



Req. #7483

ORDINANCE NO. 26465

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

11 WHEREAS, Level 3 Communications, LLC is a telecommunications
12 utility currently involved in the construction of a telecommunications network
13 utilizing fiber optic technology, and

14 WHEREAS, as part of such network, Level 3 Communications, LLC has
15 designed a system of fiber optic cable a portion of which will pass through the
16 City, and

17 WHEREAS, Level 3 Communications, LLC has applied to the City for a
18 Franchise to install fiber optic cable within the City streets and public
19 rights-of-way, and

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

23 WHEREAS this City of Tacoma Telecommunications Franchise
24 Ordinance contains the following:
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1 BE IT ORDAINED BY THE CITY OF TACOMA:

2 Section 1 - DEFINITIONS. For the purposes of this Franchise, the
3 following terms, phrases, words, and their derivations shall have the meaning
4 given herein; words not defined herein which are defined in Title 16, shall have
5 the same meaning or be interpreted as provided in Title 16. Words not defined
6 here or in Title 16 have their ordinary meaning. A reference to Title 16 or to
7 the City's Charter refers to the same as amended from time to time.
8

9 1.1 "City" means the City of Tacoma, a municipal corporation of the
10 State of Washington.
11

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

14 1.3 "Communications facility" means a device which, along or as part
15 of an aggregation of devices, is capable of transmitting signals from place to
16 place.
17

18 1.4 "Communications system" refers to a telecommunications system.

19 1.5 "Construction, operation, or repair" and similar formulations of
20 that term means the named actions interpreted broadly, encompassing, among
21 other things, installation, extension, maintenance, replacement, or components,
22 relocation, undergrounding, grading, site preparation, adjusting, testing, make-
23 ready, and excavation.
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1 1.6 "Customer" means any Person or entity who legally receives
2 within the corporate limits of the City any one or more of the services provided
3 by the Telecommunications System.

4 1.7 "Facilities" or "Installations" are and refer to and include, but are
5 not limited to, plant, systems, improvements, and equipment owned, leased, or
6 otherwise used by the Franchisee, such as poles, fiber, wires, fixtures,
7 equipment, underground circuits, and conduit in public rights-of-way and other
8 property necessary or convenient for the transmission and distribution of
9 communications service where such facilities are location.

10 1.8 "Franchise" means the rights granted by this Franchise and
11 conditioned as set forth herein, and under the Tacoma Municipal Code and the
12 City Charter.

13 1.9 "Franchise Area" means that area within the present and
14 future corporate limits of Tacoma.

15 1.10 "Franchisee" is Level 3 Communications, LLC, a Delaware
16 Limited Liability Company, with its home office at 1025 Eldorado Boulevard,
17 Broomfield, Colorado, 80021, Telephone, (303) 926-3000. It is a subsidiary of
18 Level 3 Communications, Inc. whose home office is located at 1025 Eldorado
19 Boulevard, Broomfield, Colorado, 80021, Telephone, (303) 926-3000.

20 1.11 "Gross Receipts" means Gross Revenue as defined in Title 16,
21 Chapters 1 and 2.



1 1.12 "Operator" when used with reference to a system, refers to a
2 Person (a) who provides service over a Communications System and directly or
3 through one or more Affiliates owns a significant interest in such facility; or
4 (b) who otherwise controls or is responsible for, through any arrangement, the
5 management and operation of such a facility. A Person that operates under
6 agreement of a Telecommunications System or a specific portion of a
7 Telecommunications System to provide Telecommunications Services shall be
8 treated as an Operator for purposes of this franchise.
9

10 1.13 "Overhead Facilities" refers to electric utility and Communications
11 Facilities located above the surface of the ground, including the underground
12 supports and foundations for such facilities.
13

14 1.14 "Person" includes any individual corporation, partnership,
15 association, joint stock company, trust, or any other legal entity, but not the
16 City.
17

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

3 1.16 "SONET" is the acronym for Synchronous Optical Network, which
4 involves the transmission of light signals over optical fiber. SONET allows
5 different fiber systems or networks to interconnect efficiently with a high level of
6 accuracy and customer control.

7
8 1.17 "System" means the Telecommunications System.

9 1.18 "Telecommunications Service" means the transmission for hire
10 of information in electronic or optical form, including, but not limited to, voice,
11 video, or data, whether or not the transmission medium is owned by the
12 provider itself. Telecommunications Service includes telephone service but
13 does not include Cable Service or over-the-air broadcasts to the
14 public-at-large from facilities licensed by the Federal Communications
15 Commission or any successor thereto.

16
17 1.19 "Telecommunications System" means a tangible facility that is used
18 to provide one or more Telecommunications Services, any portion of which
19 occupies Public Rights-of-Way. The term Telecommunications System by way
20 of example, and not limitation, includes wires, equipment cabinets, guys,
21 conduit, radio transmitting towers, poles, other supporting structures, and
22 associated and appurtenant facilities used to transmit telecommunications
23 signals. The term Telecommunications System includes all devices mounted on
24 light poles in the Public Rights-of-Way through which Telecommunications
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1 Services are originated or terminated. An Open Video System is not a
2 Telecommunications System to the extent that it provides only video services; a
3 Cable System is not a Telecommunications System to the extent that it provides
4 only Cable Service.

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6 1.20. "Telephone Service" means the providing by any person of
7 access to a local telephone network, local telephone network switching service,
8 toll service, or coin telephone service, or providing telephonic, video, data, or
9 similar communication or transmission for hire via a local telephone network,
10 toll line, channel, cable, microwave, or similar communication or transmission
11 system. Telephone Service includes intrastate or interstate service, including
12 toll service, originating from, or received on, communications equipment or
13 apparatus in this State if the charge for the service is billed to a person in this
14 State. Telephone Service does not include the providing of competitive
15 Telephone Service as defined in Tacoma Municipal Code § 6.66.020, the
16 providing of cable television service, or the providing of broadcast services by
17 radio or television stations.
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20 1.21 "Title," when used in the context of referring to this Title of the
21 Tacoma Municipal Code, shall mean this Title 16 of the Tacoma Municipal
22 Code and Chapters 16.01 through 16.06 of this Title.

23 1.22 "Underground Facilities" refers to electric utility and
24 Communications Facilities located under the surface of the ground, excluding
25 the underground foundations or supports for Overhead Facilities.
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1 Section 2 - FRANCHISE.

