.7 "Facilities" or "Installations" are and refer to and include, but are not  
5 limited to, plant, systems, improvements, and equipment owned, leased, or  
6 otherwise used by Franchisee, such as poles, fiber, wires, fixtures, equipment,  
7 underground circuits, and conduit in Public Rights-of-Way and other property  
8 necessary or convenient for the transmission and distribution of communications  
9 service where such facilities are located. "Facilities" or "Installations," when used  
10 without a modifier, shall be considered to encompass both Overhead  
11 Facilities/Installations and Underground Facilities/Installations.

12 1.8 "Franchise" means the rights granted by this Franchise and conditioned  
13 as set forth herein, and under the Tacoma Municipal Code and the City Charter.

14 1.9 "Franchise Area" means that area within the present and future  
15 corporate limits of Tacoma.

16 1.10 "Franchisee" is Mashell Telecom, Inc., a Washington corporation,  
17 d/b/a Rainier Connect, with its home office at 2516 Holgate Street, Tacoma, WA  
18 98402.

19 1.11 "Gross Receipts," for purposes of this Franchise, means any and all  
20 receipts or income received directly or indirectly by Franchisee, which is derived  
21 from the operation of its System in the City, less uncollectibles. Gross Receipts  
22 shall include, by way of example and not limitation, revenues from its  
23 Telecommunications Service, all fees, late fees, installation and connection fees,  
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1 upgrade and downgrade fees, and rental fees. The term Gross Receipts shall not  
2 include any taxes on Services furnished by Franchisee imposed by any  
3 municipality, state, or other governmental unit and collected by Franchisee for such  
4 governmental unit, nor shall the term include any wholesale services provided by  
5 Franchisee upon which fees or taxes have already been levied within the City of  
6 Tacoma.

7 1.12 "Operator" when used with reference to a system, refers to a Person  
8 (a) who provides service over a Communications System and directly or through  
9 one or more affiliates owns a significant interest in such facility; or (b) who  
10 otherwise controls or is responsible for, through any arrangement, the  
11 management and operation of such a facility. A Person that operates under  
12 agreement of a Telecommunications System or a specific portion of a  
13 Telecommunications System to provide Telecommunications Services shall be  
14 treated as an Operator for purposes of this Franchise.  
15

16 1.13 "Overhead Facilities" refers to electric utility and Communications  
17 Facilities located above the surface of the ground, including the underground  
18 supports and foundations for such Facilities.  
19

20 1.14 "Person" includes any individual corporation, partnership, association,  
21 joint stock company, trust, or any other legal entity, but not the City for purposes  
22 hereof.  
23

24 1.15 "Public Rights-of-Way" mean the public streets and easements over  
25 which, under the City Charter, the Tacoma Municipal Code, City ordinances, and  
26 applicable laws, the City has authority to grant Franchises, permits, or Licenses for



1 use thereof or has regulatory authority there over, but expressly excluding railroad  
2 rights-of-way/crossings, airport, and harbor areas. Public Rights-of-Way, for the  
3 purpose of this Franchise, also do not include buildings, parks, poles, conduits, or  
4 similar facilities or property owned by or leased to the City, including, by way of  
5 example and not limitation, structures in the Public Rights-of-Way such as utility  
6 poles and light poles.

7 1.16 "System" means the Telecommunications System.

8 1.17 "Telecommunications Service" or "Service" means the transmission for  
9 hire of information in electronic or optical form, including, but not limited to, voice,  
10 video, or data, whether or not the transmission medium is owned by the provider  
11 itself. Telecommunications Service includes telephone service but does not  
12 include cable TV or commercial video service or over-the-air broadcasts to the  
13 public-at-large from facilities licensed by the Federal Communications Commission  
14 or any successor thereto.  
15

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

1 Telecommunications System to the extent that it provides only Cable Service.

2 The term Telecommunications System includes any of the tangible components of  
3 a Telecommunications System which occupies Public Rights-of-Way.  
4

5 1.19. "Telephone Service" means the provision of access to a local  
6 telephone network, local telephone network switching service, intrastate toll  
7 service, or coin telephone service, or providing telephonic, video, data, or similar  
8 communication or transmission for hire via a local telephone network, toll line,  
9 channel, cable, microwave, or similar communication or transmission system by  
10 any person. Telephone Service includes intrastate or interstate service, including  
11 toll service, originating from, or received on, communications equipment or  
12 apparatus in this state if the charge for the service is billed to a person in this state.  
13 Telephone Service does not include the providing of Competitive telephone service  
14 as defined in Tacoma Municipal Code § 6A.40.030, the providing of cable  
15 television service, or the providing of broadcast services by radio or television  
16 stations.  
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19 1.20 "Title," when used alone in the context of referring to this Title of the  
20 Tacoma Municipal Code, shall mean Title 16 (and more specifically Title 16B) of  
21 the Tacoma Municipal Code.  
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23 1.21 "Underground Facilities" refers to electric utility and Communications  
24 Facilities located under the surface of the ground, excluding the underground  
25 foundations or supports for Overhead Facilities.  
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Section 2. Franchise.

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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 construct, maintain, and operate a fiber optic Telecommunication System to provide Telecommunication Service and internet access service, and to use the City's Public Rights-of-Way as authorized herein.

Such grant is subject to and must be exercised in strict accordance with and subject to this Franchise Agreement, Title 16B, and other applicable provisions of the Tacoma Municipal Code, and the Tacoma City Charter, including, but not limited to, the provisions set forth in Article VIII of the Charter, and this Franchise may be revoked under Section 2.5 if it is not so exercised. The exercise of any rights pursuant to this Franchise is subject to the exercise of the City's police powers, and other regulatory powers as the City may have or obtain in the future, and all rights granted herein must be exercised in strict accordance with applicable laws, including, by way of example and not limitation, zoning codes and permitting requirements. No rights shall pass to Franchisee by implication. This Franchise shall constitute both a right and an obligation to provide the services of the Telecommunications System as required by the provisions of this Franchise.

