



## ORDINANCE NO. 27898

1 AN ORDINANCE relating to cable communications and franchise services;  
2 granting to the Port of Tacoma the nonexclusive right, privilege, authority,  
3 and limited franchise to construct, operate, maintain, remove, replace, and  
4 repair fiber-optic communications facilities in designated area of City  
5 right-of-way, together with equipment and appurtenances for the  
6 transmission of data within and through those certain right-of-way areas,  
7 streets, and public property.

8 WHEREAS, on April 15, 1997, the City Council passed Amended  
9 Substitute Ordinance No. 26053, amending the Tacoma Municipal Code to add  
10 Title 16 regulating the occupancy and use of public rights-of-way by  
11 telecommunications systems, cable systems, and private communication  
12 systems; regulating cable systems; establishing franchise and licensing  
13 requirements; and prescribing minimum charges, terms, and conditions for the  
14 construction, maintenance, and repair of such systems, and

15 WHEREAS, on April 21, 2002, the City Council passed Substitute  
16 Ordinance No. 26936, repealing and reenacting Title 16 to be entitled "Cable  
17 Systems, Open Video Systems, Telecommunications Systems, and Private  
18 Communications Systems" for the regulation of cable, open video and private  
19 communications systems and to comply with federal and state law, and

20 WHEREAS the City's telecommunications right-of-way ordinance  
21 requires operators of telecommunications systems to obtain a franchise to use  
22 and occupy City right-of-way for their business purposes, and

23 WHEREAS, in response to a franchise application received from the Port  
24 of Tacoma, City staff has negotiated a limited franchise agreement that  
25 establishes the contractual and legal charges, terms, and conditions for and  
26



1 upon the construction, maintenance, and repair of its communications system in  
2 conformance with the City Council's telecommunications right-of-way  
3 ordinance; Now, Therefore,

4 BE IT ORDAINED BY THE CITY OF TACOMA:

5 Section 1. Purpose.

6 The City grants this nonexclusive franchise to Grantee to operate and  
7 maintain fiber optic communication lines and related facilities (the "Facilities")  
8 necessary to the operation of Grantee's business and to the health, safety and  
9 welfare of the community. This franchise is conditioned upon the terms and  
10 conditions contained herein and Grantee's compliance with any applicable  
11 federal or state regulatory programs that currently exist or may hereafter be  
12 enacted by any federal or state regulatory agencies with jurisdiction over the  
13 Grantee and its use of the right-of-way. The purpose of this franchise is to  
14 delineate the conditions relating to Grantee's use of the public's right of way,  
15 streets and property and to create a foundation for the parties to work  
16 cooperatively in the public's best interests after this ordinance becomes  
17 effective. By granting this franchise, the City is not assuming any risks or  
18 liabilities therefrom, which shall be solely and separately borne by Grantee.  
19  
20

21 Section 2. Right Conveyed.

22 2.1 Grantor hereby grants, under the terms and conditions contained  
23 herein, to Grantee, a municipal corporation organized and existing under and by  
24 virtue of the laws of the State of Washington, and which is registered and  
25 authorized to transact business within the State of Washington, the right,  
26



1 privilege, authority and franchise to construct, operate, maintain, remove,  
2 replace and repair the Facilities, together with all equipment and appurtenances  
3 as may be necessary thereto, for the transmission and handling of electronic  
4 information and data, through and under those certain streets, avenues, drives  
5 and other public lands within the City of Tacoma, as designated and more  
6 particularly described in Schedule I, which is attached hereto and expressly  
7 incorporated herein by this reference (the "Franchised Area").

8  
9 2.2 This franchise is only intended to convey a limited right and  
10 interest as to that public property and those rights of way designated on  
11 Schedule I in which the City has an actual interest. It is not a warranty of title or  
12 interest in City road rights of way, nor is it a warranty of Grantee's right to locate  
13 in any such area. None of the rights granted herein shall affect the City's ability  
14 or jurisdiction over its property, streets or rights of way.

15 Section 3. Term.

16  
17 Each of the provisions of this franchise shall become effective upon  
18 Grantee's acceptance of the terms and conditions of this franchise (the  
19 "Effective Date") and shall remain in effect for ten (10) years thereafter.  
20 Subsequently, and in accordance with the terms and provisions of Tacoma  
21 Charter Article VIII, City Council may consider renewing this franchise, at the  
22 written request of Grantee, for any additional renewal period at any time within  
23 two (2) years before the end of the franchise's original ten (10) year term,  
24 unless either party expresses its intention in writing to terminate this franchise  
25 at the conclusion of the original ten (10) year term.  
26



Section 4. Compliance with Laws Standards and Policies.

1  
2 Grantee shall, in carrying out any authorized activities under the  
3 privileges granted herein, comply with all applicable federal, state and local  
4 laws of any governmental entity with jurisdiction over the Facilities. This shall  
5 include all applicable laws, rules and regulations, and published City of Tacoma  
6 policies relating to Grantee's use of City right-of-way existing at the Effective  
7 Date of this franchise or that may be subsequently enacted, modified or  
8 amended by any governmental entity with jurisdiction over Grantee and/or the  
9 Facilities.  
10

11 Section 5. Construction on Public Properties.

12 5.1 This Section 5 shall apply to all construction done by Grantee in  
13 the Franchised Area. Except in the event of an emergency, Grantee shall  
14 provide Grantor at least thirty (30) calendar days' written notice prior to any  
15 alteration, repair, replacement, removal, or other substantial activity, other than  
16 routine inspections and maintenance, by Grantee, its agents, employees or  
17 contractors on Grantee's Facilities or appurtenant structures on Grantor's  
18 property. Said written notice shall include, at a minimum, detailed plans and  
19 specifications, if any, and a detailed description of the proposed work and  
20 anticipated time of the work. Such work shall only commence upon the  
21 issuance of applicable permits by the City, which permits shall not be  
22 unreasonably withheld or delayed. In the event of an emergency requiring  
23 immediate action by Grantee for the protection of the Facilities, Grantor's  
24  
25  
26



1 property or other persons or property, Grantee may take such action upon such  
2 notice to Grantor as is reasonable under the circumstances.