2 2.1 Grant of Franchise. The City hereby grants to Franchisee a
3 non-exclusive Franchise which, once it becomes effective, shall authorize
4 Franchisee, to use the City's Public Rights-of-Way within the Franchise Area to
5 construct, repair, and operate an underground fiber optic Telecommunication
6 System to provide Telecommunication Service.
7

8 Such grant is subject to and must be exercised in strict accordance with
9 and subject to this Franchise Agreement, Title 16 of the Tacoma Municipal
10 Code, and the Tacoma City Charter including but not limited to the provisions
11 set forth in Article VIII of the Charter, and may be revoked if it is not so
12 exercised. Provided further, that the exercise of any rights pursuant to the
13 Franchise is subject to the exercise of the City's police powers, and other
14 regulatory powers as it may have or obtain in the future, and all rights granted
15 herein must be exercised in strict accordance with applicable law, including by
16 way of example and not limitation, zoning codes and permitting requirements.
17 No rights shall pass to the Franchisee by implication. Said Franchise shall
18 constitute both a right and an obligation to provide the services of the
19 Telecommunications System as required by the provisions of this Franchise.
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22 The grant of this Franchise is limited to the purpose of Franchisee
23 providing Telecommunications Service. This Franchise does not include
24 permission to provide cable service, as defined in 47 U.S.C. § 522,
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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
4 Public Rights-of-Way shall be used by Franchisee if the City, in its sole
5 opinion, determines that such use is inconsistent with the terms, conditions or
6 provisions by which such Public Rights-of-Way was created or dedicated, or
7 presently used under applicable laws.

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

13
14 2.2 Franchise Term. The term of the Franchise shall be ten years
15 unless terminated sooner in accordance with this Franchise, Title 16, or the
16 City Charter.

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

19
20 2.4 Transfers, Generally.

21 A. Every Transfer shall be subject to the prior written approval
22 of the City except as provided herein. A Transfer is any transaction in which:
23 (1) all or a portion of the Telecommunications System is sold or assigned
24 (except a sale or assignment that results in removal of a particular portion of
25 the facility from the Public Rights-of-Way); (2) there is any change, acquisition,
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1 or direct or indirect transfer of control of the Franchisee; or (3) the rights and/or
2 obligations held by the Franchisee under the Franchise are transferred, sold,
3 assigned, or leased, in whole or in part, directly or indirectly, to another party.
4 The term "control" in (2) refers to actual working control, in whatever manner
5 exercised. It will be presumed that a change in working control within the
6 meaning of (2) has occurred in any case where there is a change in voting
7 interest of 10 percent or more; or a change in voting interest that results in a
8 Person obtaining a 50 percent or greater interest in Franchisee; or a change in
9 voting interest that results in a Person that held 50 percent or greater interest
10 reducing their interest to below 50 percent. A Transfer without the prior written
11 approval of the City is a substantial violation of this Franchise and shall make
12 the Franchise subject to termination by the City as provided herein and in
13 Title 16.

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

18
19 C. Franchisee, shall within 60 days of the closing date of any
20 Transfer, file with the City Clerk a copy of the deed, agreement, mortgage,
21 lease, or other written instrument evidencing such sale, lease, mortgage,
22 assignment or Transfer, certified and sworn to as correct by Franchisee. Every
23 such Transfer, whether voluntary or involuntary, may be deemed void and of no
24 effect by the City unless Franchisee files the required copy within the 60-day
25 period.
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1 D. The requirements of this section shall not be deemed to
2 prohibit the use of Franchisee's property as collateral for security in financing
3 the construction or acquisition of all or part of the Telecommunications System
4 franchised hereunder. However, no such arrangement may be made if it would
5 in any respect under any condition prevent the Operator or any successor from
6 complying with the Franchise and applicable law, nor may any such
7 arrangement permit a third party to succeed to the interest of the Operator, or
8 to own or control the Telecommunications System, without the prior consent of
9 the City. Any mortgage, pledge or lease shall be subject to and subordinate to
10 the rights of the City under this Franchise, and other applicable law.
11

12 2.5 Change in Control-Notice and Affiliate Exception. Franchisee
13 shall promptly notify the City of any proposed change in, transfer of, or
14 acquisition by any other Person of an ownership interest in Franchisee that
15 results in a change in control of Franchisee within the meaning of
16 Section 2.4.A. However, if the proposed change in control merely results in a
17 Transfer of control from Franchisee to another entity that is 100 percent owned
18 by a direct parent of Franchisee, and such parent provided an unconditional
19 guaranty of performance of the Transferee Affiliate at the time the Franchise
20 was issued, then such Transfer shall not require the prior approval of the City
21 so long as all the conditions on affiliate Transfers set forth in Title 16 are
22 satisfied (including, without limitation, the notice requirements).
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1 2.6 Revocation. In addition to any rights set out elsewhere in this
2 Franchise, the City Charter or Title 16, the City reserves the right to declare a
3 forfeiture or otherwise revoke the Franchise, and all rights and privileges
4 pertaining thereto, as provided in Title 16 or in the event that:

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

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

10 C. Franchisee fails to obtain and maintain any permit required
11 by any federal or state regulatory body or by the City, relating to the
12 construction, repair and operation of the system; or
13

14 D. At any time during the term of the Franchise, Franchisee
15 fails to provide and maintain all of the securities required under this Franchise
16 including, but not limited to, the performance bond and letter of credit; fails to
17 maintain the insurance required by this Franchise; or fails to satisfy the
18 indemnity set out in this Franchise; or if Franchisee's guarantor revokes its
19 guarantee or fails to satisfy or becomes unable to satisfy its obligations
20 thereunder.
21

22 E. The procedures for revocation and forfeiture shall be
23 governed by Title 16, Section 16.01.8.5. Before the Franchise is revoked,
24 Franchisee shall be given notice and opportunity to cure at least equivalent to
25 that required by Title 16 as of the effective date of this Franchise (except in
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1 those cases where notice and opportunity to cure are not required), and shall
2 be accorded at least an opportunity to be heard that provides at least the due
3 process protections required by Title 16 as of the effective date of this
4 Franchise, which opportunities and protections are set out in Section 2.6.F.

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

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20 (2) Notwithstanding the foregoing, the City may declare
21 a Franchise forfeited without opportunity to cure when the Franchisee: (a)
22 stops providing service it is required to provide in the Franchise (b) Transfers
23 without the prior consent of the City as required in the Franchise; (c) fails to
24 pay the Franchise application fees owed hereunder; or (d) defrauds or attempts
25 to defraud the City or Franchisee's customers. However, Franchisee shall
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1 have the right to receive 30 days' prior notice of an intent to declare a
2 Franchise forfeited, and shall have the opportunity to show cause why the
3 Franchise should not be forfeited.

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

3 2.7 Continuity of Service and Right to Purchase the System.