The grant of this Franchise is limited to the purpose of Franchisee providing Telecommunications Service and internet access service. This Franchise does not include permission to provide cable service, as defined in 47 U.S.C. § 522,



1 multichannel video programming, open video systems, or uses other than  
2 Telecommunications Service.

3 Notwithstanding the above grant to use Public Rights-of-Way, no Public  
4 Rights-of-Way shall be used by Franchisee if the City, in its opinion, determines  
5 that such use is inconsistent with the terms, conditions, or provisions by which  
6 such Public Right-of-Way was created or dedicated, or presently used under  
7 applicable laws.

8 In the event of any conflict between a provision in this Franchise and any  
9 provision of the City Charter, which Charter is incorporated herein by reference,  
10 the applicable provision of the Charter shall control over any inconsistent provision  
11 of this Franchise.

12  
13 2.2 Franchise Term. The term of the Franchise shall be ten years unless  
14 terminated sooner in accordance with this Franchise, Title 16B, or the City Charter.  
15 At the expiration of the term, Franchisee may apply to extend or renew the  
16 Franchise as provided in Title 16B.02.100.

17  
18 2.3 Franchise Non-Exclusive. The Franchise granted herein shall be non-  
19 exclusive.

20 2.4 Transfers, Generally.

21  
22 A. Any transfer of this Franchise, as the term "Transfer" is defined in  
23 Title 16B.01.030.Y, shall be accomplished in accordance with Title 16B.02.120.  
24 Any Transfer not made in accordance with Title 16B.02.120 may be considered a  
25 substantial violation of this Franchise by the City and may subject the Franchise to  
26 termination proceedings by the City as provided 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 Tacoma Municipal Code.

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 sale, lease, contractual agreement, mortgage, assignment, or 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. 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 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 declare a



1 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.  
17

18           E. The procedures for revocation and forfeiture shall be governed by  
19 Title 16B.05.100. Before the Franchise is revoked, Franchisee shall be given  
20 notice and opportunity to cure at least equivalent to that required by Title 16B as of  
21 the effective date of this Franchise (except in those cases where notice and  
22 opportunity to cure are not required or would be futile), and shall be accorded at  
23 least an opportunity to be heard that provides at least the due process protections  
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1 required by Title 16B as of the effective date of this Franchise, which opportunities  
2 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 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 45 days of Franchisee's acceptance of this  
19 Franchise; (b) stops providing all Service it is required to provide under the  
20 Franchise; (c) Transfers without the prior consent of the City as and when required  
21 in the Franchise; or (d) is found by a court or regulatory body with appropriate  
22 jurisdiction to have defrauded or attempted to defraud the City or Franchisee's  
23 customers within the City. Notwithstanding the provisions of Title 16B.05.100C.2,  
24 if Franchisee fails to timely pay any undisputed Franchise  
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1 application/administrative fees or other fees owed hereunder or under Title 16B,  
2 before the City can initiate any termination or forfeiture of rights, Franchisee shall  
3 be provided with ten (10) business days' prior written notice and an opportunity to  
4 cure the failure to pay. However, Franchisee shall have the right to receive  
5 30 days' prior notice of an intent to declare a Franchise forfeited, and shall have  
6 the opportunity to show cause why the Franchise should not be forfeited.

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

4 2.6 Continuity of Service and Right to Purchase the System.

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

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

13  
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.  
18

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 the City  
5 itself or its inhabitants, all of the property of the grantee within the  
6 public streets, alleys, or places at a fair and just value, which shall  
7 not include any valuation of the franchise, right, or privilege, which  
8 shall thereupon be terminated."

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

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

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

20 2.7 Right to Require Removal of Property/Right to Remove Property.

21 A. Upon termination of this Franchise, Franchisee may be required  
22 to remove its property from any Public Rights-of-Way, and restore such  
23 Rights-of-Way to the condition required by the City Code and City's Right-of-Way  
24 Restoration Policy, subject to any rights Franchisee may have to abandon property  
25 in place, as set out in Title 16B. If Franchisee fails to remove property that the City  
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1 requires it to remove, the City may perform the work and collect the actual cost  
2 thereof from Franchisee. The actual cost thereof, including direct and indirect  
3 administrative costs, shall be a lien upon all plant and property of Franchisee  
4 effective upon filing of the lien with the Pierce County Auditor. In the event that  
5 Franchisee is permitted to abandon its Facilities in place, the City acknowledges  
6 that any ownership it takes in the Facilities thereafter is taken on an AS-IS,  
7 WHERE-IS basis.

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

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

19           D. Franchisee shall file a written removal plan with the City not later  
20 than 30 calendar days following the date of the receipt of any orders directing  
21 removal, or any consent to removal describing the work that will be performed, the  
22 manner in which it will be performed, and a schedule for removal by location. The  
23 removal plan shall be subject to approval and regulation by the City, including,  
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1 without limitation, the City's Right-of-Way Restoration Policy. The affected  
2 property must be restored in compliance with City's Right-of-Way Restoration  
3 Policy; and any damage caused by Franchisee's removal must be  
4 addressed/compensated to the reasonable satisfaction of the City.