3       5.2 All work done hereunder by Grantee or upon Grantee's direction  
4 or on Grantee's behalf shall be undertaken and completed in a workmanlike  
5 manner and in accordance with the descriptions, plans and specifications  
6 provided to, and approved by, Grantor. Grantee's activities shall be conducted  
7 in such a manner as to avoid damage or interference with other utilities, drains  
8 or other structures, and to interfere as little as possible with public travel, or  
9 other municipal uses and the free use of adjoining property and so as to provide  
10 safety for persons and property. The Grantee's construction, maintenance and  
11 repairs shall be in compliance with all applicable laws and regulations of  
12 governmental agencies with jurisdiction including, without limitation the City's  
13 right-of-way restoration policy.  
14

15       5.3 The City may condition the granting of any permit or other  
16 approval that is required under this Franchise, at any time, on any lawful  
17 condition or regulation, unless such condition or regulation is in conflict with a  
18 federal directive, as may be reasonably necessary to the management of the  
19 public right-of-way or the Grantor's property, including, by way of example and  
20 not limitation, bonding, maintaining proper distance from other utilities,  
21 protecting the continuity of pedestrian and vehicular traffic and protecting any  
22 right-of-way improvements, private facilities and public safety.  
23

24       5.4 Whenever it shall be necessary in constructing, maintaining,  
25 repairing, relocating, removing or replacing any of the Grantee's Facilities in any  
26



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

street, right of way area, or public property, the Grantee shall without delay, as soon as is commercially reasonable, and at Grantee's sole expense, remove all debris and restore the surface of the street, or public property as nearly as practicable to as good or better condition as it was in before the work began. Grantee shall replace any property corner monuments, survey reference or hubs that were disturbed or destroyed during Grantee's work in the areas covered by this franchise. Such restoration shall be done in a manner consistent with applicable codes and laws, under the supervision of the City's Director of Public Works or his authorized designee and to the City's reasonable satisfaction and specifications. Whenever restoration is required hereunder, the restoration shall be done under a bond in an amount appropriate to guarantee adequate restoration.

5.5 Grantee shall continuously be a member of the State of Washington one number locator service under RCW 19.122, or approved equivalent, and shall comply with all such applicable rules and regulations. Grantee shall provide reasonable notice to the City prior to commencing any work or construction under this Franchise and additionally to those owners or other persons in control of property abutting the Franchise Area when such work or construction will affect access to such property or otherwise impact such property or the private or public improvements within said area.

5.6 Upon acceptance of this franchise by Grantee, and as a condition of this Franchise, Grantee shall make available to the City, upon the City's written request and at no cost to the City, within sixty (60) working days from



1 construction completion of the Facilities, relevant as-built plans, maps and  
2 records revealing the current location and condition of Grantee's Facilities  
3 within the public right-of-way and public places.

4 5.7 Nothing in this franchise shall be deemed to impose any duty or  
5 obligation upon Grantor to determine the adequacy or sufficiency of Grantee's  
6 plans and designs or to ascertain whether Grantee's proposed or actual  
7 construction, testing, maintenance, repairs, replacement or removal is in  
8 conformance with the plans and specifications reviewed by Grantor. Grantee  
9 shall ensure that any contractor working on its job sites within the Franchise  
10 Area has a written safety plan addressing the safety of all persons and property  
11 during the performance of any work therein.

12 Section 6. Operations, Maintenance, Inspection and Testing.

13 Grantee shall operate, test, inspect and maintain its Facilities in full  
14 compliance with all applicable laws, rules, regulations and policies as now  
15 enacted or hereafter amended, and any other current or future laws or  
16 regulations that are applicable to Grantee's Facilities.

17 Section 7. INTENTIONALLY OMITTED

18 Section 8. Relocation.

19 8.1 Relocation for Public Work. Grantee shall, by a time specified by  
20 the Grantor, protect, support, temporarily disconnect, relocate, or remove any of  
21 its Facilities when required by Grantor for work in furtherance of the public  
22 health, safety, or welfare, which work includes, without limitation: traffic  
23 conditions; public safety; public right-of-way construction; public right-of-way  
24 conditions; public safety; public right-of-way construction; public right-of-way  
25 conditions; public safety; public right-of-way construction; public right-of-way  
26 conditions; public safety; public right-of-way construction; public right-of-way



1 repair (including resurfacing or widening); change of public right-of-way grade;  
2 construction, installation or repair of sewers, drains, water pipes, power lines,  
3 signal lines, tracks, or any other type of government-owned telecommunications  
4 or public transportation systems, public work, public facility, or improvement or  
5 any government-owned utility; public right-of-way vacation; or for any other  
6 public purpose where the work involved would be aided by the removal or  
7 relocation of the Facilities. Collectively, such matters are referred to as the  
8 "public work."  
9