4 A. In the event the City has declared a forfeiture for cause or
5 otherwise revoked for cause the Franchise as provided herein, or in the event
6 of expiration of the initial term of the Franchise without the Franchise being
7 renewed or extended (referred to below collectively as a "termination"),
8 Franchisee shall, at the direction of the City expressed by ordinance, continue
9 its operations for such reasonable period (the "Continuation Period") as the
10 City may determine is necessary to permit transition to another provider, which
11 period may be established taking into account any appeal of the termination.
12 During such Continuation Period, Franchisee shall continue to be bound by all
13 its obligations under the Franchise and Title 16. During this Continuation
14 Period, Franchisee shall not Transfer any portion of its Telecommunications
15 System to any other Person, including parts of the System rented, leased, or
16 lease-purchased; or significantly alter the Telecommunications System or
17 remove property from the City, or otherwise encumber the Telecommunications
18 System in any manner, without prior written consent of the City. The
19 Franchisee's obligations to remove its facilities under Title 16,
20 Section 16.01.8.6 shall be deferred for the Continuation Period. Within 30
21 days of the date the City passes the ordinance requiring continuation of
22 service, or 30 days after the effective date of the termination, whichever is
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1 earlier, Franchisee shall provide the City with an inventory of all its property in
2 the City, and in addition, such other property as may be used and useful by it in
3 providing service within the City. Any property on the list that is essential to
4 providing service to other communities must be clearly identified. Property on
5 the list that is not within the City must be clearly identified, and its location
6 stated.
7

8 B. The City shall have an option to purchase the
9 Telecommunications System upon termination of the Franchise, whether
10 termination is, or is not, for cause. This option requires Franchisee to convey
11 the Telecommunications System or such portion thereof as the City may
12 choose to purchase free and clear of any encumbrances, along with (1) all
13 equipment, Facilities, tools, vehicles and real property interests necessary for
14 the Telecommunications System's operation, free and clear of any
15 encumbrances; (2) Customer lists and billing records; (3) all repair records,
16 maps, and equipment and Facilities records (including records identifying
17 equipment that is being used in the field, warranties with respect to such
18 equipment and the like); (4) and such other properties, contract rights or
19 intangibles as may be normally conveyed in order to permit a buyer to take
20 over and continue the operations of a seller with minimal disruption to
21 Customers; provided, that nothing herein shall require the City to accept or pay
22 for any contract that it does not wish to assume. Franchisee is not required to
23 convey portions of the Telecommunications System located outside the City
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1 which are essential to Franchisee's operations in other communities, and which
2 were so identified on the inventory provided pursuant to Section 2.7.A. This
3 option also requires Franchisee to sell the Telecommunications System, or
4 such portion thereof as the City may choose to purchase at an equitable price,
5 if the Franchise is terminated for cause. If Franchisee's request for a Franchise
6 renewal is denied, the option requires Franchisee to sell the
7 Telecommunications System, or such portion thereof as the City may choose to
8 purchase, at fair market value, determined on the basis of the value of the
9 Telecommunications System as a going concern (taking into account such
10 property used and useful in providing service within the City that is not to be
11 conveyed) and with no value allocated to the Franchise itself.

14 C. The City may exercise its Section 2.7.B option rights in the
15 following manner: the City will have up to 180 days after receiving the inventory
16 required by Section 2.7.A to notify Franchisee that it intends to exercise its
17 right to purchase the Telecommunications System or a portion of the
18 Telecommunications System. Within 90 days of the date the City notifies
19 Franchisee of its intent to exercise the option, or by such other time as the
20 parties may separately agree, the parties shall meet to establish a price that
21 comports with the requirements of Section 2.7.B. If the parties are unable to
22 agree to a price within 180 days after the City notifies Franchisee that the City
23 intends to exercise its purchase option, either party may require the price to be
24 set by appraisal by sending the other party notice that it wishes to have price
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1 set by appraisal. Within 45 days of the date that notice is submitted, each
2 party may appoint one appraiser. If each party appoints an appraiser, the two
3 appraisers shall appoint a third appraiser; if only a single appraiser is
4 appointed (whether by mutual agreement or because of the failure of a party to
5 timely nominate an appraiser) that appraiser shall be the sole appraiser. The
6 appraiser or appraisers shall establish a price for the System or portion thereof
7 that the City desires to purchase in accordance with Section 2.7.B. This
8 appraisal determination shall be final and non-appealable. The City shall have
9 120 days after the decision of the appraisers to notify Franchisee that it wishes
10 to conclude the transaction; if it does not so notify the Franchisee, the option
11 shall be deemed terminated.
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14 If the City gives the notice required by the preceding paragraph,
15 the parties will thereafter promptly sign all necessary documents required to
16 close the transaction; provided, however, that the City may make conclusion of
17 the transaction conditional upon any necessary voter approval of any bond
18 funding for acquisition of all or a part of the System and, if applicable, the
19 successful sale of the bonds.
20

21 The City and Franchisee will share equally the costs associated
22 with any appraiser that is jointly appointed (by them or by the appraisers each
23 selects); the City will bear costs associated with any appraiser that it separately
24 appoints and Franchisee will bear costs associated with any appraiser that it
25 separately appoints.
26



1 D. (1) Nothing in this section or in any other section of this
2 Franchise shall prevent the City's exercise of its rights under the Tacoma City
3 Charter. Included within the rights granted under Tacoma's Charter is the right
4 to purchase or condemn Franchisee's property within the Franchised Area at
5 any time, which right is expressly set out in Section 8.1(c) of the Charter as
6 follows:
7

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

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

16 (3) Nothing in this section shall be read to limit the
17 City's right to acquire the Telecommunications System as a result of
18 abandonment.
19

20 E. In the event the City purchases, acquires, takes over, or
21 holds all or parts of the System, the City shall have the right without limitation
22 to assign, sell, lease, or otherwise transfer its interest in all or parts of the
23 System to any other Person or entity, including any other Franchisee of a
24 Telecommunications System, on whatever terms the City deems appropriate.
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1 2.8 Right to Require Removal of Property/Right To Remove Property.

