



ORDINANCE NO. 28524

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

11 WHEREAS New Cingular Wireless PCS, LLC, a Delaware limited liability
12 company (“New Cingular Wireless PCS, LLC” or “Franchisee”) is a
13 telecommunications company currently involved in the business of operating a
14 telecommunications network utilizing fiber optic and wireless technology, and

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

18 WHEREAS New Cingular Wireless PCS, LLC has applied to the City to
19 install and operate Personal Wireless Facilities (as defined at Section 1.14 below)
20 and fiber optic cable within the City streets and public rights-of-way, and also
21 intends, with appropriate, additional City authorization and subject to City zoning
22 and land use regulations, to place above-ground transmission facilities in certain
locations in City right-of-way, and

WHEREAS the City Council has determined to grant such a franchise to
New Cingular Wireless PCS, LLC upon those certain terms and conditions which



the City Council deems necessary due to the unique nature of fiber optic cable and wireless transmission facilities as set forth herein, and

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

Section 1. Definitions.

1	1.1 City.....	4
2	1.2 City Manager.....	4
3	1.3 Communications System	4
4	1.4 Construction, operation, or maintenance	4
5	1.5 Customer	5
6	1.6 Facilities or Installations.....	5
7	1.7 Franchise	5
8	1.8 Franchise Area.....	5
9	1.9 Franchisee	6
10	1.10 Gross Receipts	6
11	1.11 Operator.....	6
12	1.12 Overhead Facilities	7
13	1.13 Person	7
14	1.14 Personal Wireless Facilities	7
15	1.15 Public Rights-of-Way	7
16	1.16 System.....	7
17	1.17 Telecommunications Service	7
18	1.18 Telecommunications System	8
19	1.19 Telephone Service	9
20	1.20 Underground Facilities	9

Section 2. Franchise.

1	2.1 Grant of Franchise	9
2	2.2 Franchise Term.....	11
3	2.3 Franchise Non-Exclusive	11
4	2.4 Transfers, Generally	11
5	2.5 Revocation.....	12
6	2.6 Continuity of Service and Right to Purchase the System.....	16
7	2.7 Right to Require Removal of Property/Right to Remove Property ...	20
8	2.8 Intentionally Omitted	22
9	2.9 Responsibility for Costs	22
10	2.10 Work of Contractors and Subcontractors	22
11	2.11 Survival of Terms	23
12	2.12 Termination by Franchisee	23



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

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

3.1 Use of Public Rights-of-Way 23

3.2 Construction, Operation, or Maintenance 24

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

3.4 Information Regarding Ongoing Work..... 32

Section 4. Regulatory Provisions.

4.1 Intent 32

4.2 Remedies for Franchise Violations 32

4.3 Procedure for Remediating Franchise Violations 33

4.4 Failure to Enforce..... 36

4.5 Force Majeure..... 36

4.6 Alternative Remedies..... 37

4.7 Compliance with the Laws 37

Section 5. Reporting Requirements.

5.1 Quarterly Reports..... 38

5.2 Future Franchise Fee Report..... 38

5.3 Additional Reports..... 39

5.4 Preservation of Confidential Information 39

Section 6. Compensation and Financial Provisions.

6.1 Fees; Taxes 40

6.2 Auditing and Financial Records 43

6.3 Performance Bond..... 45

6.4 Indemnification by Franchisee 46

6.5 Franchisee Insurance 47

6.6 Security Fund..... 49

Section 7. Miscellaneous Provisions

7.1 Posting and Publication 49

7.2 Guarantee of Performance 49

7.3 Governing Law and Venue 50

7.4 No Recourse..... 50

7.5 Notice 50

7.6 Execution..... 51

Now, Therefore,



BE IT ORDAINED BY THE CITY OF TACOMA:

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

Section 1. Definitions. For the purposes of this Franchise, the following terms, phrases, words, and their derivations shall have the meaning given herein; words not defined herein which are defined in Title 16B of the Tacoma Municipal Code (“TMC”), shall have the same meaning or be interpreted as provided in Title 16B. Words not defined here or in Title 16B shall be construed consistently with Title 47 of the United States Code, and if not therein, they shall have their common and ordinary meaning. A reference to any Title of the TMC or to the City Charter refers to the same as may be amended from time to time. Any reference to a “party” hereunder shall mean the City or Franchisee, as applicable, and a reference to the “parties” shall mean collectively the City and Franchisee.

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

1.2 “City Manager” means the City Manager or the City Manager’s designee.

1.3 “Communications System” refers to a telecommunications system.

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



1.5 "Customer" means any Person or entity who legally receives within the corporate limits of the City any one or more of the services provided by the Telecommunications System. The definition of "Customer" shall also include Persons who use Franchisee's Facilities, whether as lessees or through other arrangement.

1.6 "Facilities" or "Installations" are and refer to and include, but are not limited to, plants, systems, improvements, and equipment owned, leased, installed, operated, maintained, or otherwise used by Franchisee, such as antennae, poles, fiber, wires, fixtures, equipment, underground circuits, and conduit in Public Rights-of-Way and other property necessary or convenient for the transmission and distribution of communications service where such facilities are located.

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

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

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



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

1.9 "Franchisee" means New Cingular Wireless PCS, LLC d/b/a AT&T

Mobility, a Delaware limited liability company.