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

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

24 2.9 Responsibility for Costs. Except as expressly provided otherwise, any  
25 act that Franchisee is required to perform under this Franchise shall be performed  
26 at its cost. If Franchisee fails to perform work that it is required to perform within



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

6 2.10 Work of Contractors and Subcontractors. Work by contractors and  
7 subcontractors is subject to the same restrictions, limitations, and conditions as if  
8 the work were performed by Franchisee. Franchisee shall be responsible for all  
9 work performed by its contractors and subcontractors, and others performing work  
10 on its behalf as if the work were performed by it and shall ensure that all such work  
11 is performed in compliance with this Franchise and Title 16B, and other applicable  
12 laws, including, without limitation, the City's Right-of-Way Restoration Policy. A  
13 copy of the presently effective policy has been provided to Franchisee, and the  
14 City agrees to provide a current copy of the policy upon subsequent request from  
15 Franchisee. Franchisee and its contractors and subcontractors shall be jointly and  
16 severally liable for all damages and correcting all damages caused by them. It is  
17 Franchisee's responsibility to ensure that contractors, subcontractor, or other  
18 Person(s) performing work on Franchisee's behalf are familiar with the  
19 requirements of this Franchise, Title 16B, the City's Right-of-Way Restoration  
20 Policy, and other applicable laws governing the work performed by them.  
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24 2.11 Survival of Terms. Upon the termination or forfeiture of the Franchise,  
25 Franchisee shall no longer have the right to occupy the Public Rights-of-Way for  
26 the purpose of providing Telecommunications Service. However, Franchisee's



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

### 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 and internet access 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 Maintenance. 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



1 maintenance of the Telecommunications System, including, without limitation, the  
2 City's Right-of-Way Restoration Policy.

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

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

17 Collectively, such matters are referred to below as the "public work."  
18

19 2. In the event of an emergency, or where the  
20 Telecommunications System creates or is contributing to an imminent danger to  
21 health, safety, or property, the City may protect, support, temporarily disconnect,  
22 remove, or relocate any or all parts of the Telecommunications System without  
23 prior notice, and charge Franchisee for actual costs incurred.  
24

25 3. In the case of non-public work, if any Person that is  
26 authorized to place Facilities in the Rights-of-Way requests Franchisee to protect,



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

13 4. Franchisee shall, on the request of any Person holding a  
14 valid permit issued by a governmental authority, temporarily raise or lower its wires  
15 to permit the moving of buildings or other objects. The expense of such temporary  
16 removal or raising or lowering of wires shall be paid by the Person requesting the  
17 same.  
18

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

14 C. Franchisee’s construction, operation, or maintenance of its  
15 Telecommunications System shall not commence until all required permits have  
16 been properly filed for and obtained from the proper City officials and all required  
17 permits and associated fees paid. In any permit so issued, the City may impose,  
18 as a condition of the granting of the permit, such conditions and regulations as may  
19 be necessary to the management of the Public Rights-of-Way, including, by way of  
20 example and not limitation, for the purpose of protecting any structures in the  
21 Public Rights-of-Way, maintaining proper distance from other utilities, for the  
22 proper restoration of such Public Rights-of-Way and structures, and for the  
23 protection of the City and the public and the continuity of pedestrian and vehicular  
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1 traffic, which conditions shall not be more onerous than those imposed on other  
2 entities in the same portion of the Public Rights-of-Way.

3 D. Franchisee must follow City-established requirements for  
4 placement of Facilities in Public Rights-of-Way, including the specific location of  
5 Facilities in the Public Rights-of-Way, and must in any event install Facilities in a  
6 manner that minimizes interference with the use of the Public Rights-of-Way by  
7 others, including others that may be installing Communications Facilities. The City  
8 may require that Facilities be installed at a particular time, at a specific place, or in  
9 a particular manner as a condition of access to a particular Public Right-of-Way  
10 area; may deny access if Franchisee is not willing to comply with the City's  
11 requirements; and may remove, or require removal of, any Facility that is not  
12 installed in compliance with the requirements established by the City, or which is  
13 installed without prior City approval of the time, place, or manner of installation and  
14 charge Franchisee for all the costs associated with removal; and may require  
15 Franchisee to cooperate with others to minimize adverse impacts on the Public  
16 Rights-of-Way through joint trenching and other arrangements consistent with  
17 requirements the City imposes on other similarly situated franchisees or users of  
18 the Public Rights-of-Way.

19 E. Franchisee agrees that, as a condition of a permit for installation  
20 of conduit, the City may require it to install conduit in excess of its reasonably  
21 foreseeable requirements for the purpose of accommodating the City where the  
22 City Manager determines it is appropriate to do so to minimize disruption of public  
23 passage or infrastructure, to forestall or relieve exhaustion of Right-of-Way  
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1 capacity, or to protect environmentally sensitive areas; provided that the City will  
2 be responsible for the additional costs, including material and labor, associated  
3 with installing such excess conduit if installed for City use; and provided further that  
4 City's use of any such excess conduit is limited to non-commercial, governmental  
5 uses.

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

9 G. Whenever all existing utilities are located underground in an area  
10 in the City, Franchisee, at its own cost, must also locate its Telecommunication  
11 System underground, including Telecommunication System Facilities, such as  
12 drops, which cross private property.

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

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

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

7 H. Franchisee shall participate in conversion to underground Local  
8 Improvement Districts ("LIDs") at the same time as other utilities are required to  
9 participate in conversion to underground LIDs. Franchisee, at no cost to the City  
10 or abutting property owners, shall share fairly with other utilities the cost of  
11 undergrounding when done through the LID process. As part of its obligations  
12 under the Tacoma Municipal Code, Franchisee shall provide the preliminary cost  
13 estimate, facility conversion designs, and final cost estimates to any LID project  
14 coordinator in a timely manner. At the request of an LID project coordinator,  
15 Franchisee shall perform underground construction and movement of Customer  
16 connections underground (overhead reclaim), in coordination with the  
17 undergrounding services provided by other LID utilities, at no cost to the City or  
18 abutting property owners.