10 8.1.1 Grantee may, after receipt of written notice requesting a  
11 relocation of its facilities under section 8.1, submit to the City written alternatives  
12 to such relocation within thirty (30) calendar days of receiving the plans and  
13 specifications. The City shall evaluate such alternatives and advise Grantee in  
14 writing if one or more of the alternatives are suitable to accommodate the work  
15 that would otherwise necessitate relocation of the Facilities. If so requested by  
16 the City, Grantee shall submit additional information to assist the City in making  
17 such evaluation. The City shall give each alternative proposed by Grantee full  
18 and fair consideration but retains sole discretion to decide for itself whether to  
19 utilize its original plan or an alternative proposed by Grantee. In the event the  
20 City ultimately determines that there is no other reasonable alternative, Grantee  
21 shall relocate its Facilities as otherwise provided in this Section.  
22

23 8.1.2 Grantor shall work cooperatively with Grantee in determining  
24 a viable and practical route within which Grantee may relocate its Facilities under  
25 this Section 8, in order to minimize costs while meeting the public work project  
26



1 objectives. Upon receipt of Grantor's notice, plans and specifications, Grantee  
2 shall complete relocation of its Facilities so as to accommodate the public work  
3 project at least ten (10) calendar days prior to commencement of the public work  
4 project or such other time as the parties may agree in writing.

5 8.2 Notice. Except in the case of emergencies, the City shall provide  
6 written notice, describing where the public work is to be performed, at least  
7 sixty (60) days prior to the deadline by which Grantee must protect, support,  
8 temporarily disconnect, relocate or remove its Facilities. Grantee may seek an  
9 extension of the time to perform such tasks where they cannot be performed in  
10 sixty (60) days even with the exercise of due diligence, and such request for an  
11 extension shall not be unreasonably refused.  
12

13 8.3 Emergency Relocation or Repair. In the event of an emergency, or  
14 where the Facilities create or are contributing to an imminent danger to health,  
15 safety, or property, the City may protect, support, temporarily disconnect,  
16 remove, repair or relocate any or all parts of the Facilities, without prior notice,  
17 and charge the Grantee for costs incurred.  
18

19 8.4 Relocation for Other than Public Work. The City reserves its  
20 authority to require relocation of the Facilities located within the public  
21 right-of-way, as provided for under applicable state, federal, and local law.  
22

23 8.5 Redesign Option. As an alternative to relocation, Grantee may  
24 propose an alternative design for the pending public work in order to avoid any  
25 relocation of Grantee's Facilities. Such redesign proposal shall be subject to  
26 review and approval by the City and all costs of the redesign, including, without



1 limitation, the costs actually incurred in the public work as a result of the  
2 redesign shall be solely for Grantee's account. Approval and acceptance of any  
3 such redesign proposal shall be at the sole discretion of the City.

4 Section 9. INTENTIONALLY OMITTED

5 Section 10. Dispute Resolution.

6 10.1 In the event of a dispute between Grantor and Grantee arising by  
7 reason of this franchise, or any obligation hereunder, the dispute shall first be  
8 referred to the operational officers or representatives designated by Grantor  
9 and Grantee to have oversight over the administration of this franchise. Said  
10 officers or representatives shall meet within thirty (30) calendar days of either  
11 party's request for said meeting, whichever request is first, and the parties shall  
12 make a good faith effort to attempt to achieve a resolution of the dispute.  
13

14 10.2 In the event that the parties are unable to resolve the dispute  
15 under the procedure set forth in section 10.1, then the parties hereby agree that  
16 the matter shall be referred to mediation within Pierce County. The parties shall  
17 mutually agree upon a mediator to assist them in resolving their differences. If  
18 the parties are unable to agree upon a mediator, the parties shall jointly obtain a  
19 list of seven (7) mediators from a reputable dispute resolution organization and  
20 alternate striking mediators on that list until one remains. A coin toss shall  
21 determine who may strike the first name. If a party fails to notify the other party  
22 of which mediator it has stricken within two (2) business days, the other party  
23  
24  
25  
26



1 shall have the option of selecting the mediator from those mediators remaining  
2 on the list. Any expenses incidental to mediation shall be borne equally by the  
3 parties.

4 10.3 If either party is dissatisfied with the outcome of the mediation,  
5 that party may then pursue any available judicial remedies in Pierce County,  
6 provided, that if the party seeking judicial redress does not substantially prevail  
7 in the judicial action, it shall pay the other party's reasonable legal fees and  
8 costs incurred in the judicial action.

9  
10 Section 11. Abandonment or Removal of Facilities.

11 In the event of abandonment or Grantee's permanent cessation of use of  
12 its Facilities, or any portion thereof within the City of Tacoma, the Grantee shall,  
13 within one hundred and eighty days (180) after the abandonment or permanent  
14 cessation of use, remove the Facilities, secure the Facilities in such a manner  
15 as to cause it to be as safe as is reasonably possible, or petitioning the City to  
16 be allowed to decommission the Facilities in place, all in compliance with  
17 applicable laws, regulations and industry standards. In the event of the removal  
18 of all or a portion of the Facilities, Grantee shall restore the Franchise Area as  
19 nearly as possible to a condition that existed prior to installation of Grantee's  
20 facilities and in compliance with the City's right-of-way restoration policy. Such  
21 property restoration work shall be done at Grantee's sole cost and expense and  
22 to Grantor's reasonable satisfaction. If Grantee fails to remove, secure or  
23 decommission the Facilities, and/or fails to restore the Franchised Area or take  
24 such other mutually agreed upon action, Grantor may, after reasonable notice  
25  
26



1 to Grantee, remove the Facilities, restore the Franchised Area or take such  
2 other action as is reasonably necessary at Grantee's expense and Grantor shall  
3 not be liable therefor. This remedy shall not be deemed to be exclusive and  
4 shall not prevent the City from seeking a judicial order directing that the  
5 Facilities be removed.