1.10 "Gross Receipts," for purposes of this Franchise, means any and all

receipts or income received directly or indirectly by Franchisee which is derived from the operation of its System in the City, less uncollectibles. Gross Receipts shall include, by way of example and not limitation, revenues from its

Telecommunications Service, all fees, late fees, installation and connection fees, upgrade and downgrade fees, and rental fees. The term "Gross Receipts" shall not include any taxes on services furnished by Franchisee imposed by any

municipality, state, or other governmental unit and collected by Franchisee for such governmental unit, nor shall the term include any wholesale services provided by Franchisee upon which fees or taxes have already been levied within the City of Tacoma.

1.11 "Operator," when used with reference to a System, refers to a Person

(a) who provides service over a Communications System and directly or through one or more affiliates owns a significant interest in such facility; or (b) who otherwise controls or is responsible for, through any arrangement, the

management and operation of such a facility. A Person that operates under agreement of a Telecommunications System or a specific portion of a Telecommunications System to provide Telecommunications Services shall be

treated as an Operator for purposes of this Franchise.



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

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

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

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

1.16 "System" means the Telecommunications System.

1.17 "Telecommunications Service" or "Service" means the transmission for hire of information in electronic, optical form, or by wireless transmission, including,



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

6 1.18 "Telecommunications System" means a tangible facility that is used to
7 provide one or more Telecommunications Services, any portion of which occupies
8 Public Rights-of-Way. The term "Telecommunications System," by way of example
9 and not limitation, includes antennae, wires, equipment cabinets, guys, conduit,
10 radio transmitting towers, poles, other supporting structures, and associated and
11 appurtenant facilities used to transmit telecommunications signals. The term
12 "Telecommunications System" includes all devices mounted on light poles (where
13 separately authorized by an attachment agreement) in the Public Rights-of-Way
14 through which Telecommunications Services are originated or terminated. An
15 Open Video System is not a Telecommunications System to the extent that it
16 provides only video services; a Cable System is not a Telecommunications System
17 to the extent that it provides only Cable Service. The term "Telecommunications
18 System" includes any of the tangible components of a Telecommunications
19 System which occupies Public Rights-of-Way, but poles and other structures to
20 which Franchisee's Facilities are attached shall not be deemed to be part of
21 Franchisee's Telecommunications System unless such poles or other structures
22 are owned by Franchisee.



1.19. "Telephone Service" means the provision of access to a local
1 telephone network, local telephone network switching service, intrastate toll
2 service, or coin telephone service, or providing telephonic, video, data, or similar
3 communication or transmission for hire via a local telephone network, toll line,
4 channel, cable, microwave, or similar communication or transmission system by
5 any person. Telephone Service includes intrastate or interstate service, including
6 toll service, originating from, or received on, communications equipment or
7 apparatus in this state if the charge for the service is billed to a person in this state.
8 Telephone Service does not include the providing of Competitive telephone service
9 as defined in TMC 6A.40.030, the providing of cable television service, or the
10 providing of broadcast services by radio or television stations.

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

14 Section 2. Franchise.

2.1 Grant of Franchise. The City hereby grants to Franchisee a
15 non-exclusive Franchise which, once it becomes effective, shall authorize
16 Franchisee to use the City's Public Rights-of-Way within the Franchise Area to
17 construct, maintain, and operate a fiber optic/wireless Telecommunication System
18 to provide Telecommunication Service and internet access service, and to use the
19 City's Public Rights-of-Way as authorized herein. This grant of Franchise does
20 not, by itself, grant any right to construct, operate, or maintain any new above-
21 ground Facilities without prior City approval, which will require additional permitting
22



and/or an additional site-specific or master siting agreement, in conformance with
1 City zoning and land use ordinances and applicable state laws.

2 This grant is subject to and must be exercised in strict accordance with and
3 subject to this Franchise Agreement, Title 16B, and other applicable provisions of
4 the TMC and Tacoma City Charter, including, but not limited to, the provisions set
5 forth in Article VIII of the Charter, and TMC Title 13, and this Franchise may be
6 revoked under Section 2.5 if it is not so exercised. The exercise of any rights
7 pursuant to this Franchise is subject to the exercise of the City's police powers,
8 and other regulatory powers as the City may have or obtain in the future, and all
9 rights granted herein must be exercised in strict accordance with applicable laws,
10 including, by way of example and not limitation, zoning codes and permitting
11 requirements. No rights shall pass to Franchisee by implication. This Franchise
12 shall constitute both a right and an obligation to provide or cause to be provided
13 the services of the Telecommunications System as required by the provisions of
14 this Franchise.

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

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



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

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

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

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

13 2.4 Transfers, Generally.

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



1 B. Applications for approval of any Transfer shall be filed in
2 accordance with procedures set out in Title 16B of the TMC.

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

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

21 2.5 Revocation. In addition to any rights set out elsewhere in this
22 Franchise, the City Charter, or Title 16, subject to the notice and cure provisions
contained in Title 16B, Section 16B.05.100, the City reserves the right to declare



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

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

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

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

10 D. At any time during the term of the Franchise, Franchisee fails to
11 provide and maintain all of the securities required under this Franchise, including,
12 but not limited to, the performance bond required under this Franchise; fails to
13 maintain the insurance required by this Franchise; or fails to satisfy the indemnity
14 set out in this Franchise; or if any guarantor of Franchisee revokes its guarantee or
15 fails to satisfy or becomes unable to satisfy its obligations under such guarantee.