19 I. Franchisee shall promptly repair any and all Public Rights-of-Way,  
20 public property, or private property that is disturbed or damaged during the  
21 construction, operation, or maintenance of its Telecommunications System. Public  
22 property and Public Rights-of-Way must be restored in conformance with the City's  
23 Right-of-Way Restoration Policy.  
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1 J. No tree trimming shall be performed without the permission of the  
2 City and other affected authorities, and any tree trimming must be performed in  
3 strict accordance with the City Code. Even if tree trimming is authorized by the  
4 City, Franchisee is liable for any damage it causes during the course of tree  
5 trimming.

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

9 L. Franchisee shall not remove any Facilities except as hereinafter  
10 provided.

11  
12 1. Franchisee shall not remove any Facilities which require  
13 trenching or other opening of the Rights-of-Way along the extension of the  
14 Facilities to be removed without the express permission of the City, which  
15 permission shall not be unreasonably withheld, conditioned or delayed.  
16 Franchisee must request permission from the City to remove the Facilities at least  
17 30 days in advance of the date Franchisee proposes to begin removal.

18  
19 2. Franchisee shall remove such Facilities as the City orders it  
20 to remove; provided, that the City may not order removal where such removal is  
21 primarily to give economic benefit or advantage to a competing provider of  
22 Telecommunications Service.

23  
24 3. Where trenching or other opening of the Rights-of-Way  
25 along the extension of Facilities to be removed is required, Franchisee must post  
26 bonds as the City may require ensuring that the property is promptly removed, with



1 minimum disruption. Franchisee must restore the affected property in  
2 conformance with the City's Right-of-Way Restoration Policy; and Franchisee must  
3 compensate those whose property it damages for the damage.

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

8 3.3 Right to Inspect and Order Corrections. The City may inspect the  
9 Telecommunications System at any time reasonable under the circumstances to  
10 ensure compliance with this Franchise and applicable law, including to ensure that  
11 Franchisee's Telecommunications System is constructed and maintained in a safe  
12 condition. If Franchisee's representatives are not on-site performing work on the  
13 Telecommunications System, whenever feasible, the City shall give reasonable  
14 advance notice of its intent to inspect so that Franchisee may have a  
15 representative present during the inspection. If an unsafe condition is found to  
16 exist, the City, in addition to taking any other action permitted under applicable law,  
17 may order Franchisee, in writing, to make the necessary repairs and alterations  
18 specified therein forthwith to correct the unsafe condition on a time table  
19 established by the City which is reasonable in light of the unsafe condition. The  
20 City has the right to correct, inspect, administer, and repair the unsafe condition if  
21 Franchisee fails to do so in a timely manner, and to charge Franchisee therefor.  
22

23 3.4 Information Regarding Ongoing Work. In addition to providing notice to  
24 the public of ongoing work as may be required under applicable law, Franchisee  
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1 shall make available information regarding any ongoing construction, operation or  
2 installation of its Telecommunications System sufficient to show (1) the nature of  
3 the work being performed; (2) where it is performed; (3) its estimated completion  
4 date; and (4) progress to completion.

5 Section 4. Regulatory Provisions.

6 4.1 Intent. The City shall have the right to administer and regulate activities  
7 of this Franchise up to the fullest extent of the law. The failure to reserve a  
8 particular right to regulate, or reference a particular regulation, shall not be  
9 interpreted by negative implication or otherwise to prevent the application of a  
10 regulation to Franchisee.  
11

12 4.2 Remedies for Franchise Violations. The City has the right to exercise  
13 any and all of the following remedies, singly or in combination, in the event  
14 Franchisee violates any provision of this Franchise:

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

23 C. Commencing an action for equitable or other relief;

24 D. Declaring the Franchise to be revoked; and/or  
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1 E. Seeking specific performance of any provision, which reasonably  
2 lends itself to such remedy.

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

9 4.3 Procedure for Remediating Franchise Violations. Before imposing  
10 liquidated damages, or drawing upon the performance bond, or any other security  
11 set out in Section 6, the City shall follow the procedure below.

12 A. Notice of Violation. In the event that the City believes that  
13 Franchisee has not complied with the terms of this Franchise, the City shall notify  
14 Franchisee in writing, by certified mail, of the nature of the alleged noncompliance.  
15

16 B. Franchisee's Right to Cure or Respond. Except as provided in  
17 Section 4.3.D, Franchisee shall have 30 days from the receipt of notice described  
18 above to (a) respond to the City contesting the assertion of noncompliance, or  
19 (b) to cure such default or, in the event that by the nature of the default such  
20 default cannot be cured within the 30-day period, initiate steps to remedy such  
21 default as promptly as possible and complete the cure within a reasonable time.  
22 The duty to cure includes the duty to cure all harms caused by the acts or  
23 omissions of Franchisee which gave rise to the alleged non-compliance. At the  
24 end of the 30-day period, Franchisee shall notify the City, in writing, of the steps it  
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1 has taken to cure the default, if any; if the cure is not complete, the reason it is not  
2 complete and the projected date for completion; and if the default is disputed, the  
3 complete basis for that contention.