2 A. Upon termination of the Franchise, Franchisee may be
3 required to remove its property from any Public Rights-of-Way, and restore
4 such Rights-of-Way to its same or better condition as existed just prior to such
5 removal, subject to any rights Franchisee may have to abandon property in
6 place, as set out in Title 16. If Franchisee fails to remove property that the City
7 requires it to remove, the City may perform the work and collect the cost
8 thereof from Franchisee. The actual cost thereof, including direct and indirect
9 administrative costs, shall be a lien upon all plant and property of Franchisee
10 effective upon filing of the lien with the Pierce County Auditor.
11

12 B. To the extent any portion of the System in the Public
13 Rights-of-Way or on any other public property is not removed by the Operator
14 within 12 months of the later of the end of the Franchise term or any
15 Continuation Period, the property will be deemed abandoned and shall become
16 the property of the City if the City wishes to own it.
17

18 C. Any order by the City issued pursuant to Section 2.8.A to
19 remove Installations shall be sent by registered or certified mail to Franchisee
20 not later than 24 months following the date of Franchise termination. Removal
21 shall be completed (except with respect to property that Franchisee is
22 permitted or required to abandon in place) not later than 12 months following
23 the date of notification to remove the Facilities.
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1 2.12 Survival of Terms. Upon the termination or forfeiture of the
2 Franchise, Franchisee shall no longer have the right to occupy the Public
3 Rights-of-Way for the purpose of providing Telecommunications Service.
4 However, Franchisee's obligations to the City (other than the obligation to
5 provide service to Customers) survive the expiration of these rights according
6 to their terms. By way of illustration and not limitation, Sections 2.7, 2.8, 2.10,
7 and 4 of this Franchise shall continue in effect as to Franchisee
8 notwithstanding any expiration, forfeiture, or revocation of the Franchise,
9 except to the extent that a City-approved Transfer, sale, or assignment of the
10 Telecommunications System is completed, and another entity has assumed full
11 and complete responsibility for the Telecommunications System or for the
12 relevant acts or omissions.
13
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15 SECTION 3 - OPERATION IN STREETS AND RIGHTS-OF-WAY.

16 3.1 Use of Public Rights-of-Way. Franchisee may, subject to the
17 terms of this Franchise and Title 16 and other applicable laws, construct,
18 operate and maintain an underground fiber optic Telecommunications System
19 in Public Rights-of-Way within the Franchise Area, to provide
20 Telecommunications Services. Without limiting the foregoing, Franchisee
21 expressly agrees that it will construct, operate and maintain its System in
22 compliance with the requirements of Title 16, including those governing the
23 placement of its Telecommunications System, and with other applicable City
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1 codes; and will obtain and maintain all bonds and billable work orders required
2 by the same.

3 3.2 Construction, Operation, or Repair. Franchisee shall, in all
4 cases, comply with all lawful City ordinances and regulations now in effect or
5 hereinafter enacted regarding the acquisition of permits and such other items
6 as may be required by the City in connection with the construction, operation or
7 repair of the Telecommunications System.
8

9 Without limiting the foregoing, Franchisee agrees that it shall, in the
10 course of constructing, operating and maintaining its Telecommunications
11 System comply with the requirements of Title 16 and among other things:
12

13 A. (1) Franchisee shall, by a time specified by the City,
14 protect, support, temporarily disconnect, relocate, or remove any of its property
15 when required by the City by reason of traffic conditions; public safety; Public
16 Rights-of-Way construction; Public Rights-of-Way repair (including resurfacing
17 or widening); change of Public Rights-of-Way grade; construction, installation
18 or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any
19 other type of government-owned Communications System, public work, public
20 facility, or improvement or any government-owned utility; Public Rights-of-Way
21 vacation; or for any other purpose where the work involved would be aided by
22 the removal or relocation of the Telecommunications System. Collectively,
23 such matters are referred to below as the "public work."
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1 (2) In the event of an emergency, or where the
2 Telecommunications System creates or is contributing to an imminent danger
3 to health, safety, or property, the City may protect, support, temporarily
4 disconnect, remove, or relocate any or all parts of the Telecommunications
5 System without prior notice, and charge the Franchisee for costs incurred.
6

7 (3) If any Person that is authorized to place Facilities in
8 the Rights-of-Way requests Franchisee to protect, support, temporarily
9 disconnect, remove, or relocate Franchisee's facilities to accommodate the
10 construction, operation, or repair of the facilities of such other Person, the
11 Franchisee shall, after 30 days' advance written notice, take action to effect the
12 necessary changes requested. Unless the matter is governed by a valid
13 contract or a state or federal law or regulation, or unless the Franchisee's
14 Telecommunications System was not properly installed, the reasonable cost of
15 the same shall be borne by the Person requesting the protection, support,
16 temporary disconnection, removal, or relocation and at no charge to the City,
17 even if the City makes the request for such action.
18
19

20 (4) Franchisee shall, on the request of any Person
21 holding a valid permit issued by a governmental authority, temporarily raise or
22 lower its wires to permit the moving of buildings or other objects. The expense
23 of such temporary removal or raising or lowering of wires shall be paid by the
24 Person requesting the same.
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1 B. The Franchisee's obligation to construct, operate, and
2 repair its Telecommunications System in compliance with all laws, ordinances,
3 departmental rules and regulations and practices affecting such System,
4 includes, by way of example, and not limitation, the obligation to construct,
5 operate and repair in accordance with zoning codes, safety codes and City
6 construction standards, including the most current version of the Standard
7 Specifications for Road, Bridge and Municipal Construction, as prepared by the
8 Washington State Department of Transportation (WSDOT) and the
9 Washington State Chapter of American Public Works Association (APWA); the
10 most current version of the APWA Amendments to Division One, and the most
11 current version of the City of Tacoma Amendments thereto. In addition, the
12 construction, operation, and repair shall be performed in a manner consistent
13 with high industry standards. The Franchisee shall exercise reasonable care in
14 the performance of all its activities and shall use commonly accepted methods
15 and devices for preventing failures and accidents that are likely to cause
16 damage, injury, or nuisance to the public or to property.

17
18 C. Franchisee's construction, operation, or repair of its
19 Telecommunications System shall not commence until all required permits
20 have been properly filed for and obtained from the proper City officials and all
21 required permits and associated fees paid. In any permit so issued, the City
22 may impose, as a condition of the granting of the permit, such conditions and
23 regulations as may be necessary to the management of the Public
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1 Rights-of-Way, including, by way of example and not limitation, for the purpose
2 of protecting any structures in the Public Rights-of-Way, maintaining proper
3 distance from other utilities, for the proper restoration of such Public
4 Rights-of-Way and structures, and for the protection of the City and the public
5 and the continuity of pedestrian and vehicular traffic.
6

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

23 E. Franchisee agrees that, as a condition of a permit for
24 installation of conduit, the City may require it to install conduit in excess of its
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1 reasonably foreseeable requirements for the purpose of accommodating the
2 City and/or other Franchisees and Licensees where the City Manager
3 determines it is appropriate to do so to minimize disruption of public passage or
4 infrastructure, to forestall or relieve exhaustion of Right-of-Way capacity, or to
5 protect environmentally sensitive areas.
6

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

9 G. Whenever all existing utilities are located underground in
10 an area in the City, the Franchisee must also locate its Telecommunication
11 System underground, including Telecommunication System Facilities, such as
12 drops, which cross private property.
13

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

17 2. Whenever an electric utility opens a trench for the
18 purpose of installing or relocating Facilities, the Franchisee shall concurrently
19 relocate its Facilities underground and, if it uses the same trench, share the
20 cost.
21

22 3. The City Manager may, for good cause shown,
23 exempt a particular portion of the Telecommunication System from the
24 obligation to locate or relocate Facilities underground, where relocation is
25 impractical, or where the interest in protecting against visual blight can be
26



1 protected in another manner. Nothing in this Section 3.2.G prevents the City
2 from ordering the Franchisee to locate or relocate its Telecommunication
3 System underground under other provisions of the Tacoma Municipal Code, it
4 being the intent that the number and extent of Overhead Facilities and the
5 visual pollution resulting therefrom will, over time, be reduced and eventually,
6 to the extent feasible, eliminated.