16 E. The procedures for revocation and forfeiture shall be governed by
17 Title 16B, Section 16B.05.100. Before the Franchise is revoked, Franchisee shall
18 be given notice and opportunity to cure at least equivalent to that required by
19 Title 16B as of the effective date of this Franchise (except in those cases where
20 notice and opportunity to cure are not required or would be futile), and shall be
21 accorded at least an opportunity to be heard that provides at least the due process
22



1 protections required by Title 16B as of the effective date of this Franchise, which
2 opportunities and protections are set out in Section 2.5.F, below.

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

15 (2) Notwithstanding the foregoing, the City may declare a
16 Franchise forfeited without opportunity to cure when Franchisee: (a) stops
17 providing or causing to be provided all Service it is required to provide or cause to
18 be provided under this Franchise, (b) Transfers without the prior consent of the
19 City as and when required in the Franchise, or (c) is found by a court or regulatory
20 body with appropriate jurisdiction to have defrauded or attempted to defraud the
21 City or Franchisee's Customers within the City. Notwithstanding the provisions of
22 Title 16B.05.100.C.2, if Franchisee fails to timely pay any undisputed Franchise
application/administrative fees or other undisputed fees owed hereunder or under



Title 16B, before the City can initiate any termination or forfeiture of rights,
1 Franchisee shall be provided with ten (10) business days' prior written notice and
2 an opportunity to cure the failure to pay. However, Franchisee shall have the right
3 to receive 30 days' prior notice of an intent to declare a Franchise forfeited, and
4 shall have the opportunity to show cause why the Franchise should not be
5 forfeited.

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



1 Franchise to the successful bidder in writing; and (b) the successful bidder has
2 covenanted and agreed in writing with the City to assume and be bound by the
3 terms and conditions of this Franchise and Title 16B.

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

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

12 B. In the event the City has declared a forfeiture for cause or
13 otherwise validly revoked this Franchise as provided herein, or in the event of
14 expiration of the initial term of this Franchise without this Franchise being
15 renewed or extended as provided in Section 2.2 (referred to below collectively
16 as a "termination"), the City shall have an option upon termination of the
17 Franchise to purchase that portion of the Telecommunications System located in
18 the Right-of-Way owned by Franchisee, whether termination is or is not for
19 cause. This option does not include any of Franchisee's proprietary equipment,
20 or other proprietary technology. This option requires Franchisee to convey the
21 Telecommunications System, or such portion thereof as the City may choose to
22 purchase, provided that nothing herein shall require the City to accept or pay for
any contract that it does not wish to assume. Franchisee is not required to



1 convey portions of the Telecommunications System not located in the Right-of-
2 Way, located outside the City, or that is leased or used (but not owned) by
3 Franchisee from a third party pursuant to a tariff or contract. The foregoing
4 option also requires Franchisee to sell the Telecommunications System owned
5 by Franchisee and located in the Right-of-Way, or such portion thereof as the
6 City may choose to purchase, at a fair market price, if the Franchise is
7 terminated for cause. If Franchisee's request for a Franchise renewal is denied,
8 the option requires Franchisee to sell the Telecommunications System owned
9 by Franchisee and located in the Right-of-Way, or such portion thereof as the
10 City may choose to purchase, at fair market value, determined on the basis of
11 the value of the Telecommunications System as a going concern (taking into
12 account such property used and useful in providing service within the City that is
13 not to be conveyed) and with no value allocated to the Franchise itself.

14 C. The City may exercise its Section 2.6.B option rights in the
15 following manner: the City will first give Franchisee written notice of its intent to
16 purchase the Telecommunications System or a portion of the
17 Telecommunications System and request an inventory of the System or portion
18 specified in the City of Tacoma. Thereafter, Franchisee shall have 60 days to
19 produce the requested inventory and the City shall have up to 180 days after
20 receiving the inventory to notify Franchisee that it intends to continue with the
21 exercise of its right to purchase the Telecommunications System or a portion of
22 the Telecommunications System. Within 90 days of the date the City notifies
Franchisee of its intent to exercise the option, or by such other time as the parties



1 may separately agree, the parties shall meet to establish a price that comports
2 with the requirements of Section 2.6.B. If the parties are unable to agree to a
3 price within 180 days after the City notifies Franchisee that the City intends to
4 exercise its purchase option, either party may require the price to be set by
5 appraisal by sending the other party notice that it wishes to have the price set by
6 appraisal. Within 45 days of the date that notice is submitted, each party may
7 appoint one appraiser. If each party appoints an appraiser, the two appraisers
8 shall appoint a third appraiser; if only a single appraiser is appointed (whether by
9 mutual agreement or because of the failure of a party to timely nominate an
10 appraiser) that appraiser shall be the sole appraiser. The appraiser or appraisers
11 shall establish a price for the System or portion thereof that the City desires to
12 purchase in accordance with Section 2.6.B. This appraisal determination shall be
13 final and non-appealable. The City shall have 120 days after the decision of the
14 appraisers to notify Franchisee that it wishes to conclude the transaction; if it does
15 not so notify Franchisee, the option shall be deemed terminated.

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

22 The City and Franchisee will share equally the costs associated
with any appraiser that is jointly appointed (by them or by the appraisers each



1 selects); the City will bear costs associated with any appraiser that it separately
2 appoints and Franchisee will bear costs associated with any appraiser that it
3 separately appoints.