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

8 D. Action after Hearing. If the City determines after such hearing  
9 that Franchisee did not timely cure, or initiate steps to cure the default in a timely  
10 manner satisfactory to the City, after the notice required by Section 4.3.A was  
11 provided, then the City may draw upon any performance bond, security fund or  
12 other security, including requiring performance under the guarantee; and impose  
13 liquidated damages. However, notice and opportunity to cure are not required for  
14 repeat violations, or for a failure to correct a default where Franchisee knew or  
15 should have known it was in default; in such cases, the performance bond, letter of  
16 credit, or other security may be drawn upon, the guarantor required to perform and  
17 liquidated damages imposed after the hearing required by Section 4.3.C.

18 E. Liquidated Damage Amounts. Because any material failure to  
19 comply with the provisions of this Franchise by Franchisee will result in injury to the  
20 City, and because it may be difficult to estimate the extent of each such injury,  
21 Franchisee and the City agree to the following liquidated damages, which  
22 provisions represent the best estimate of the damages resulting from injuries of  
23 specific types. The amounts of the liquidated damages set forth in this Franchise  
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are in 2016 dollars and shall be increased each year by the increase in the  
1 U. S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for  
2 Pacific Cities and U. S. City Average for the greater Seattle area. The amount of  
3 liquidated damages for all material violations of this Franchise for which actual  
4 damages may not be ascertainable shall be: \$500 per day for each violation for  
5 each day the violation continues. It is provided, however, that the City shall allow  
6 Franchisee a minimum of 30 days, or longer in appropriate circumstances where  
7 cure/compliance efforts have begun within the initial 30 day period, consistent with  
8 the right to cure provided above, after notice to Franchisee of such neglect, failure,  
9 or refusal to comply within which to meet compliance or correct performance, prior  
10 to the assessment of any liquidated damages.  
11  
12

13 4.4 Failure to Enforce. Franchisee shall not be relieved of any of its  
14 obligations to comply promptly with any provision of this Franchise by reason of  
15 any failure of the City to enforce prompt compliance, and the City's failure to  
16 enforce shall not constitute a waiver of rights or acquiescence in Franchisee's  
17 conduct.  
18

19 4.5 Force Majeure. Franchisee shall not be deemed in default with  
20 provisions of this Franchise where performance was delayed or rendered  
21 impossible by war or riots, civil disturbances, floods, or other natural catastrophes  
22 beyond Franchisee's control; the unforeseeable unavailability of labor or materials;  
23 or power outages exceeding back-up power supplies. The acts or omissions of  
24 affiliates shall not be deemed to be beyond Franchisee's control, and the  
25 knowledge of affiliates shall be imputed to Franchisee. This Franchise shall not be  
26



1 revoked or Franchisee penalized for such noncompliance, provided that  
2 Franchisee takes immediate and diligent steps to bring itself back into compliance  
3 and to comply as soon as possible under the circumstances with this Franchise  
4 without unduly endangering the health, safety, and integrity of Franchisee's  
5 employees or property, or the health, safety, and integrity of the public, Public  
6 Rights-of-Way, public property, or private property.

7 4.6 Alternative Remedies. No provision of this Franchise shall be deemed  
8 to bar the right of the City or Franchisee to seek or obtain judicial relief from a  
9 violation of any provision of this Ordinance or any rule, regulation, requirement, or  
10 directive promulgated thereunder. Neither the existence of other remedies  
11 identified in this Franchise nor the exercise thereof shall be deemed to bar or  
12 otherwise limit the right of the City or Franchisee to recover monetary damages for  
13 such violation by Franchisee, or to seek and obtain judicial enforcement of  
14 Franchisee's or the City's obligations by means of specific performance, injunctive  
15 relief or mandate, or any other judicial remedy at law or in equity.

16 4.7 Compliance with the Laws. Franchisee shall comply with all applicable  
17 federal and state laws and regulations, including regulations of any administrative  
18 agency thereof, as well as all applicable City ordinances, resolutions, rules,  
19 policies, and regulations heretofore or hereafter adopted or established during the  
20 entire term of the Franchise; provided that, nothing herein shall prevent Franchisee  
21 from challenging a provision of laws that applies only to it as an impairment of  
22 contract. Nothing in this Franchise shall limit the City's right of eminent domain  
23 under state law. Nothing in this Franchise shall be deemed to waive the  
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requirements of any lawful code or resolution of the City regarding permits, fees to  
1 be paid, or manner of construction.

2 Section 5. Reporting Requirements.

3 5.1 Quarterly Reports. Within 30 days after the end of each of Franchisee's  
4 fiscal quarters, Franchisee shall submit a written report to the City which shall  
5 contain a listing of all categories of Gross Receipts collected by Franchisee for its  
6 business activities as identified in Section 2.1, which are activities specifically  
7 taxable as a telephone business under Tacoma Municipal Code Title 6. Said  
8 written report shall be in sufficient detail and with sufficient explanation to enable  
9 the City to understand the report and to verify the accuracy of the report. In  
10 addition, Franchisee shall provide such other reports as may be required by  
11 Title 16B.

12 5.2 Annual Report. In the event that changes in applicable laws allow the  
13 City to require a franchise fee as referenced at Section 6 below, then no later than  
14 120 days following the end of Franchisee's fiscal year each year after the  
15 imposition of franchise fees, Franchisee shall present a written report to the City  
16 which shall include:

17 A. A financial statement certified by Franchisee that includes Gross  
18 Receipts from all sources in the City, gross Subscriber revenues from each  
19 category of service in the City, as well as an income statement and a balance  
20 sheet. In the event any audited financial report has not been published by the date  
21 due under this section, then the audited financial report shall be deemed presented  
22 on time if presented within 30 days after publication.  
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1 All financial reports required under this section shall be presented to  
2 the City accompanied by such notes and explanations as are required to fully  
3 understand the reports. Such notes and explanations shall include, but not be  
4 limited to, an explanation of any and all deductions made from Gross Receipts for  
5 the calculation of Fees or taxes to be paid to the City, as well as:

6 1. A summary of the previous year's activities for the  
7 Franchise Area, including, but not limited to, the total number of Customers, miles  
8 of Facilities, any services added or dropped, and any technological changes  
9 occurring in the system;

10 2. Plans for the future; and

11 3. Such other information as is required by Title 16B.