8 H. The Franchisee shall participate in conversion to
9 underground Local Improvement Districts ("LIDs"). The Franchisee, at no cost
10 to the City or abutting property owners, shall share fairly with other utilities the
11 cost of undergrounding when done through the LID process.

13 1. As part of its obligations under the Tacoma
14 Municipal Code, the Franchisee shall provide the preliminary cost estimate,
15 facility conversion designs, and final cost estimates to any LID project
16 coordinator in a timely manner. At the request of an LID project coordinator,
17 the Franchisee shall perform underground construction and movement of
18 Customer connections underground (overhead reclaim), in coordination with
19 the undergrounding services provided by other LID utilities, at no cost to the
20 City or abutting property owners.

22 I. Franchisee shall promptly repair any and all Public
23 Rights-of-Way, public property, or private property that is disturbed or
24 damaged during the construction, operation or repair of its Telecommunications
25 System. Public property and Public Rights-of-Way must be restored to the
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1 satisfaction of the City or to a condition as good or better than before the
2 disturbance or damage occurred.

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

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

13 L. Franchisee shall not remove any underground Facilities
14 except as hereinafter provided.

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

22 (2) Franchisee shall remove such underground
23 Facilities as the City orders it to remove; provided, that the City may not order
24 removal where such removal is primarily to give economic benefit or advantage
25 to a competing provider of Telecommunications Service.
26



1 (3) Where trenching or other opening of the
2 Rights-of-Way along the extension of Facilities to be removed is required,
3 Franchisee must post bonds as the City may require to ensure that the property
4 is promptly removed, with minimum disruption. Franchisee must restore the
5 affected property to as good or better condition than existed just before
6 removal; and Franchisee must compensate those whose property it damages
7 for the damage.
8

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

15 3.3 Right To Inspect and Order Corrections. The City may inspect
16 the Telecommunications System at any time reasonable under the
17 circumstances to ensure compliance with this Franchise and applicable law,
18 including to ensure that the Telecommunications System of Franchisee is
19 constructed and maintained in a safe condition. If an unsafe condition is found
20 to exist, the City, in addition to taking any other action permitted under
21 applicable law, may order Franchisee, in writing, to make the necessary repairs
22 and alterations specified therein forthwith to correct the unsafe condition on a
23 time table established by the City which is reasonable in light of the unsafe
24 condition. The City has the right to correct, inspect, administer, and repair the
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1 shall be responsible for all direct and actual costs related to such action,
2 including, but not limited to, 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;

6 E. Seeking specific performance of any provision, which
7 reasonably lends itself to such remedy.
8

9 In determining which remedy or remedies for Franchisee's violation are
10 appropriate, the City may take into consideration the nature and extent of the
11 violation, the remedy needed to prevent such violations in the future, whether
12 Franchisee has a history of previous violations of the same or similar kind, and
13 such other considerations as are appropriate under the circumstances.
14

15 Remedies are cumulative; the exercise of one shall not foreclose the exercise
16 of others.

17 4.3 Procedure for Remedying Franchise Violations. Before imposing
18 liquidated damages, or drawing upon the performance bond, letter of credit,
19 security fund, or any other security set out in Section 6, the City shall follow the
20 procedure below.
21

22 A. Notice of Violation. In the event that the City believes that
23 Franchisee has not complied with the terms of this Franchise, the City shall
24 notify Franchisee in writing, by certified mail, of the nature of the alleged
25 noncompliance.
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B. Franchisee's Right to Cure or Respond. Except as

provided in Section 4.3.D., Franchisee shall have 30 days from the receipt of notice described above to (a) respond to the City contesting the assertion of noncompliance, or (b) to cure such default or, in the event that by the nature of the default such default cannot be cured within the 30-day period, initiate steps to remedy such default as promptly as possible. The duty to cure includes the duty to cure all harms caused by the acts or omissions of Franchisee. At the end of the 30-day period, Franchisee shall notify the City in writing of the steps it has taken to cure the default, if any; if the cure is not complete, the reason it is not complete and the projected date for completion; and if the default is disputed, the complete basis for that contention.

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

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



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

5 E. Liquidated Damage Amounts. Because Franchisee's
6 failure to comply with the provisions of this Franchise will result in injury to the
7 City, and because it may be difficult to estimate the extent of each such injury,
8 Franchisee and the City agree to the following liquidated damages, which
9 provisions represent the best estimate of the damages resulting from injuries of
10 specific types. The amounts of the liquidated damages set forth in this
11 Franchise are in 1999 dollars and shall be increased each year by the increase
12 in the U. S. Department of Labor, Bureau of Labor Statistics, Consumer Price
13 Index for Pacific Cities and U. S. City Average, Seattle, Urban Wage Earners
14 and Clerical Workers Second Half Yearly Report. The amount of liquidated
15 damages for all material violations of the Franchise Agreement for which actual
16 damages may not be ascertainable shall be: \$500 per day for each violation for
17 each day the violation continues. It is provided, however, that the City shall
18 allow the Franchisee a minimum of 30 days after notice to the Franchisee of
19 such neglect, failure, or refusal to comply within which to meet compliance or
20 correct performance, prior to the assessment of any liquidated damages.

21 4.4 Failure to Enforce. Franchisee shall not be relieved of any of its
22 obligations to comply promptly with any provision of this Franchise by reason of
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1 any failure of the City to enforce prompt compliance, and the City's failure to
2 enforce shall not constitute a waiver of rights or acquiescence in Franchisee's
3 conduct.