6 Section 12. Nonexclusive Franchise.

7 This franchise is nonexclusive. Grantor reserves the right to grant other  
8 franchises, easements, licenses, permits or other approvals to others, subject to  
9 the rights granted herein, provided that Grantor shall not grant any other  
10 franchise, license, permit or other approval which would substantially interfere  
11 with Grantee's use. Grantor shall notify Grantee in writing of any proposed  
12 franchise, easement, license or permit for a utility or other structure which may  
13 be located within ten (10) feet of Grantee's Facilities, as shown on the latest  
14 map Grantee has provided the City. When the Grantor has notice that  
15 excavation, construction or other work may be undertaken within ten (10) feet of  
16 Grantee's Facilities, it shall notify Grantee, where possible sixty (60) days in  
17 advance, so that Grantee may have the opportunity to inspect the work to see  
18 that Grantee's Facilities are not damaged. If the contractor undertaking the  
19 excavation, construction or other work is observed to have violated safety  
20 regulations, Grantor will cooperate to the extent feasible in pursuing an  
21 enforcement action to avoid third party damage to the Facilities. This provision  
22 shall not create, either expressly or implicitly, nor shall the City assume, any  
23 liability under any circumstances hereunder.  
24  
25  
26



Section 13. Indemnification.

1  
2 13.1 General Indemnification. Grantee shall indemnify, defend and  
3 hold harmless Grantor from any and all liability, loss, damage, cost, expense,  
4 and claim whatsoever, arising on or after the date of this Agreement, whether at  
5 law or in equity, arising out of or related to, directly or indirectly, the  
6 construction, operation, use, location, testing, repair, maintenance, relocation,  
7 removal, abandonment or damage to Grantee's Facilities, or from the existence  
8 of Grantee's Facilities and appurtenances, or for any information or other items  
9 transmitted through the Facilities, from any and all causes whatsoever, except  
10 to the extent they are caused by Grantor's sole negligence. If any action or  
11 proceeding is brought against Grantor by reason of the Facilities, Grantee shall  
12 defend the Grantor at the Grantee's complete expense, provided that, for  
13 uninsured actions or proceedings, defense attorneys shall be approved by  
14 Grantor, which approval shall not be unreasonably withheld.

15  
16  
17 13.2 Environmental Indemnification. Grantee shall indemnify, defend  
18 and save Grantor harmless from and against any and all liability, loss, damage,  
19 expense, actions and claims, arising on or after the date of this Agreement,  
20 either at law or in equity, including, but not limited to, costs and reasonable  
21 attorneys' and experts' fees incurred by Grantor in defense thereof, arising from  
22 (a) Grantee's breach of any environmental laws applicable to the Facilities or  
23 (b) from any release of a hazardous substance on, from or as a result of the  
24 Facilities being in the Franchise Area, or (c) other activity related to this  
25 franchise by Grantee, its agents, contractors or subcontractors. This indemnity  
26



1 includes but is not limited to (a) liability for a governmental agency's costs of  
2 removal or remedial action for hazardous substances; (b) damages to natural  
3 resources caused by hazardous substances, including the reasonable costs of  
4 assessing such damages; (c) liability for any other person's costs of responding  
5 to hazardous substances; (d) liability for any costs of investigation, abatement,  
6 correction, cleanup, fines, penalties, or other damages arising under any  
7 environmental laws; and (e) liability for personal injury, property damage, or  
8 economic loss arising under any statutory or common-law theory.  
9

10 13.3 Definitions.

11 13.3.1 "Hazardous Substance" means any hazardous, toxic, or  
12 dangerous substance, material, waste, pollutant, or contaminant, including all  
13 substances designated under the Resource Conservation and Recovery Act,  
14 42 U.S.C. § 6901 et seq.; the Comprehensive Environmental Response,  
15 Compensation and Liability Act, 42 U.S.C. § 9601 et seq.; the Hazardous  
16 Materials Transportation Act, 49 U.S.C. § 1801 et seq.; the Federal Water  
17 Pollution Control Act, 33 U.S.C. § 1257 et seq.; the Clean Air Act, 42 U.S.C.  
18 § 7401 et seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; the  
19 Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. § 136 et seq.; the  
20 Washington Hazardous Waste management Act, Chapter 70.105 RCW; and the  
21 Washington Model Toxics Control Act, Chapter 70.105D, RCW; all as amended  
22 from time to time; or any other federal, state, or local statute, code or ordinance  
23 or lawful rule, regulation, order, decree, or other governmental authority as now  
24 or at any time hereafter in effect. The term shall specifically include petroleum  
25  
26



1 and petroleum products. The term shall also be interpreted to include any  
2 substance which, after release into the environment, will or may reasonably be  
3 anticipated to cause death, disease, behavior abnormalities, cancer, or genetic  
4 abnormalities.