12  
13 5.3 Additional Reports. Franchisee shall prepare and furnish to the City  
14 within 60 days of written request, to the person and address specified in the City's  
15 request, in a form reasonably prescribed by the City, such additional reports with  
16 respect to Franchisee's operation, affairs, transactions, or property, as may be  
17 reasonably necessary and appropriate to ensure compliance with the material  
18 provisions of this Franchise, or to permit the performance of any of the rights,  
19 functions, or duties of the City in connection with the Franchise.  
20

21 5.4 Preservation of Confidential Information. Trade secrets and confidential  
22 information designated as such by Franchisee shall be subject to such protection  
23 as provided in Title 16B or under chapter 42.56 RCW, or as otherwise provided by  
24 applicable laws. Franchisee shall be responsible for clearly and conspicuously  
25 identifying the work as confidential or proprietary, and shall provide a brief written  
26



1 explanation regarding its position on the protected status of the information under  
2 state or federal law. In the event that the City receives a public records request  
3 under chapter 42.56 RCW or similar law for the disclosure of information  
4 Franchisee has designated as confidential, trade secret, or proprietary, the City  
5 shall promptly provide notice of such disclosure so that Franchisee can take  
6 appropriate steps to protect its interests. Nothing in this section prohibits the City  
7 from complying with chapter 42.56 RCW, or any other applicable law or court order  
8 requiring the release of public records, and the City shall not be liable to  
9 Franchisee for compliance with any law or court order requiring the release of  
10 public records. The City shall comply with any injunction or court order obtained by  
11 Franchisee which prohibits the disclosure of any such confidential records.  
12

13 Section 6. Compensation and Financial Provisions.

14 6.1 Fees; Taxes.

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

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

24 Franchisee agrees that its activities in the City of Tacoma identified in Section 2.1,  
25 but excluding internet access service, are activities specifically taxable as a  
26



1 telephone business under Tacoma Municipal Code Chapter 6A, and are taxable at  
2 the 6 percent rate specified in Tacoma Municipal Code 6A.40.050.D now in effect  
3 or as amended, which at the time of the execution of this Franchise agreement is  
4 6 percent of Franchisee's Gross Receipts but excluding any Gross Receipts from  
5 the provision of internet access service. It is agreed that the amount of Gross  
6 Receipts to be taxed will include the amount of tax imposed on Franchisee by City  
7 ordinance. This Franchise does not limit the City's power of taxation.

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

1 Business Tax specified in Section 6.1.B on a monthly basis accompanied by  
2 Franchisee's standard remittance form which specifies the net taxable charges, the  
3 local tax rate, and the local tax due, plus penalties and/or interest, if any is due.  
4  
5 Franchisee shall make all other required fee payments in the form, at the intervals,  
6 and in the manner requested by the City Treasurer, and furnish him/her any  
7 information related to his/her revenue collection functions reasonably requested. In  
8 case of audit, the City Treasurer may require Franchisee to furnish a verified  
9 statement of compliance with Franchisee's obligations or in response to any  
10 questions. Said certificate may be required from an independent, certified public  
11 accountant, at Franchisee's expense. All audits will take place on not less than  
12 10 business days' advance, written notice and shall be conducted during normal  
13 business hours at Franchisee's premises or offices furnished by Franchisee, which  
14 shall be a location within the City of Tacoma or other mutually agreeable place;  
15 however, Franchisee must agree to pay the associated costs of travel. The City shall  
16 not audit Franchisee more than once a year and shall not include in an audit any  
17 period previously audited. Franchisee agrees, within 30 days of written request of  
18 the City Treasurer, to provide, to the person and address specified in the City  
19 Treasurer's request, copies of all documents filed with any federal, state, or local  
20 regulatory agency, to be mailed to the City Treasurer on the same day as filed,  
21 postage prepaid, affecting any of Franchisee's Facilities or business operations in the  
22 City of Tacoma.  
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E. No Other Deductions. No deductions, including current or previously paid fees, shall be subtracted from the Gross Receipts amount, except as allowed under state or federal law, upon which payments are calculated and due for any period, nor shall copyright fees or other license fees paid by Franchisee be subtracted from Gross Receipts for purposes of calculating payments.

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

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

6.2 Auditing and Financial Records. Franchisee shall manage all of its operations in accordance with a policy of keeping books and records open and accessible to the City. Without limiting its obligations under this Franchise, Franchisee agrees that it will collect and make books and records available for inspection and non-confidential books and records for copying by the City in



1 accordance with Title 16B. Franchisee shall be responsible for collecting the  
2 information and producing it. Books and records shall be made available for  
3 inspection to the City at the Tacoma Municipal Building, or Franchisee's offices in  
4 the City of Tacoma, or such other location as the parties may agree.

5 Notwithstanding any provision of Title 16B or this Franchise, if documents are too  
6 voluminous or for security reasons cannot be produced at the Tacoma Municipal  
7 Building or mutually agreeable location within the City, then Franchisee may  
8 produce the material at another central location, provided that if such location is  
9 outside the City, it also agrees to pay the additional reasonable costs incurred by  
10 the City in reviewing the materials.  
11

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

24 Franchisee agrees to meet with a representative of the City upon request to  
25 review its methodology of record-keeping, financial reporting, computing fee  
26



obligations, and other procedures, the understanding of which the City deems  
1 necessary for understanding the meaning of reports and records.

