

ORDINANCE NO. _____

TOWN OF GARFIELD, WASHINGTON

**AN ORDINANCE OF THE TOWN OF GARFIELD, WASHINGTON, GRANTING
A NONEXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO THE PORT OF
WHITMAN AND OTHER MATTERS PROPERLY RELATING THERETO.**

An Ordinance granting a franchise (the "Franchise") to the Port of Whitman, a municipal corporation organized under the laws of the State of Washington (hereinafter referred to as "Grantee"), to locate, construct, operate and maintain poles, wires, fiber optics line, underground cables and appurtenances over, under, along and across all of Grantor's rights of way and public property in the Town of Garfield, State of Washington, and setting forth conditions accompanying the grant of Franchise; and,

WHEREAS, the Grantor duly fixed the time and place for hearing said application and due and timely notice of said hearing on such application was given pursuant to statute and ordinance, and hearing on said application having been held as prescribed by law, and the Grantor having been fully advised in the premises and having determined that it is in the public interest to grant such Franchise in the manner herein set forth; and,

WHEREAS, the Town Council has determined that it is in the best interest of and consistent with the convenience and necessity of the Town to grant a Franchise within the confines of the Town to the Franchisee, and on the terms and conditions hereinafter set forth.

NOW THEREFORE BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF GARFIELD, WASHINGTON, as follows:

ARTICLE I. DEFINITIONS

For the purpose of this Franchise the following terms, phrases, words, and their derivations shall have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever required. The word "shall" is mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

- A. "Town" is the Town of Garfield, Washington, a Fourth Class Town and municipal corporation of the State of Washington.
- C. "Franchisee" means Port of Whitman, the grantee of rights under this Franchise ordinance or its lawful successor, transferee or assignee.
- D. "Easement" shall be limited to those Rights-of-Way owned or controlled by the Town.
- E. "Facilities" means any and all fiber optic line, equipment and related appurtenances in any way comprising a part of the System.
- F. "Force Majeure" means any delays caused by reason of (1) civil commotion; (2) riots; (3) Acts of God and nature, including but not limited to floods, earthquakes, ice storms and tornadoes; (4) strikes or labor unrest; (5) the inability to secure materials; and (6) any other event or circumstances reasonably beyond the control of the Franchisee.
- G. "Franchise" means the initial authorization, or renewal thereof, issued by the Town, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of the System in, on and under the Town's Rights-of-Way.
- H. "Franchise Area" shall mean the area within the Town limits of the Town of Garfield, Washington, including areas annexed during the term of this Franchise.
- I. "Rights-of-Way" or "Right-of-Way" means the surface, the air space above the surface, and the area below the surface of any public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or similar property in which the Town holds any property interest or exercises any rights of management or control and which, consistent with the purposes for which it was acquired or dedicated, may be used for the installation and maintenance of the System. No reference in this Franchise to a "Right-of-Way" shall be deemed to be a representation or guarantee by the Town that its interests or other rights in such property are sufficient to permit its use for the installation and maintenance of the System, and the Franchisee shall be deemed to gain only those rights which the Town has the right and power to give and only to the extent necessary to carry out the purposes of this Franchise.
- J. "System" means the poles, wires, fiber optic lines and all necessary or desirable appurtenances for the purpose of a wholesale communications business in accordance with applicable law.

ARTICLE II. GRANT OF FRANCHISE

SECTION 1. Grant

- A. There is hereby granted to the Franchisee a non-exclusive right, privilege, and Franchise to have, acquire, construct, reconstruct, maintain, use and operate within the corporate limits of the Town, the System and to have, acquire, construct, reconstruct, maintain, use and operate in, over, under, along, and across the present and future Rights-of Way all necessary or desirable wires, cables, underground conduits, manholes and other structures and appurtenances in connection with the System.

- B. **Limited Rights.** This Franchise is intended to convey limited rights and interests only as to those Rights-of-Way in which the Town has an actual interest. It is not a warranty of title or interest in any Right-of-Way; it does not provide the Franchisee with any interest in any particular location within the Right-of-Way; and it does not confer rights other than as expressly provided in the grant hereof. This Franchise does not deprive the Town of any powers, rights or privileges it now has, or may later acquire in the future, to use, perform work on or to regulate the use of and to control the Town's Rights-of-Way covered by this Franchise, including without limitation the right to perform work on its roadways, streets or appurtenant drainage facilities, water and waste water facilities and including constructing, altering, paving, widening, grading, or excavating such streets.

SECTION 2. Term

- A. The Franchise granted hereunder shall be for a term of twenty-five (25) years from and after the effective date of this ordinance, unless otherwise lawfully terminated in accordance with the terms of this Franchise.