5 13.3.2 "Environmental Laws" shall include the Resource Conservation  
6 and Recovery Act, 42 U.S.C. § 6901 et seq.; the Comprehensive Environmental  
7 Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; the  
8 Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq.; the Federal  
9 Water Pollution Control Act, 33 U.S.C. § 1257 et seq.; the Clean Air Act,  
10 42 U.S.C. § 7401 et seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601  
11 et seq.; the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136  
12 et seq.; the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq.; the  
13 Washington Hazardous Waste Management Act, Chapter 70.105 RCW; and the  
14 Washington Model Toxics Control Act, Chapter 70.105D RCW; all as amended  
15 from time to time; or any other federal, state, or local statute, code, or ordinance  
16 or federal or state administrative rule, regulation, ordinance, order, decree, or  
17 other governmental authority as now or at any time hereafter in effect pertaining  
18 to the protection of human health or the environment.

21 Section 14. Insurance, Performance Bond and Security.

22 14.1 During this Agreement, Grantee shall provide and maintain, at its  
23 own cost, insurance in the minimum amount of Two Million United States  
24 Dollars (\$2000,000.00) each occurrence, in a form and with a carrier  
25 reasonably acceptable to the Grantor, naming Grantor as an additional insured  
26



1 for ongoing operations and completed operations, to cover any and all insurable  
2 liability, damage, claims and loss as set forth in Section 13.1 above, and, to the  
3 extent such coverage is reasonably available in the commercial marketplace, all  
4 liability, damage, claims and loss as set forth in Section 13.2 above, except for  
5 liability for fines and penalties for violation of environmental laws and as  
6 otherwise provided below. Insurance coverage shall include, but is not limited  
7 to, all defense costs. Such insurance shall include, but is not limited to,  
8 environmental liability coverage, at a minimum covering liability from  
9 environmental incidents, subject to time element reporting requirements, and  
10 such other applicable pollution coverage as is reasonably available in the  
11 commercial marketplace. In the event that a deductible or self retention amount  
12 applies to the insurance herein, Grantee agrees to pay the amount of that  
13 deductible or self retention amount.  
14

15           14.2 Proof of insurance and a copy of the insurance policy, including,  
16 but not limited to, coverage terms and claims procedures, shall be provided to  
17 the Grantor prior to the beginning of any substantial work, testing or  
18 construction or reconstruction on the Facilities. Said insurance shall contain a  
19 provision that it shall not be canceled without a minimum of thirty (30) days'  
20 prior written notice to the Grantor, and shall include the City of Tacoma as a  
21 named additional insured. All required liability policies shall be maintained for a  
22 period of not less than three years following termination of this franchise.  
23

24           14.3 The indemnity and insurance provisions herein under Sections 13  
25 and 14 shall survive the termination of this franchise and shall continue for as  
26



1 long as the Grantee's Facilities shall remain in or on the Franchise Area or until  
2 the parties execute a new franchise agreement which modifies or terminates  
3 these indemnity or insurance provisions.

4           14.4 Performance Bond. Within thirty (30) days after the award of this  
5 franchise, but in no event sooner than the final reading of the franchise  
6 ordinance, Grantee shall submit to the City Attorney, which shall be filed with  
7 the appropriate City department, a performance bond running to the City, with  
8 good and sufficient surety licensed to do business in the State of Washington  
9 and approved by the City in the amount of \$10,000.00, conditioned that Grantee  
10 shall well and truly observe, fulfill, and perform each term and condition of the  
11 franchise. In the alternative, Grantee may provide written evidence of the  
12 establishment of an assignment of funds in favor of the City, in a form and with  
13 a financial institution acceptable to the City in the amount of \$10,000.00. This  
14 bond (or assignment of funds) shall be conditioned that in the event Grantee  
15 shall fail to comply with any one or more of the provisions of this franchise, then  
16 there shall be recoverable jointly and severally from the principal and/or surety  
17 of such bond, any damages suffered by the Grantor as a result thereof,  
18 including the full amount of any compensation, indemnification, or cost of  
19 removal, relocation or abandonment of Facilities as prescribed herein; said  
20 condition to be a continuing obligation for the duration of the franchise and  
21 thereafter until Grantee has liquidated all of its obligations with the City that may  
22 have arisen from the acceptance of the franchise by Grantee or from its  
23 exercise of any privilege herein granted. Written evidence of payment of  
24  
25  
26



1 required premiums shall be filed and maintained with the City. In lieu of the  
2 bond, Grantee may provide for a letter of credit, assignment of funds, or similar  
3 arrangement to be established giving the City rights substantially the same as  
4 the rights of the City in relation to the bond, the provisions of which letter of  
5 credit, assignment of funds, or other arrangement shall be subject to the  
6 approval of legal counsel for the City.

7           Neither the provisions of this section, any bond (or other security)  
8 accepted by the City pursuant thereto, nor any damages recovered by the City  
9 thereunder shall be construed to excuse faithful performance by Grantee or to  
10 limit liability of Grantee under the franchise or for damages, either to the full  
11 amount of the bond or otherwise, except as otherwise provided herein.

12           14.5   Validity of Bond. If at any time during the term of the franchise,  
13 the condition of the entity issuing the bond shall change in such a manner as to  
14 render the bond unsatisfactory to the City, Grantee shall replace such bond by  
15 a bond of like amount and similarly conditioned, issued by an entity satisfactory  
16 to the City. The City Council, from time to time, may authorize or require  
17 appropriate and reasonable adjustments in the amount of the bond; provided,  
18 however, that prior to any required increase in the amount of the bond, the City  
19 shall give Grantee at least one hundred twenty (120) days' prior notice thereof  
20 stating the exact reason for the requirement. Such reasons must demonstrate a  
21 change in Grantee's business practices that would materially prohibit or impair  
22 its ability to comply with the terms of the franchise or afford compliance  
23 therewith.  
24  
25  
26



Section 15. Annual Franchise Fee.