2           The City agrees to request access to only those books and records, in  
3 exercising its rights under this section, which it deems reasonably necessary as  
4 part of a bona fide exercise of its authority over the Telecommunications System  
5 under this Franchise, Title 16B, or other applicable law. The City further agrees  
6 that it will withhold from public disclosure those books and records made available  
7 to it pursuant to this Section 6.2, but only to the extent that the City believes that it  
8 has the discretion to do so under state law. The City will, however, provide prompt  
9 notice to Franchisee of any request for such books and records in time so that  
10 Franchisee can engage whatever protective measures are available to it.  
11

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

2           6.4 Indemnification by Franchisee.

3                   A. Franchisee, by accepting this Franchise, agrees to release the  
4 City from and against any and all liability and responsibility in or arising out of, or  
5 by reason of, or resulting from or of the negligent acts, errors, or omissions of  
6 Franchisee during the construction, operation, or maintenance of the  
7 Telecommunications System, and, without limiting the provisions of Section 7.4,  
8 agrees not to sue or seek any money or damages from City, except to the extent  
9 Franchisee or Franchisee's Telecommunication System, or both, are damaged by  
10 the negligent acts or omissions or willful misconduct of the City or its employees or  
11 agents.  
12

13                   B. Franchisee agrees to indemnify and hold harmless the City, its  
14 trustees, elected and appointed officers, agents, and employees, from and against  
15 any and all claims, demands, or causes of action of whatever kind or nature, and  
16 the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities,  
17 damages, orders, judgments, or decrees, sustained by any third party arising out  
18 of, or by reason of, or resulting from or of the acts, errors, or omissions of  
19 Franchisee, or its agents, independent contractors or employees related to or in  
20 any way arising out of the construction, operation, maintenance, or relocation of  
21 the Telecommunications System. Franchisee waives immunity under  
22 Title 51 RCW and affirms that the City and Franchisee have specifically negotiated  
23 this provision, as required by RCW 4.24.115, to the extent it may apply.  
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1 C. Franchisee agrees that the covenants and representations  
2 relating to the indemnity provided in Sections A and B above shall survive the  
3 term/expiration/termination of this Franchise and continue in full force and effect as  
4 to Franchisee's responsibility to indemnify.

5 6.5 Franchisee Insurance.

6 A. Franchisee shall maintain, throughout the term of the Franchise,  
7 adequate insurance to protect the City, its trustees, elected and appointed officers,  
8 agents, and employees against claims and damages that may arise as a result of  
9 the construction, operation or maintenance of the Telecommunications System.  
10

11 B. General Requirements.

12 1. The insurance must be provided by an insurer with a  
13 rating of A [-] VII or higher in the A.M. Best's Key Rating Guide, and pursuant to  
14 RCW 48, licensed to do business in the state of Washington (or issued as a  
15 surplus line by a Washington Surplus lines broker). The City reserves the right  
16 to approve or reject the insurance provided, based upon the insurer (including  
17 financial condition), terms and coverage, the Certificate of Insurance, and/or  
18 endorsements.  
19

20 2. Franchisee shall keep this insurance in force during the  
21 entire term of the contract and for thirty (30) days after completion of all work  
22 required by the Contract, unless otherwise provided herein.  
23

24 3. The liability insurance policies required by this section shall  
25 contain a "severability of insureds," "separation of interest," or "cross liability"  
26 provision.



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4. The insurance required by the section shall be primary and non-contributory insurance to any insurance coverage or self-insurance program the City may maintain. The General Liability and Automobile Liability insurance must contain a Waiver of Subrogation endorsement in favor of the City of Tacoma.

5. Franchisee shall provide the City not less than 30 days notice of any cancellation or non-renewal of this required insurance.

6. Upon request, Franchisee shall forward to the City, a full and certified copy of the insurance policy(s) and endorsements required by this Section.

7. Franchisee shall not begin work under the Contract until the required insurance has been obtained and approved by the City.

8. Failure on the part of Franchisee to obtain and maintain the insurance as required by this section shall constitute a material default of the Franchise, upon which the City may revoke the Franchise in accordance with Section 2.5.

9. Franchisee shall be required to maintain insurance at least in the following amounts:

(a) Commercial General Liability Insurance Services Office ("ISO") Form CG0001(04-13) or its equivalent. A policy of Commercial General Liability Insurance ("CGL"), shall be written on an "occurrence," not "claims made," basis, and shall include the following coverage:

- A per project aggregate
- Products Hazard/Completed Operations - Shall be maintained for a period of six years after the termination of the Franchise or License (in the case of the communication System owner or operator ) or completion of the work for



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the Communications System Owner or Operator (in the case of contractor or subcontractor).

- Personal/Advertising Injury
- Contractual Liability
- Explosion, Collapse, or Underground Property Damage
- Blasting (only required when Franchisee’s work under this Contract includes exposures to which this specified coverage responds)
- If Franchisee is performing work within 50 feet of a railroad right-of-way, the General Liability policy shall be endorsed to eliminate the Contractual Liability exclusion pertaining to work within 50 feet of a railroad right-of-way using ISO Form CG2417(10-01) or the equivalent.
- The City of Tacoma, its trustees, elected and appointed officers, agents, and employees shall be included as an additional insured for both ongoing and completed operation using ISO Forms CG2026(04-13) and CG 2037(04-13) or the equivalent.
- Primary and Non-Contributory with any insurance or self-insurance maintained by the City.
- Waiver of Subrogation in favor of the City.