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

10 To acquire by purchase or condemnation, for the use of
11 the city itself or its inhabitants, all of the property of the
12 grantee within the public streets, alleys, or places at a fair
13 and just value, which shall not include any valuation of
14 the franchise, right, or privilege, which shall thereupon be
15 terminated.

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

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

22 E. In the event the City purchases, acquires, takes over, or holds all
or parts of the System, the City shall have the right, without limitation, to assign,
sell, lease, or otherwise transfer its interest in all or parts of such System to any



1 other Person or entity, including any other Franchisee of a Telecommunications
2 System, on whatever terms the City deems appropriate.

3 2.7 Right to Require Removal of Property/Right to Remove Property.

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

16 B. To the extent any portion of the System in the Public
17 Rights-of-Way or on any other public property of the City is not removed by the
18 Operator within 12 months of the end of the Franchise term, the City shall send
19 written notice to Franchisee, and Franchisee shall have 60 days following receipt
20 of such notice to remove its Facilities from the Right-of-Way. If Franchisee does
21 not remove its Facilities within 60 days following receipt of the City's notice, the
22 property will be deemed abandoned in its AS-IS, WHERE-IS condition and shall
become the property of the City if the City wishes to own it.



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

7 D. Franchisee shall file a written removal plan with the City not later
8 than 30 calendar days following the date of the receipt of any orders directing
9 removal, or any consent to removal describing the work that will be performed, the
10 manner in which it will be performed, and a schedule for removal by location. The
11 removal plan shall be subject to approval and regulation by the City, including,
12 without limitation, the City's Right-of-Way Restoration Policy. The affected
13 property must be restored in compliance with the City's Right-of-Way Restoration
14 Policy; and any damage caused by Franchisee's removal must be
15 addressed/compensated to the reasonable satisfaction of the City.

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



2.8 Intentionally Omitted.

1 2.9 Responsibility for Costs. Except as expressly provided otherwise, any
2 act that Franchisee is required to perform under this Franchise shall be performed
3 at its cost. If Franchisee fails to perform work that it is required to perform within
4 the time provided for performance, the City, after first providing notice and an
5 opportunity to cure as herein provided, may perform the work and bill Franchisee
6 the actual cost thereof. Franchisee shall pay the amounts billed within 30 days of
7 receipt of an itemized bill. The parties agree that any amounts paid pursuant to
8 this section or Title 16B are not franchise fees.

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



2.11 Survival of Terms. Upon the termination or forfeiture of the Franchise,
1 Franchisee shall no longer have the right to occupy the Public Rights-of-Way for
2 the purpose of providing Telecommunications Service. However, Franchisee's
3 obligations to the City (other than the obligation to provide service or cause such
4 service to be provided to Customers) survive the expiration of these rights
5 according to their terms. By way of illustration and not limitation, Sections 2.6, 2.7,
6 2.9, 2.10, and 4 of this Franchise shall continue in effect as to Franchisee
7 notwithstanding any expiration, forfeiture, or revocation of the Franchise, except to
8 the extent that a City-approved Transfer, sale, or assignment of the
9 Telecommunications System is completed and another entity has assumed full and
10 complete responsibility for the Telecommunications System or for the relevant acts
11 or omissions.

2.12 Termination by Franchisee. Franchisee may terminate this Franchise,
12 with or without cause, upon 60 days' written notice of its intent to so terminate.
13 Upon termination, Franchisee shall accrue no further obligations hereunder, but
14 any obligations accrued prior to termination shall remain, as shall obligations that
15 by their terms survive the termination hereof.
16

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

3.1 Use of Public Rights-of-Way. Franchisee may, subject to the terms of
18 this Franchise and TMC Titles 16B and 13, the City's Right-of-Way Restoration
19 Policy, and other applicable laws, enter onto and use the Public Rights-of-Way to
20 construct, operate, and maintain a Telecommunications System in Public
21 Rights-of-Way within the Franchise Area to provide, or cause to be provided,
22



1 Telecommunications Services and internet access services. Without limiting the
2 foregoing, Franchisee expressly agrees that it will construct, operate, and maintain
3 its System in compliance with the requirements of the TMC, including, but not
4 limited to, Title 16B and Title 13 zoning and land use regulations governing the
5 placement of its Telecommunications System; and will obtain and maintain all
6 bonds and billable work orders required by the same.

6 3.2 Construction, Operation, or Maintenance. Franchisee shall, in all
7 cases, comply with all lawful City ordinances and regulations now in effect or
8 hereinafter enacted regarding the acquisition of permits and such other items as
9 may be required by the City in connection with the construction, operation, or
10 maintenance of the Telecommunications System, including, without limitation, the
11 City's Right-of-Way Restoration Policy.

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

15 A. (1) Franchisee shall, with as much advance notice as is feasible
16 under the circumstances, but in no event less than 90 days, except in
17 circumstances there is a risk to public safety, protect, support, temporarily
18 disconnect, relocate, or remove any of its property when required by the City by
19 reason of traffic conditions; public safety; Public Rights-of-Way construction; Public
20 Rights-of-Way repair (including resurfacing or widening); change of Public Rights-
21 of-Way grade; construction, installation or repair of sewers, drains, water pipes,
22 power lines, signal lines, tracks, or any other type of government-owned



1 Communications System, public work, public project, public facility, or
2 improvement or any government-owned utility; Public Rights-of-Way vacation; or
3 for any other purpose where the work involved would be aided by the removal or
4 relocation of the Telecommunications System. Collectively, such matters are
5 referred to below as the “public work.”