4 4.5 Force Majeure. The Franchisee shall not be deemed in default
5 with provisions of its Franchise where performance was rendered impossible by
6 war or riots, civil disturbances, floods, or other natural catastrophes beyond the
7 Franchisee's control; the unforeseeable unavailability of labor or materials; or
8 power outages exceeding back-up power supplies. The acts or omissions of
9 Affiliates are not beyond the Franchisee's control, and the knowledge of
10 Affiliates shall be imputed to Franchisee. The Franchise shall not be revoked
11 or the Franchisee penalized for such noncompliance, provided that the
12 Franchisee takes immediate and diligent steps to bring itself back into
13 compliance and to comply as soon as possible under the circumstances with its
14 Franchise without unduly endangering the health, safety, and integrity of the
15 Franchisee's employees or property, or the health, safety, and integrity of the
16 public, Public Rights-of-Way, public property, or private property.
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20 4.6 Alternative Remedies. No provision of this Franchise shall be
21 deemed to bar the right of the City to seek or obtain judicial relief from a
22 violation of any provision of the Ordinance or any rule, regulation, requirement
23 or directive promulgated thereunder. Neither the existence of other remedies
24 identified in this Franchise nor the exercise thereof shall be deemed to bar or
25 otherwise limit the right of the City to recover monetary damages for such
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1 violation by Franchisee, or to seek and obtain judicial enforcement of
2 Franchisee's obligations by means of specific performance, injunctive relief or
3 mandate, or any other judicial remedy at law or in equity.

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

16 SECTION 5 - REPORTING REQUIREMENTS.

17 5.1 Quarterly Reports. Within 30 days after the end of each of
18 Franchisee's fiscal quarters, Franchisee shall submit a written report to the
19 City, which shall contain a listing of all categories of Gross Revenues earned
20 and Gross Receipts collected by Franchisee for its business activities as
21 identified in Section 2.1, which are activities specifically taxable as a telephone
22 business under Tacoma Municipal Code Chapter 6.66. Said written report
23 shall be in sufficient detail and with sufficient explanation, to enable the City to
24 understand the report and to verify the accuracy of the report. In addition,
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1 Franchisees shall provide such other quarterly reports as may be required by
2 Title 16.

3 5.2 Annual Report. No later than 120 days following the end of
4 Franchisee's fiscal year each year, Franchisee shall present a written report to
5 the City which shall include:
6

7 A. Audited financial statements for (1) Franchisee and (2) the
8 Affiliate which signed the guarantee for the previous fiscal year; and a financial
9 statement for Franchisee that includes Gross Revenues from all sources, gross
10 Subscriber revenues from each category of service, as well as an income
11 statement and a balance sheet. In the event any audited financial report has
12 not been published by the date due under this section, then the audited
13 financial report shall be deemed presented on time if presented within 30 days
14 after publication.
15

16 All financial reports required under this section shall be presented
17 to the City accompanied by such notes and explanations as are required to
18 fully understand the reports. Such notes and explanations shall include, but
19 not be limited to, an explanation of any and all deductions made from Gross
20 Revenues in order to arrive at Gross Receipts for the calculation of Fees or
21 taxes to be paid to the City.
22

23 B. A summary of the previous year's activities for the
24 Franchise Area, including, but not limited to, the total number of Customers,
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1 miles of underground Facilities, any services added or dropped, and any
2 technological changes occurring in the system.

3 C. Plans for the future.

4 D. Such other information as is required by Title 16.

5
6 5.3 Additional Reports. Franchisee shall prepare and furnish to the
7 City, upon request, at the times and in the form prescribed by the City, such
8 additional reports with respect to Franchisee's operation, affairs, transactions,
9 or property, as may be reasonably necessary and appropriate to ensure
10 compliance with the material provisions of this Franchise, or to permit the
11 performance of any of the rights, functions or duties of the City or such other
12 regulatory entity in connection with the Franchise.

13
14 5.4 Preservation of Confidential Information. Trade secrets and
15 confidential information designated as such by Franchisee shall be subject to
16 protection as provided in Title 16.

17 SECTION 6 - COMPENSATION AND FINANCIAL PROVISIONS.

18
19 6.1 Fees; Taxes.

20 A. State Prohibition of Franchise Fee. The parties understand
21 that RCW 35.21.860 currently prohibits a municipal franchise fee. Franchisee
22 agrees that if this statutory prohibition is removed, the City may assess a
23 reasonable franchise fee. The parties agree that a reasonable amount would
24 be 6 percent of Franchisee's Gross Receipts from its business activities paid
25 monthly in the City of Tacoma, which Gross Receipts include the amount of tax
26



1 imposed by the City. The parties agree that this Section 6.1(A) herein does not
2 limit the right of the Franchisee to challenge the franchise fee pursuant to
3 47 USC § 253.
4

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

6 Franchisee agrees that all of its activities in the City of Tacoma, as identified in
7 Section 2.1, are activities specifically taxable as a telephone business under
8 Tacoma Municipal Code Chapter 6.66, and are taxable at the rate specified in
9 Tacoma Municipal Code Chapter 6.66 now in effect or as amended, which at
10 the time of the execution of this Franchise agreement is 6 percent of the
11 Franchisee's Gross Receipts. It is agreed that the amount of Gross Receipts to
12 be taxed will include the amount of tax imposed on Franchisee by City
13 ordinance. This Franchise does not limit the City's power of taxation.
14

15 C. Franchisee Obligated to Pay Administrative Costs. In

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

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

4 E. No Other Deductions. Subject to federal law and regulation,
5 no deductions including current or previously paid fees shall be subtracted
6 from the Gross Revenue amount upon which payments are calculated and due
7 for any period. Nor shall copyright fees or other license fees paid by
8 Franchisee be subtracted from Gross Revenues for purposes of calculating
9 payments.
10

11 F. Late Payments. Any fees owing which remain unpaid more
12 than 10 days after the dates specified herein shall be delinquent and shall
13 thereafter accrue interest at 12 percent per annum or 2 percent above highest
14 prime lending rate published daily in the Wall Street Journal, during the period
15 the payment is due but unpaid, whichever is greater.
16

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

3 6.2 Auditing and Financial Records. Franchisee shall manage all of
4 its operations in accordance with a policy of keeping books and records open
5 and accessible to the City. Without limiting its obligations under this
6 Franchise, Franchisee agrees that it will collect and make available books and
7 records for inspection and copying by the City in accordance with Title 16.
8 Franchisee shall be responsible for collecting the information and producing it.
9 Books and records shall be produced to the City at the Tacoma Municipal
10 Building, or such other location as the parties may agree. Notwithstanding any
11 provision of Title 16 or this Franchise, if documents are too voluminous or for
12 security reasons cannot be produced at the Tacoma Municipal Building or
13 mutually agreeable location within the City, then the Franchisee may produce
14 the material at another central location, provided it also agrees to pay the
15 additional reasonable costs incurred by the City in reviewing the materials.
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19 Franchisee shall take all steps required, if any, to ensure that it is able to
20 provide the City all information which must be provided or may be requested
21 under Title 16 or this Franchise, including by providing appropriate Subscriber
22 privacy notices. Nothing in this section shall be read to require a Franchisee to
23 violate 47 U.S.C. § 551. Franchisee shall be responsible for redacting any
24 data that federal law prevents it from providing to the City. Records shall be
25 kept for at least six years. In addition to maintaining all records as required by
26



1 Title 16, Franchisee shall maintain records sufficient to show its compliance
2 with the requirements of this Franchise, and shall produce those records within
3 30 days of a City request.