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

15.1 In consideration for granting this franchise and for the use of the Franchised Area, there is hereby established an annual fee of \$4,000.00, paid in United States Dollars (the "Franchise Fee"). The first installment of the Franchise Fee shall be paid within three (3) weeks of the time Grantee accepts this franchise and shall cover the first twelve (12) months of operation. Each succeeding installment shall cover the next twelve (12) month period and shall be paid upon receipt of invoice, not later than the anniversary date of this franchise's Effective Date. Interest shall accrue on any late payment at the rate of twelve percent (12%) per annum.

15.2 Grantee agrees that it will obtain, pursuant to the City's currently effective code and rates, any and all licenses, permits or other approvals necessary for Grantee to operate, maintain or repair its facilities in the franchised area. This shall include, by way of example only and not limitation, inspection and permit costs associated with Grantee's work in the City's right of way. The franchise fee set forth in section 15.1 does not include standard and customary payments associated with the City's administrative expenses incurred in reviewing, licensing, permitting or granting any other approvals necessary for Grantee to construct, operate, maintain or repair its Facilities or for any inspection or enforcement costs related thereto. Additionally, the foregoing annual fee does not include any generally applicable taxes that the Grantor may legally levy.



Section 16. Notice.

1  
2 All notices, demands, requests, consents and approvals which may, or  
3 are required to be given by any party to any other party hereunder, shall be in  
4 writing and shall be deemed to have been duly given if delivered personally,  
5 sent by facsimile, sent by a nationally recognized overnight delivery service, or  
6 if mailed or deposited in the United States mail and sent by registered or  
7 certified mail, return receipt requested, postage prepaid to:

8 Grantor: Cable Communications and Franchise Services  
9 Manager  
10 City of Tacoma  
11 1224 MLK, Jr., Way  
Tacoma, WA 98405

12 With copy to: City Attorney  
13 City of Tacoma  
14 747 Market Street, #737  
Tacoma, WA 98402

15 Grantee: Port of Tacoma, Director of Contracts  
16 P.O. Box 1837  
Tacoma, WA 98401

17 With copy to: Port General Counsel (provided the City has been  
18 informed of the Port Counsel's current address)

19 or to such other address as the foregoing parties hereto may from time-to-time  
20 designate in writing and deliver in a like manner. All notices shall be deemed  
21 complete upon actual receipt or refusal to accept delivery. Facsimile  
22 transmission of any signed original document and retransmission of any signed  
23 facsimile transmission shall be the same as delivery of an original document.  
24  
25  
26



Section 17. Assignment and Transfer of Franchise.

1  
2 17.1 In accordance with Tacoma City Charter Article VIII, Section 8.5,  
3 this franchise shall not be leased, assigned or otherwise alienated without the  
4 express consent of the Grantor by ordinance, which approval shall not be  
5 unreasonably withheld.

6 17.2 Subject to the foregoing, Grantee and any proposed assignee or  
7 transferee shall provide and certify the following to the City not less than ninety  
8 (90) days prior to the proposed date of transfer:

9  
10 17.2.1 Complete information setting forth the nature, terms and  
11 conditions of the proposed assignment or transfer;

12 17.2.2 All information reasonably required by the City of a  
13 franchise applicant under Tacoma City Charter Article VIII and any applicable  
14 provisions of the Tacoma Municipal Code, as it may be amended from time to  
15 time, with respect to the proposed assignee or transferee;

16 17.2.3 Any other information reasonably required by the City; and,

17  
18 17.2.4 An application fee which shall be set by the City, plus any  
19 other costs actually and reasonably incurred by the City in processing and  
20 investigating the proposed assignment or transfer.

21 17.3 No transfer shall be approved unless the assignee or transferee  
22 has at least the legal, technical, financial, and other requisite qualifications to  
23 carry on the activities of the franchisee granted hereunder.  
24  
25  
26



1           17.4 Any transfer or assignment of this franchise without the prior  
2 written consent of the City as set forth herein shall be void and shall result in  
3 revocation of the existing permit or franchise.

4           Section 18. Reservation of Police Power.

5           All the rights and privileges granted in this franchise shall be governed by  
6 the terms and conditions contained herein subject to the City's reservation of all  
7 its police powers to enact ordinances that are necessary to protect the health,  
8 safety and welfare of the general public.

9           Section 19. Termination.

10           19.1 Grantor may terminate this Agreement upon the occurrence of  
11 any of the following events:  
12

13           19.1.1 If Grantee materially breaches or otherwise fails to perform,  
14 comply with or otherwise observe any of the terms and conditions of this  
15 franchise or fails to maintain all required licenses and approvals from federal,  
16 state, and local jurisdictions, and fails to cure such breach or default within thirty  
17 (30) calendar days of Grantor's providing Grantee written notice thereof, or, if  
18 not reasonably capable of being cured within thirty (30) calendar days, within  
19 such other reasonable period of time as the parties may agree upon; or,  
20

21           19.1.2 Grantee becomes insolvent, unable or unwilling to pay its  
22 debts, or is adjudged a bankrupt; or

23           19.1.3 Grantee fails to maintain the full amount of, or to post a  
24 performance bond as required under the terms of this franchise.  
25  
26



1 19.2 This Agreement shall not be terminated except upon a majority  
2 vote of the City Council, after reasonable notice to Grantee and an opportunity  
3 to be heard, provided that if exigent circumstances necessitate immediate  
4 termination, the hearing may be held as soon as possible after the termination.