6 (2) In the event of an emergency, or where the
7 Telecommunications System creates or is contributing to an imminent danger to
8 health, safety, or property, the City may protect, support, temporarily disconnect,
9 remove, or relocate any or all parts of the Telecommunications System without
10 prior notice, and charge Franchisee for actual costs incurred.

11 B. Franchisee’s obligation to construct, operate, and maintain its
12 Telecommunications System in compliance with all applicable laws, ordinances,
13 departmental rules and regulations and published or otherwise readily available
14 practices affecting such System, includes, by way of example, and not limitation,
15 the obligation to construct, operate, and maintain in accordance with zoning codes,
16 safety codes, and City construction standards, including the most current version
17 of the Standard Specifications for Road, Bridge and Municipal Construction, as
18 prepared by the Washington State Department of Transportation (“WSDOT”) and
19 the Washington State Chapter of American Public Works Association (“APWA”);
20 the most current version of the APWA Amendments to Division One; and the most
21 current version of the City of Tacoma Amendments thereto. In addition, the
22 construction, operation, and maintenance shall be performed in a manner
consistent with industry standards. Franchisee shall exercise reasonable care in



1 the performance of all its activities and shall use commonly accepted methods and
2 devices for preventing failures and accidents that are likely to cause damage,
3 injury, or nuisance to the public or to property. In the event that Franchisee's work
4 or other use of the Public Rights-of-Way causes damage to any City facility,
5 Franchisee shall bear the cost of repairing, or replacing as necessary, such City
6 facility.

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

18 D. Franchisee must follow City-established requirements for
19 placement of Facilities in Public Rights-of-Way, including the specific location of all
20 Facilities, which includes, without limitation, Personal Wireless Facilities, in the
21 Public Rights-of-Way, and must in any event install Facilities in a manner that
22 minimizes interference with the use of the Public Rights-of-Way by others,
including others that may be installing Communications Facilities.



1 The City may require that Facilities be installed at a particular time, at a
2 specific place, or in a particular manner as a condition of access to a particular
3 Public Right-of-Way area; may deny access if Franchisee is not willing to comply
4 with the City's requirements; and may, upon reasonable advance written notice
5 and an opportunity to cure, remove, or require removal of, any Facility that is not
6 installed in compliance with the requirements established by the City, or which is
7 installed without prior City approval of the time, place, or manner of installation and
8 charge Franchisee for all the costs associated with removal; and may require
9 Franchisee to cooperate with others to minimize adverse impacts on the Public
10 Rights-of-Way through joint trenching and other arrangements consistent with
11 requirements the City imposes on other similarly situated franchisees or users of
12 the Public Rights-of-Way.

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



F. To the extent possible and technically and operationally feasible,

1 Franchisee shall use conduit existing at the time of permitting in installing its
2 System.

G. Subject to subsection G.3 below, and recognizing that

3 Franchisee's intended Personal Wireless Facilities are intended to be located
4 above ground and certain components may be required to be located above
5 ground to function, Franchisee shall be subject to the requirement that whenever
6 all existing utilities are located underground in an area in the City, Franchisee, at
7 its own cost, must also locate its Telecommunication System underground,
8 including Telecommunication System Facilities, such as drops, which cross private
9 property.
10

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

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

18 (3) The City Manager, or designee, may, for good cause
19 shown, exempt a particular portion of the Telecommunication System from the
20 obligation to locate or relocate Facilities underground, where relocation is
21 impractical, where the Facilities, due to the nature of their function must be above
22 ground, or where the interest in protecting against visual blight can be protected in



another manner. Nothing in this Section 3.2.G prevents the City from ordering
1 Franchisee to locate or relocate its Telecommunication System, either
2 underground or to a mutually agreed-upon above ground location, when other
3 existing utilities in an area are ordered to locate or relocate their facilities
4 underground under other provisions of the TMC, it being the intent that the number
5 and extent of Overhead Facilities and the visual pollution resulting therefrom will,
6 over time, be reduced and eventually, to the extent feasible, be eliminated.

7 H. Subject to subsection G.3. above, Franchisee shall participate in
8 conversion to underground Local Improvement Districts (“LIDs”) at the same time
9 as other utilities are required to participate in conversion to underground LIDs.
10 Franchisee, at no cost to the City or abutting property owners, shall share fairly
11 with other utilities the cost of undergrounding when done through the LID process.
12 As part of its obligations under the TMC, Franchisee shall provide the preliminary
13 cost estimate, facility conversion designs, and final cost estimates to any LID
14 project coordinator in a timely manner. At the request of an LID project
15 coordinator, Franchisee shall perform underground construction and movement of
16 Customer connections underground (overhead reclaim), in coordination with the
17 undergrounding services provided by other LID utilities, at no cost to the City or
18 abutting property owners.

19 I. Franchisee shall promptly repair any and all Public Rights-of-Way,
20 public property, or private property that is disturbed or damaged during the
21 construction, operation, or maintenance of its Telecommunications System. Public
22



property and Public Rights-of-Way must be restored in conformance with the City's
1 Right-of-Way Restoration Policy.

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

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

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

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

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

21 (3) Where trenching or other opening of the Rights-of-Way
22 along the extension of Facilities to be removed is required, Franchisee must post



1 bonds as the City may require ensuring that the property is promptly removed with
2 minimum disruption. Franchisee must restore the affected property in
3 conformance with the City's Right-of-Way Restoration Policy; and Franchisee must
4 compensate those whose property it damages for the damage.