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

10 The City agrees to request access to only those books and records, in
11 exercising its rights under this section, which it deems reasonably necessary as
12 part of a bona fide exercise of its authority over the Telecommunications
13 System under this Franchise, Title 16 or other applicable law. The City further
14 agrees that it will withhold from public disclosure those books and records
15 made available to it pursuant to this section 6.2, but only to the extent that the
16 City believes that it has the discretion to do so under state law.
17

18
19 6.3 Performance Bond. At the same time it provides its Franchise
20 acceptance to the City, Franchisee shall provide a performance bond to ensure
21 the faithful performance of its responsibilities under this Franchise and
22 applicable law, including by way of example and not limitation, its obligations to
23 relocate and remove its facilities; and to restore City Rights-of-Way and other
24 property. The initial amount of the performance bond shall be \$100,000. The
25 amount of the bond may be changed from time to time to reflect changed risks
26



1 to the City or to the public. The Franchisee may be required to obtain additional
2 bonds in accordance with the City's ordinary practices. The bond shall be in a
3 form and with a surety acceptable to the City's Risk Manager and in a form
4 acceptable to the City Attorney. Franchisee shall pay all premiums or costs
5 associated with maintaining the bond, and shall keep the same in full force and
6 effect at all times.
7

8 6.4 Indemnification by Franchisee.

9 A. Franchisee, by accepting this Franchise, agrees to release
10 the City from and against any and all liability and responsibility in or arising out
11 of the construction, operation or maintenance of the Telecommunications
12 System, and, without limiting the provisions of Section 7.4, agrees not to sue or
13 seek any money or damages from City in connection with the above mentioned
14 matters .
15

16 B. Franchisee agrees to indemnify and hold harmless the
17 City, its trustees, elected and appointed officers, agents, and employees, from
18 and against any and all claims, demands, or causes of action of whatsoever
19 kind or nature, and the resulting losses, costs, expenses, reasonable attorneys'
20 fees, liabilities, damages, orders, judgments, or decrees, sustained by the City
21 or any third party arising out of, or by reason of, or resulting from or of the acts,
22 errors, or omissions of the Franchisee, or its agents, independent contractors
23 or employees related to or in any way arising out of the construction, operation
24 or repair of the Telecommunications System. Franchisee waives immunity
25
26

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1 under Title 51 RCW and affirms that the City and Franchisee have specifically
2 negotiated this provision, as required by RCW 4.24.115, to the extent it may
3 apply.

4 C. Franchisee agrees that the covenants and representations
5 relating to the indemnity provided in A-B above shall survive the term of its
6 Franchise and continue in full force and effect as to the Franchisee's
7 responsibility to indemnify.
8

9 6.5 Franchisee Insurance.

10 A. Franchisee shall maintain, throughout the term of the
11 Franchise, adequate insurance to protect the City, its trustees, elected and
12 appointed officers, agents, and employees against claims and damages that
13 may arise as a result of the construction, operation or repair of the
14 Telecommunications System. This obligation shall require Franchisee to
15 maintain insurance at least in the following amounts:
16

17 (1) **COMPREHENSIVE GENERAL LIABILITY** insurance
18 to cover liability bodily injury and property damage. Exposures to be covered
19 are: premises, operations, products/completed operations, and certain
20 contracts. Coverage must be written on an occurrence basis, with the following
21 limits of liability:
22

23 (a) Bodily Injury

- 24 1. Each Occurrence \$1,000,000
25 2. Annual Aggregate \$ 3,000,000
26



(b) Property Damage

1. Each Occurrence \$1,000,000
2. Annual Aggregate \$3,000,000

(c) Personal Injury

Annual Aggregate \$ 3,000,000

(2) COMPLETED OPERATIONS AND PRODUCTS

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

(3) PROPERTY DAMAGE LIABILITY INSURANCE

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

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

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

(5) COMPREHENSIVE AUTO LIABILITY Coverage

shall include owned, hired, and non-owned vehicles.

(a) Bodily Injury

1. Each Occurrence \$ 1,000,000
2. Annual Aggregate \$ 3,000,000

(b) Property Damage

1. Each Occurrence \$ 1,000,000
2. Annual Aggregate \$ 3,000,000.

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

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



1 D. The certificates shall contain a provision that coverages
2 afforded under these policies will not be canceled until at least 30 days' prior
3 written notice has been given to the City. Policies shall be issued by
4 companies authorized to do business under the laws of the State of
5 Washington. Financial Ratings must be no less than "A" in the latest edition of
6 "Bests Key Rating Guide", published by A.M. Best Guide.
7

8 E. In the event that the insurance certificate provided
9 indicates that the insurance shall terminate or lapse during the period of the
10 Franchise then in that event, the Franchisee shall furnish, at least 30 days prior
11 to the expiration of the date of such insurance, a renewed certificate of
12 insurance as proof that equal and like coverage has been or will be obtained
13 prior to any such lapse or termination during the balance of the period of the
14 Franchise.
15

16 F. The City shall reserve the right to require any other
17 insurance coverage it deems necessary during the term of the Franchise,
18 depending upon the exposures.
19

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

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

8 SECTION 7 - MISCELLANEOUS PROVISIONS.

9 7.1 Posting and Publication. Franchisee shall assume the cost of
10 posting and publication of this Franchise as such posting and publication is
11 required by law and such is payable upon Franchisee's filing of acceptance of
12 the Franchise.
13

14 7.2 Guarantee of Performance. Franchisee acknowledges that it
15 enters into the Franchise voluntarily in order to secure and in consideration of
16 the grant from the City of a ten-year Franchise. Performance pursuant to the
17 terms and conditions of this Franchise agreement is guaranteed by Franchisee.
18

19 7.3 Governing Law and Venue. The Franchise shall be governed by
20 and construed in accordance with the laws of the State of Washington, and
21 Franchisee agrees that any action brought relative to enforcement of this
22 Franchise shall be initiated in the Superior Court of Pierce County, and shall
23 not be removed to a federal court.
24

25 7.4 No Recourse. Without limiting such immunities as the City or
26 other Persons may have under applicable law, Franchisee shall have no



1 monetary recourse whatsoever against the City or its officials, boards,
2 commissions, agents or employees for any loss, costs, expense or damage
3 arising out of any provision or requirement of Title 16 or because of the
4 enforcement of Title 16 or the City's exercise of its authority pursuant to
5 Title 16, this Franchise or other applicable law.
6