5 19.3 Grantor's right to terminate this franchise is in addition to and not  
6 in limitation of any other remedy of Grantor at law or equity. Grantor's failure to  
7 exercise such remedy at any time shall not waive Grantor's right to terminate or  
8 assert any other remedy at law or equity for any future breach or default of  
9 Grantee.

10 19.4 Termination of this franchise shall not release Grantee from any  
11 liability or obligation with respect to any matter occurring prior to such  
12 termination, nor shall such termination release Grantee from any obligation to  
13 remove or secure the Facilities and restore the premises pursuant to Section 11  
14 hereof.

15 Section 20. Legal Relations.

16 20.1 Grantee accepts any privileges granted hereunder by Grantor to  
17 the franchised public right of way and other public property in an "as is"  
18 condition. Grantee agrees that the City has never made any representations,  
19 implied or express warranties or guarantees as to the suitability, security or  
20 safety of Grantee's location of Facilities or the Facilities themselves in public  
21 property or right of way or possible hazards or dangers arising from other uses  
22 of the public right of way or other public property by the City or the general  
23 public. Grantee shall remain solely and separately liable for the function,  
24  
25  
26



1 testing, maintenance, replacement and/or repair of the Facilities or other  
2 activities permitted hereunder.

3 20.2 Grantee hereby waives immunity under Title 51 RCW in any  
4 cases involving the Grantor and affirms that the Grantor and Grantee have  
5 specifically negotiated this provision, to the extent it may apply.

6 20.3 This franchise ordinance shall not create any duty on the City or  
7 any of its officials, employees or agents and no liability shall arise from any  
8 action or failure to act by the City or any of its officials, employees or agents in  
9 the exercise of powers reserved herein. Further, this ordinance is not intended  
10 to acknowledge, create, imply or expand any duty or liability of the Grantor with  
11 respect to any function in the exercise of its police power or for any other  
12 purpose. Any duty that may be deemed to be created in the City hereunder  
13 shall be deemed a duty to the general public and not to any specific party,  
14 group or entity.  
15

16 20.4 This franchise shall be governed by, and construed in accordance  
17 with, the laws of the State of Washington and the parties agree that, in any such  
18 action brought hereunder, except actions based on federal questions, venue  
19 shall lie exclusively in Pierce County, Washington.  
20

21 Section 21. Grantee's Acceptance.

22 This franchise ordinance shall be completely void if Grantee shall not file  
23 its unconditional acceptance of this franchise within thirty (30) calendar days  
24  
25  
26



1 from the final passage of same by Council. Grantee shall file its unconditional  
2 acceptance with the City's Finance Director and a copy of same with the City  
3 Attorney's Office.

4 Section 22. Specific Performance.

5 The parties acknowledge that the covenants set forth herein are  
6 essential to this franchise, and, but for the mutual agreements of the parties to  
7 comply with such covenants, the parties would not have entered into this  
8 franchise. The parties further acknowledge that they may not have an  
9 adequate remedy at law if the other party violates such covenant. Therefore,  
10 the parties shall have the right, in addition to any other rights they may have, to  
11 obtain in any court of competent jurisdiction injunctive relief to restrain any  
12 breach or threatened breach of or otherwise to specifically enforce any of such  
13 covenants contained herein should the other party fail to perform them after  
14 notice as provided herein.  
15

16 Section 23. Miscellaneous Provisions.

17  
18 23.1 All the provisions, conditions, terms and requirements contained  
19 herein shall be binding upon the Grantee's successors and assigns. All of  
20 Grantee's privileges, obligations, and liabilities shall inure to its successors and  
21 assigns equally as if they were specifically mentioned in this franchise wherever  
22 the Grantee is so mentioned.

23  
24 23.2 Any modification, change or alteration to this franchise shall only  
25 be effective if completed in a written ordinance duly approved by City Council  
26 approving said modification, change or alteration.



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


23.3 No failure by any of the foregoing parties to insist upon the strict performance of any covenant, duty, agreement, or condition of this franchise or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or any other covenant, agreement, term or condition. Any party hereto, by notice, and only by notice as provided herein may, but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation or covenant of any other party hereto. No waiver shall affect or alter this franchise, and each and every covenant, agreement, term and condition of this franchise shall continue in full force and effect with respect to other then existing or subsequent breach thereof.

23.4 The captions of this franchise ordinance are for convenience and reference only and in no way define, limit, or describe the scope or intent of this franchise.

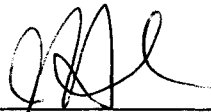
Passed JUL 13 2010

  
Mayor

Attest:

  
City Clerk

Approved as to Form:

  
Deputy City Attorney



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

FRANCHISE ACCEPTANCE BY GRANTEE:

I, the undersigned official of the Port of Tacoma (the "Port"), am authorized to bind the Port and to accept the terms and conditions of the foregoing franchise (Ordinance No. \_\_\_\_\_), which are hereby accepted by the Port this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_. The foregoing date shall constitute the "Effective Date" of the Ordinance.