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

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



condition if Franchisee fails to do so in a timely manner, and to charge Franchisee therefor.

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

Section 4. Regulatory Provisions.

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

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

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



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

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

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

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

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

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 and complete the cure within a reasonable time.

1 The duty to cure includes the duty to cure all harms caused by the acts or
2 omissions of Franchisee which gave rise to the alleged non-compliance. At the
3 end of the 30-day period, Franchisee shall notify the City in writing of the steps it
4 has taken to cure the default, if any; if the cure is not complete, the reason it is not
5 complete and the projected date for completion; and if the default is disputed, the
6 complete basis for that contention.

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

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

21 E. Liquidated Damage Amounts. Because any material failure to
22 comply with the provisions of this Franchise by Franchisee will result in injury to the



City, and because it may be difficult to estimate the extent of each such injury,
1 Franchisee and the City agree to the following liquidated damages, which
2 provisions represent the best estimate of the damages resulting from injuries of
3 specific types. The amounts of the liquidated damages set forth in this Franchise
4 are in 2018 dollars and shall be increased each year by the increase in the
5 U. S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for
6 Pacific Cities and U. S. City Average for the greater Seattle area. The amount of
7 liquidated damages for all material violations of this Franchise for which actual
8 damages may not be ascertainable shall be: \$100 per day for each violation for
9 each day the violation continues. It is provided, however, that the City shall allow
10 Franchisee a minimum of 30 days after notice to Franchisee of such neglect,
11 failure, or refusal to comply within which to meet compliance or correct
12 performance, prior to the assessment of any liquidated damages.

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

16 G. City's Right to Cure or Respond. The City shall have 30 days
17 from the receipt of notice described above to (a) respond to Franchisee, contesting
18 the assertion of noncompliance; or (b) to cure such default or, in the event that by
19 the nature of the default such default cannot be cured within the 30-day period,
20 initiate steps to remedy such default as promptly as possible and complete the
21 cure within a reasonable time. The duty to cure includes the duty to cure all harms
22 caused by the acts or omissions of City which gave rise to the alleged non-



1 compliance. At the end of the 30-day period, the City shall notify Franchisee in
2 writing of the steps it has taken to cure the default, if any; if the cure is not
3 complete, the reason it is not complete and the projected date for completion; and
4 if the default is disputed, the complete basis for that contention. If the City fails to
5 timely cure the default, then, in addition to any other remedy at law or equity, or
6 provided for in this Franchise, Franchisee may: (i) sue for damages, specific
7 performance, or injunctive relief; or (ii) terminate the Franchise.

8 4.4 Failure to Enforce. Neither party shall be relieved of any of its
9 obligations to comply promptly with any provision of this Franchise by reason of
10 any failure of the other party to enforce prompt compliance, and the failure to
11 enforce shall not constitute a waiver of rights or acquiescence in the defaulting
12 party's conduct.

13 4.5 Force Majeure. Franchisee shall not be deemed in default with
14 provisions of this Franchise where performance was rendered impossible by war
15 or riots, civil disturbances, floods, or other natural catastrophes beyond
16 Franchisee's control; the unforeseeable unavailability of labor or materials; or
17 power outages exceeding back-up power supplies. The acts or omissions of
18 affiliates shall not be deemed to be beyond Franchisee's control, and the
19 knowledge of affiliates shall be imputed to Franchisee. This Franchise shall not
20 be revoked or Franchisee penalized for such noncompliance, provided that
21 Franchisee takes immediate and diligent steps to bring itself back into compliance
22 and to comply as soon as possible under the circumstances with this Franchise
without unduly endangering the health, safety, and integrity of Franchisee's



employees or property, or the health, safety, and integrity of the public, Public
1 Rights-of-Way, public property, or private property.

2 4.6 Alternative Remedies. No provision of this Franchise shall be deemed
3 to bar the right of the City or Franchisee to seek or obtain judicial relief from a
4 violation of any provision of this Ordinance or any rule, regulation, requirement, or
5 directive promulgated thereunder. Neither the existence of other remedies
6 identified in this Franchise nor the exercise thereof shall be deemed to bar or
7 otherwise limit the right of the City or Franchisee to recover monetary damages for
8 such violation by Franchisee, or to seek and obtain judicial enforcement of
9 Franchisee's or the City's obligations by means of specific performance, injunctive
10 relief or mandate, or any other judicial remedy at law or in equity.

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

21
22



Section 5. Reporting Requirements.

1 5.1 Annual Reports. Within 120 days following the end of Franchisee's
2 fiscal year each year, the City may, in writing, require that Franchisee submit a
3 written report to the City which shall contain a listing of all categories of Gross
4 Receipts collected by Franchisee for its business activities as identified in
5 Section 2.1, which are activities specifically taxable as a telephone business under
6 TMC Title 6. Said written report shall be in sufficient detail and with sufficient
7 explanation to enable the City to understand the report and to verify the accuracy
8 of the report. In addition, Franchisee shall provide such other reports as may be
9 required by Title 16B.