7 7.5 Notice. Unless expressly otherwise agreed between the parties,
8 every notice, billing, or response required by this Franchise to be served upon
9 the City or Franchisee shall be in writing, and shall be deemed to have been
10 duly given to the required party five business days after having been posted in
11 a properly sealed and correctly addressed envelope when hand delivered or
12 sent by mail, postage prepaid. The notices or responses to the City shall be
13 addressed as follows:
14

15 City of Tacoma
16 Tacoma Municipal Building
17 747 Market St., Suite 208
18 Tacoma, WA 98402-3768
19 Attn: General Services Director

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

21 Level 3 Communications, LLC
22 1025 Eldorado Boulevard
23 Broomfield, Colorado, 80021
24 Attn: Director, Network Development
25 Attn: General Counsel
26

27 The City and Franchisee may designate such other address from time to
28 time by giving written notice to the other, but notice cannot be required to more



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

3 7.6 Execution. Franchisee shall execute and return to the City three
4 original countersigned copies of this Ordinance and a signed acceptance of the
5 Franchise granted hereunder within 30 days after the date of passage of the
6 Ordinance by the City Council. The acceptance shall be in a form acceptable
7 to the City Attorney and in accepting the Franchise, Franchisee warrants that it
8 has carefully read the terms and conditions of this Franchise and
9 unconditionally accepts all of the terms and conditions of this Franchise and
10 agrees to abide by the same and acknowledges that it has relied upon its own
11 investigation of all relevant facts, that it has had the assistance of counsel, that
12 it was not induced to accept a Franchise, that this Franchise represents the
13 entire agreement between Franchisee and the City, and that Franchisee
14 accepts all risks related to the interpretation of this Franchise. The
15 countersigned Ordinance and acceptance shall be returned to the City
16 accompanied by: evidence of insurance; a payment for publication costs;
17 billable work order deposit, and security deposit (or the letter of credit). The
18 Franchise rights granted herein shall not become effective until all of the
19 foregoing are received in acceptable form. In the event Franchisee fails to
20 submit the countersigned Ordinance and acceptance as provided for herein, or
21 fails to provide the required accompanying documents and payments, within
22
23
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1 the time limits set forth in this section, the grant of the Franchise shall be null
2 and void.

3
4 Passed **JUL 20 1999**

5
6
7 
Mayor

8 
9 Attest: City Clerk

10
11 Approved as to form and legality

12 
13 Assistant City Attorney



ACCEPTANCE OF CITY FRANCHISE

Ordinance No. 26465, effective August 21, 1999

I, John L. Scarno, am the SENIOR DIRECTOR of
LEVEL 3 COMMUNICATIONS, LLC, and am the authorized representative to accept
the above-referenced City franchise ordinance on behalf of
LEVEL 3 COMMUNICATIONS, LLC.

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

DATED this 23rd day of July, 1999.

By John L. Scarno
Its SENIOR DIRECTOR

Witness: [Signature]



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ACCEPTANCE OF CITY FRANCHISE

Ordinance No. _____, effective _____, 199__

I, _____, am the _____ of
_____, and am the authorized representative to accept
the above-referenced City franchise ordinance on behalf of
_____.

I certify that this franchise and all terms and conditions thereof are
accepted by _____ without qualification or
reservation.

DATED this _____ day of _____, 1999.

By _____
Its _____

Witness: _____

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REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:

Ordinance #:

Resolution #:

7983
26465

1. DATE: JUNE 7, 1999

2. REQUESTING DEPARTMENT/DIVISION/PROGRAM General Services/Communications Division	3. CONTACT PERSON (for questions): Carol Mathewson, Communications Manager	PHONE/EXTENSION 594-7997
---	---	-----------------------------

4. PREPARATION OF AN **ORDINANCE** IS REQUESTED FOR THE CITY COUNCIL MEETING OF TUESDAY, JUNE 29, 1999.

5. SUMMARY TITLE/RECOMMENDATION: (A concise sentence, as it will appear on the Council Agenda)

Granting a non-exclusive telecommunications franchise to Level 3 Communications, L.L.C. to construct, operate and maintain a telecommunications system within the City of Tacoma.

6. BACKGROUND INFORMATION/GENERAL DISCUSSION: (Why is this request necessary? Are there legal requirements? What are the viable alternatives? Who has been involved in the process?)

A telecommunications rights-of-way ordinance was approved by the City Council on April 15, 1997. The proposed franchise agreement with Level 3 Communications, L.L.C. (Level 3) establishes the contractual and legal charges, terms and conditions for, and upon, the construction, maintenance and repair of their telecommunications system in conformance with this telecommunications rights-of-way ordinance. Granting the franchise will enable Level 3 to provide long-haul pass-through carrier services, with the possibility of providing local service in the future.

7. FINANCIAL IMPACT: (Future impact on the budget.)

The City will be collecting a telecommunications tax of six (6) percent of Level 3's gross revenue on taxable telecommunications services provided within the City.

8. LIST ALL MATERIAL AVAILABLE AS BACKUP INFORMATION FOR THE REQUEST AND INDICATE WHERE FILED:

Source Documents/Backup Material

Location of Document

Ordinance No. 26053

City Clerk

9. FUNDING SOURCE: (Enter amount of funding from each source)

Fund Number & Name:

State \$

City \$

Other \$

Total Amount

N/A

If an expenditure, is it budgeted?

☐

Yes

☐

No

Where? Org #

Acct #

10. ATTORNEY CONTACT: (Enter Name of Attorney that you've been working with)

Chris Bacha

11. Department Director/Utility Division Approval <i>John Rowe</i>	Approved as to Availability of Funds <i>Carol Mathewson</i> Director of Finance	<i>Nancy Fowler</i> City Manager/Director Utilities Approval
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RECEIVED

1999 JUN - 8 AM 8:07

CITY CLERK'S OFFICE

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Ordinance No. 26465

First Reading of Ordinance: JUN 29 1999 - *First Reading on 7-20-99*

Final Reading of Ordinance: JUL 20 1999

Passed: JUL 20 1999

Roll Call Vote:

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Baarsma	<input checked="" type="checkbox"/>			
Mr. Crowley	<input checked="" type="checkbox"/>			
Mr. De Forrest	<input checked="" type="checkbox"/>			
Mr. Kirby	<input checked="" type="checkbox"/>			
Dr. McGavick	<input checked="" type="checkbox"/>			
Mr. Miller	<input checked="" type="checkbox"/>			
Mr. Phelps	<input checked="" type="checkbox"/>			
Dr. Silas	<input checked="" type="checkbox"/>			
Mayor Ebersole	<input checked="" type="checkbox"/>			

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Baarsma				
Mr. Crowley				
Mr. De Forrest				
Mr. Kirby				
Dr. McGavick				
Mr. Miller				
Mr. Phelps				
Dr. Silas				
Mayor Ebersole				