Port of Tacoma

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Notary Public in and for the  
State of Washington  
My commission  
expires \_\_\_\_\_

Received on behalf of the City this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Name: \_\_\_\_\_

Title: \_\_\_\_\_



## Schedule I

### "Franchised Area"

A meandering 5 Foot wide strip lying within the northerly 75 feet of the Port of Tacoma Road Right of Way described as follows:

Beginning at a point 45 Feet easterly of the intersection of East 11<sup>th</sup> Street, as vacated by City of Tacoma Ordinance 15312 dated April 18, 1955 and the extended northerly margin of Port of Tacoma Road as dedicated per the Corrected Plat of Port of Tacoma Industrial Development District, First Addition recorded March 20, 1957 under Auditor's File Number 1782439, records of Pierce County, Washington; thence Southeasterly, within said Port of Tacoma Road Right of Way, to a point lying 250 Feet Easterly of the easterly margin of Lincoln Avenue and the Terminus of this described strip.

As further depicted within the As-Build drawings attached hereto and incorporated herein by this reference.

All situate in the Northeast and Southeast Quarter of Section 34, and the Southwest Quarter of Section 35, Township 21 North, Range 3 East of the W.M., City of Tacoma, County of Pierce, State of Washington.



REQUEST FOR RECEIVED

ORDINANCE  RESOLUTION

Request #:

12611

Ord./Res. #:

27898

JUN 01 2010

1. DATE: May 28, 2010

CITY CLERK'S OFFICE

2. SPONSORED BY: COUNCIL MEMBER(S) N/A			
3a. REQUESTING DEPARTMENT/DIVISION/PROGRAM Information Technology / Enterprise Applications Support / Citizen Solutions / Cable Communications and Franchise Services 3b. "DO PASS" FROM Government Performance and Finance <input type="checkbox"/> Yes <u>Scheduled for 6/16/10</u> <input type="checkbox"/> No <input type="checkbox"/> To Committee as information only <input type="checkbox"/> Did not go before a Committee 3c. DID THIS ITEM GO BEFORE THE PUBLIC UTILITY BOARD? <input type="checkbox"/> Yes, on <input checked="" type="checkbox"/> Not required	4a. CONTACT (for questions): Jeff Lueders PHONE: 591-5727	4b. Person Presenting: Jeff Lueders PHONE: 591-5727	
	4c. ATTORNEY: Jeff Capell PHONE: 591-5638		
	<i>[Signature]</i> Department Director/Utility Division	<i>[Signature]</i> Budget Officer/Finance Director	<i>[Signature]</i> City Manager/Director Utilities

5. REQUESTED COUNCIL DATE: June 22, 2010

(If a specific council meeting date is required, explain why; i.e., grant application deadline, contract expiration date, required contract execution date, public notice or hearing required, etc.)

6. SUMMARY AGENDA TITLE: (A concise sentence, as it will appear on the Council agenda.)

Granting a non-exclusive telecommunications franchise to Port of Tacoma, to construct, operate, and maintain a telecommunications system within the City of Tacoma.

7. 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?)

On April 15, 1997, the City Council passed a telecommunications rights-of-way ordinance, which Ordinance was repealed and reenacted by the City Council on May 21, 2002, by Ordinance No. 26936 The City's telecommunications rights-of-way ordinance requires operators of telecommunications systems to obtain a franchise to use and occupy City rights-of-way for their business purposes. City staff, in response to a franchise application received from Port of Tacoma have negotiated a franchise agreement which establishes the contractual and legal charges, terms, and conditions for, and upon, the construction, maintenance, and repair of their telecommunications system in conformance with the City Council's telecommunications rights-of-way ordinance.

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

Source Documents/Backup Material	Location of Document
Proposed Franchise Agreement	City Clerk

REQUEST (CONT)

CITY CLERK USE ONLY

Request #:	12611
Ord/Res #:	27898

9. WHICH OF THE CITY'S STRATEGIC GOALS DOES THIS ITEM SUPPORT? (CHECK THE GOAL THAT BEST APPLIES)

- A.  A SAFE, CLEAN AND ATTRACTIVE COMMUNITY
- B.  A DIVERSE, PRODUCTIVE AND SUSTAINABLE ECONOMY
- C.  A HIGH-PERFORMING, OPEN AND ENGAGED GOVERNMENT

10. IF THIS CONTRACT IS FOR AN AMOUNT OF \$200,000 OR LESS, EXPLAIN WHY IT NEEDS LEGISLATIVE APPROVAL:

11. FINANCIAL IMPACT:  EXPENDITURE  REVENUE

- A.  NO IMPACT (NO FISCAL NOTE)
- B.  YES, OVER \$100,000, Fiscal Note Attached
- C.  YES, UNDER \$100,000, (NO FISCAL NOTE)

Provide funding source information below:

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

Fund Number & Name:	State \$	City \$	Other \$	Total Amount
1431 IT Municipal Cable TV			\$40,000.00 (\$4,000 per year for ten years)	\$40,000.00

If an expenditure, is it budgeted?  Yes  No Where? Cost Center:  
Acct #:

Ordinance No. 27898

First Reading of Ordinance: JUN 22 2010

Final Reading of Ordinance: JUL 13 2010

Passed: JUL 13 2010

Roll Call Vote:

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Boe	X			
Mr. Campbell	X			
Mr. Fey	X			
Mr. Lonergan	X			
Mr. Manthou	X			
Mr. Mello	X			
Ms. Walker	X			
Ms. Woodards	X			
Mayor Strickland	X			

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Boe				
Mr. Campbell				
Mr. Fey				
Mr. Lonergan				
Mr. Manthou				
Mr. Mello				
Ms. Walker				
Ms. Woodards				
Mayor Strickland				