10 5.2 Future Franchise Fee Report. In the event that changes in applicable
11 laws allow the City to require a franchise fee as referenced in Section 6 below,
12 then no later than 120 days following the end of Franchisee's fiscal year each year
13 after the imposition of franchise fees, Franchisee shall present a written report to
14 the City which shall include:

15 A. Audited financial statements for (1) Franchisee and (2) any
16 affiliate which is involved in any way with the operation or ownership of the
17 System; and a financial statement for Franchisee that includes Gross Receipts
18 from all sources, as well as an income statement and a balance sheet. In the
19 event any audited financial report has not been published by the date due under
20 this section, then the audited financial report shall be deemed presented on time if
21 presented within 30 days after publication.

22



1 All financial reports required under this section shall be presented to
2 the City, accompanied by such notes and explanations as are required to fully
3 understand the reports. Such notes and explanations shall include, but not be
4 limited to, an explanation of any and all deductions made from Gross Receipts for
5 the calculation of fees or taxes to be paid to the City, as well as:

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

10 (2) Plans for the future; and

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

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

19 5.4 Preservation of Confidential Information. Trade secrets and confidential
20 information designated as such by Franchisee shall be subject to such protection
21 as provided in Title 16B or under chapter 42.56 RCW, or as otherwise provided by
22 applicable laws. Franchisee shall be responsible for clearly and conspicuously
identifying the work as confidential or proprietary, and shall provide a brief written



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

12 Section 6. Compensation and Financial Provisions.

13 6.1 Fees; Taxes.

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

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

21 Franchisee agrees that its activities in the City of Tacoma identified in Section 2.1,
22 but excluding internet access service, are activities specifically taxable as a
telephone business under TMC Chapter 6A, and are taxable at the rate specified in



1 TMC 6A.40.050.D, now in effect or as amended, which at the time of the execution
2 of this Franchise agreement is 7.5 percent of the Franchisee's Gross Receipts, but
3 excluding any Gross Receipts from the provision of internet access service. It is
4 agreed that the amount of Gross Receipts to be taxed will not include the amount
5 of tax imposed on Franchisee by City ordinance unless Franchisee is passing on
6 the amount of tax imposed to its customers within the City. This Franchise does
7 not limit the City's power of taxation.

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



D. Manner of Payment; Audit. Franchisee will pay the City Telephone

1 Business Tax specified in Section 6.1.B on a monthly basis accompanied by
2 Franchisee's standard remittance form which specifies the net taxable charges, the
3 local tax rate, and the local tax due, plus penalties and/or interest, if any is due.
4 Franchisee shall make all other required fee payments in the form, at the intervals,
5 and in the manner requested by the City Treasurer, and furnish the City Treasurer
6 any information related to his/her revenue collection functions reasonably requested.
7 In case of audit, the City Treasurer may require Franchisee to furnish a verified
8 statement of compliance with Franchisee's obligations or in response to any
9 questions. Said certificate may be required from an independent, certified public
10 accountant at Franchisee's expense. All audits will take place on Franchisee's
11 premises or offices furnished by Franchisee, which shall be a location within the City
12 of Tacoma or other mutually agreeable place; however, Franchisee must agree to
13 pay the associated costs of travel. Franchisee agrees, within 30 days of written
14 request of the City Treasurer, to provide to the person and address specified in the
15 City Treasurer's request, copies of all documents filed with any federal, state, or
16 local regulatory agency, to be mailed to the City Treasurer on the same day as filed,
17 postage prepaid, affecting any of Franchisee's Facilities or business operations in the
18 City of Tacoma.

19 E. No Other Deductions. No deductions, including current or
20 previously paid fees, shall be subtracted from the Gross Receipts amount, except
21 as allowed under state or federal law, upon which payments are calculated and
22 due for any period, nor shall copyright fees or other license fees paid by



Franchisee be subtracted from Gross Receipts for purposes of calculating
1 payments.

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

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

15 6.2 Auditing and Financial Records. Franchisee shall manage all of its
16 operations in the City of Tacoma in accordance with a policy of keeping books and
17 records open and accessible to the City. Without limiting its obligations under this
18 Franchise, Franchisee agrees that it will collect and make books and records for
19 operations in the City of Tacoma available for inspection and non-confidential
20 books and records for operations in the City of Tacoma for copying by the City in
21 accordance with Title 16B. Franchisee shall be responsible for collecting the
22 information and producing it. Books and records shall be made available for



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

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

22 Franchisee agrees to meet with a representative of the City upon request,
but in no event more than once annually, to review its methodology of record-



1 keeping, financial reporting, computing fee obligations, and other procedures, the
2 understanding of which the City deems necessary for understanding the meaning
3 of reports and records.

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

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



1 reasonably acceptable to the City Attorney. Franchisee shall pay all premiums or
2 costs associated with maintaining the bond, and shall keep the same in full force
3 and effect at all times during the Franchise Term.

4 6.4 Indemnification by Franchisee.

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

13 B. Franchisee agrees to indemnify and hold harmless the City, its
14 trustees, elected and appointed officers, agents, and employees, from and against
15 any and all claims, demands, or causes of action of whatever kind or nature, and
16 the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities,
17 damages, orders, judgments, or decrees, sustained by any third party arising out
18 of, or by reason of, or resulting from or of the acts, errors, or omissions of
19 Franchisee or its agents, independent contractors, or employees related to or in
20 any way arising out of the construction, operation, maintenance, or relocation of
21 the Telecommunications System, unless and to the extent caused by the
22 negligence or willful misconduct of the City or its agents or representatives.