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

(i) Workers’ Compensation	Statutory
(ii) Employer’s Liability	\$1,000,000 per occurrence



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(c) Commercial Automobile Liability Coverage using Insurance Services Office form CA0001 or the equivalent and shall include all owned (if any), hired, and non-owned vehicles, with a limit not less than \$1,000,000 each accident for bodily injury and property damage. Such insurance shall be Primary and Non-Contributory with any insurance or self-insurance maintained by the City and shall contain a Waiver of Subrogation in favor of the City.

(d) A Commercial Umbrella Liability or Excess Liability policy with limits not less than \$5,000,000 each occurrence and \$5,000,000 aggregate. Such policy must provide coverage in excess of the above required Commercial General Liability, Commercial Automobile Liability, and Employer's Liability policies.

C. The required insurance must be obtained and maintained for the entire period Franchisee has facilities in the Public Rights-of-Way, and for six years thereafter. If 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.

D. 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





1 acceptance of the Franchise, and annually thereafter, and as provided in Section E  
2 below.

3 E. Policies shall be issued by companies authorized to do business  
4 under the laws of the state of Washington. Financial Ratings must be no less than  
5 A [-] VII in the latest edition of A.M. Best's Key Rating Guide.

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

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

16 H. It is Franchisee's responsibility to ensure that each subcontractor  
17 obtains and maintains adequate liability insurance coverage, and upon request of  
18 the City, Franchisee shall provide evidence of such insurance.  
19

20 6.6 Security Fund. Franchisee shall establish a cash security fund or  
21 provide the City an irrevocable letter of credit or assignment of funds in the amount  
22 of \$50,000 as additional security to secure the payment of fees owed, to secure  
23 any other performance promised in this Franchise, and to pay any taxes, fees, or  
24 liens owed to the City. Any letter of credit shall be in a form and with an institution  
25 acceptable to the City's Director of Finance and in a form acceptable to the City  
26



1 Attorney. Should the City draw upon the cash security fund or letter of credit or  
2 assignment of funds, it shall promptly notify Franchisee, and Franchisee shall  
3 promptly restore the fund or the letter of credit or assignment of funds to the full  
4 required amount. The City may, from time to time, change the amount of the  
5 required security fund/letter of credit/assignment of funds to reflect changes in the  
6 risks to the City and to the public, including delinquencies in taxes or other  
7 payments to the City.

8 Section 7. Miscellaneous Provisions.

9  
10 7.1 Posting and Publication. Franchisee shall assume the cost of posting  
11 and publication of this Franchise, as such posting and publication is required by  
12 law, and such is payable upon Franchisee's filing its acceptance of the Franchise.

13 7.2 Guarantee of Performance. Franchisee acknowledges that it enters  
14 into the Franchise voluntarily in order to secure and in consideration of the grant  
15 from the City of a ten-year Franchise. Performance pursuant to the terms and  
16 conditions of this Franchise agreement is guaranteed by Franchisee.

17  
18 7.3 Governing Law and Venue. The Franchise shall be governed by and  
19 construed in accordance with the laws of the state of Washington without recourse  
20 to any principles of Conflicts of Laws, except that where federal law preemptively  
21 applies it shall control. Any litigation between the City and Franchisee arising  
22 under or regarding this Franchise shall occur, if in the state courts, in the Superior  
23 Court of Pierce County, and if in the federal courts, in the United State District  
24 Court for the Western District of Washington.  
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1 7.4 No Recourse. Without limiting such immunities as the City or other  
2 Persons may have under applicable law, Franchisee shall have no monetary  
3 recourse whatsoever against the City or its officials, boards, commissions, agents  
4 or employees for any loss, costs, expense, or damage arising out of any provision  
5 or requirement of Title 16B or because of the enforcement of Title 16B or the City's  
6 exercise of its authority pursuant to Title 16B, this Franchise, or other applicable  
7 law, except to the extent Franchisee or Franchisee's Telecommunication System,  
8 or both, are damaged by the negligent acts or omissions or willful misconduct of  
9 the City or its representatives.  
10

11 7.5 Notice. Unless expressly otherwise set forth herein or agreed between  
12 the parties in writing, every notice, billing, or response required by this Franchise to  
13 be served upon the City or Franchisee shall be in writing, and shall be deemed to  
14 have been duly given to the required recipient upon actual receipt or refusal of  
15 delivery and shall be sent by a nationally recognized overnight courier or by  
16 U.S. certified mail, return receipt requested postage prepaid. The notices or  
17 responses to the City shall be addressed as follows:  
18

19 City of Tacoma  
20 Municipal Services Building  
21 1224 MLK Jr. Way  
22 Tacoma, WA 98405  
Attn: Franchise Services Manager

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

24 Mashell Telecom, Inc. d/b/a Rainier Connect  
25 Attn: Brian Haynes  
26 2516 Holgate Street  
Tacoma, WA 98402



With a copy to (which alone shall not constitute notice)

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Richard A Finnigan, Attorney  
2112 Black Lake Blvd. SW  
Olympia, WA 98512

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.

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



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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 \_\_\_\_\_, 2016.

I, \_\_\_\_\_, am the \_\_\_\_\_ of  
Mashell Telecom, Inc., a Washington corporation, d/b/a Rainier Connect, and am  
the authorized representative to accept the above referenced City franchise  
ordinance on behalf of Mashell Telecom, Inc. d/b/a Rainier Connect.

I certify that this franchise and all terms and conditions thereof are accepted  
by Mashell Telecom, Inc. d/b/a Rainier Connect.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

Mashell Telecom, Inc. d/b/a Rainier Connect

By \_\_\_\_\_

Its \_\_\_\_\_