Franchisee waives immunity under Title 51 RCW and affirms that the City and



Franchisee have specifically negotiated this provision, as required by
1 RCW 4.24.115, to the extent it may apply.

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

7 6.5 Franchisee Insurance.

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

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

22



1 C. Certificates of insurance, reflecting evidence of the required
2 insurance and including the City as an additional insured with all required
3 endorsements on the Commercial General Liability and Automotive
4 policies/coverages hereby required, shall be filed with the City's Risk Manager.
5 The certificate shall be filed with the acceptance of the Franchise and annually
6 thereafter, and as provided in E below.

7 D. Policies shall be issued by companies authorized to do business
8 under the laws of the state of Washington. Financial Ratings must be no less than
9 "A-VII" in the latest edition of "Bests Key Rating Guide," published by A.M. Best
10 Guide.

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

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

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



1 6.6 Security Fund. Franchisee shall establish a cash security fund or
2 provide the City an irrevocable letter of credit or assignment of funds in the
3 amount of \$50,000, as additional security to secure the payment of fees owed, to
4 secure any other performance promised in this Franchise, and to pay any taxes,
5 fees, or liens owed to the City. Any letter of credit shall be in a form and with an
6 institution acceptable to the City's Director of Finance and in a form acceptable to
7 the City Attorney. Should the City draw upon the cash security fund or letter of
8 credit or assignment of funds, it shall promptly notify Franchisee and Franchisee
9 shall promptly restore the fund or the letter of credit or assignment of funds to the
10 full required amount. The City may from time to time change the amount of the
11 required security fund/letter of credit/assignment of funds to reflect changes in
12 the risks to the City and to the public, including delinquencies in taxes or other
13 payments to the City.

14 Section 7. Miscellaneous Provisions.

15 7.1 Posting and Publication. Franchisee shall assume the cost of posting
16 and publication of this Franchise, as such posting and publication is required by
17 law, and such is payable upon Franchisee's filing its acceptance of the
18 Franchise.

19 7.2 Guarantee of Performance. Franchisee acknowledges that it enters
20 into the Franchise voluntarily in order to secure and in consideration of the grant
21 from the City of a ten-year Franchise. Performance pursuant to the terms and
22 conditions of this Franchise agreement is guaranteed by Franchisee.



1 7.3 Governing Law and Venue. The Franchise shall be governed by and
2 construed in accordance with the laws of the state of Washington without
3 recourse to any principles of Conflicts of Laws, except that where federal law
4 preemptively applies it shall control. Any litigation between the City and
5 Franchisee arising under or regarding this Franchise shall occur, if in the state
6 courts, in the Superior Court of Pierce County, and if in the federal courts, in the
7 United States District Court for the Western District of Washington.

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

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



1 City of Tacoma
2 Municipal Services Building
3 1224 MLK Jr Way
4 Tacoma, WA 98405
5 Attn: Franchise Services Manager

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

7 New Cingular Wireless PCS, LLC
8 Attn: Network Real Estate Administration
9 Site No. City of Tacoma Franchise Agreement (WA)
10 575 Morosgo Drive NE
11 Atlanta, GA 30324

12 With a copy to:

13 New Cingular Wireless PCS, LLC
14 Attn: AT&T Legal Dept. – Network Operations
15 Site No. City of Tacoma Franchise Agreement (WA)
16 208 S. Akard Street
17 Dallas, TX 75202-4206

18 The City and Franchisee may designate such other address from time to
19 time by giving written notice to the other, but notice cannot be required to more
20 than two addresses.

21 7.6 Execution. Franchisee shall execute and return to the City three
22 original countersigned copies of this Ordinance and a signed acceptance of the
Franchise granted hereunder within 30 days after the date of passage of the
Ordinance by the City Council. The acceptance shall be submitted in the form
attached hereto or other form acceptable to the City Attorney and in accepting
the Franchise, Franchisee warrants that it has carefully read the terms and
conditions of this Franchise and unconditionally accepts all of the terms and
conditions of this Franchise and agrees to abide by the same and acknowledges
that it has relied upon its own investigation of all relevant facts, that it has had



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

the assistance of counsel, that it was not induced to accept a Franchise, that this Franchise represents the entire agreement between Franchisee and the City, and that Franchisee accepts all risks related to the interpretation of this Franchise. The countersigned Ordinance and acceptance shall be returned to the City accompanied by: evidence of insurance; a payment for publication costs; billable work order deposit; and the security fund deposit and performance bond.

The Franchise rights granted herein shall not become effective until all of the foregoing is received in acceptable form. In the event Franchisee fails to submit the countersigned Ordinance and acceptance as provided for herein or fails to provide the required accompanying documents and payments within the time limits set forth in this section, the grant of the Franchise shall be null and void.

Passed _____

Mayor

Attest:

City Clerk

Approved as to form:

Deputy City Attorney



ACCEPTANCE OF CITY FRANCHISE

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

Ordinance No. _____, effective _____, 2018.

I, _____, am the _____ of New Cingular Wireless PCS, LLC, a Washington limited liability company, and am the authorized representative to accept the above referenced City franchise ordinance on behalf of New Cingular Wireless PCS, LLC.

I certify that this franchise and all terms and conditions thereof are accepted by New Cingular Wireless PCS, LLC.

DATED this ____ day of _____, 2018.

NEW CINGULAR WIRELESS PCS, LLC

By: AT&T Mobility Corporation
Its: Manager

By _____

Its _____