SECTION 3. Franchise Subject to Other Laws

This Franchise is subject to and shall be governed by all applicable provisions of law. Notwithstanding any other provisions of this Franchise to the contrary, the Franchisee shall at all times comply with all laws and regulations of the state and federal government or any administrative agencies thereof, provided, however, if any such law or regulations shall require the Franchisee to perform any service, or shall permit the Franchisee to perform any service, or shall prohibit the Franchisee from performing any service, in conflict with the terms of this Franchise, Town ordinance, or any regulation of the Town Council, then as soon as possible following knowledge thereof, the Franchisee shall notify the attorney for the Town of the point of conflict believed to exist between such regulation or law and regulations of the Town Council, the Town's ordinance or this Franchise.

SECTION 4. Other Franchises

This Franchise shall not be construed as any limitation upon the right of the Town to grant to other persons rights, privileges, or authorities similar to the rights, privileges, and authorities herein set forth, in the same or other Rights-of-Way, public ways or public places. The Town specifically reserves the right to grant at any time during the term of this Franchise or renewal thereof, if any, such additional Franchises as it deems appropriate.

SECTION 5. Waivers

- A. The failure of the Town on one or more occasions to exercise a right or to require compliance or performance under this Franchise, or any other applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance by the Town, nor shall it excuse the Franchisee from complying or performing, unless such right or such compliance or performance has been specifically waived in writing by the Town.
- B. No waiver by the Town of any breach or violation of any provision of this Franchise or any ordinance shall be deemed to be a waiver or a continuing waiver by the Town of any subsequent breach or violation of the same or any other provision. Neither the granting of the Franchise, nor any provision herein, nor any action by the Town hereunder shall constitute a waiver of or a bar to the exercise of any governmental right or power of the Town, as provided for under state and federal law, including without limitation the right of eminent domain.
- C. No waiver of any provisions of this Franchise by the Town shall be effective unless authorized in writing by the Town.

SECTION 6 Franchise Acceptance; Prior Franchise Superseded and Repealed

- A. Upon adoption of this Franchise and acceptance hereof by the Franchisee, the Franchisee agrees to be bound by all the terms and conditions contained herein, which acceptance shall constitute an absolute and unconditional acceptance of the Franchise and promise to comply with and abide by all its provisions, terms, and conditions. The Franchisee's signature at the end of this Franchise shall constitute compliance with this section.
- B. By accepting the Franchise, the Franchisee: (1) acknowledges and accepts the Town's legal right to issue and enforce the Franchise; (2) accepts and agrees to comply with each and every provision of this Franchise; and (3) agrees that the Franchise was authorized pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

SECTION 7. Police Powers

In accepting this Franchise, the Franchisee acknowledges that its rights hereunder are subject to the police powers of the Town to adopt and enforce general ordinances necessary to the safety and welfare of the public, and the Franchisee agrees to comply with all generally applicable laws and ordinances enacted by the Town pursuant to such power that do not alter the Franchisee's material obligations under this Agreement.

Any conflict between the provisions of this Franchise and any other present or future lawful exercise of the Town' police powers shall be resolved in favor of the latter, except that any such exercise that is not of general application in the jurisdiction or applies specifically to the Franchisee or which contains provisions inconsistent with this Franchise shall prevail only if upon such exercise, the Town finds an emergency exists constituting a danger to health, safety, property or general welfare or such exercise is mandated by law.

SECTION 8 Permits Required

In addition to this Franchise, in order for the Franchisee to be allowed to occupy or use the Rights-of-Way of the Town, the Franchisee shall obtain all other required authorizations, certificates, licenses and permits, in accordance with federal, state and local law. The Town shall not unreasonably withhold any permits requested by the Franchisee as determined by applicable law.

ARTICLE III. STANDARDS FOR USE OF RIGHT OF WAY

SECTION 1. Uses of Rights-of-way

- A. **Non-exclusive Grant.** This grant for the use of all Town Rights-of-Way is nonexclusive and does not establish priority for use over other franchise holders, permit holders and the Town's own use of public property. Additionally, Franchisee shall respect rights and property of the Town and other authorized users of the Rights-of-Way. Disputes between the Franchisee and other entities over the use of the Rights-of-Way shall first be submitted to the Mayor or Administrator of the Town for possible resolution.
- B. **Interference with Persons and Improvements.** The Franchisee's System shall be located, erected and maintained so that none of its facilities shall endanger or interfere with the lives of persons, or interfere with any improvements the Town may deem proper to make, or unnecessarily hinder or obstruct the free use of Rights-of-Way or other public property. The Town shall have power at any time to order and require Franchisee to remove and abate any pole, wire, cable, or other

structure that is dangerous to life or property, and in case Franchisee, after notice, fails or refuses to act 'Within a reasonable time, the Town shall have the power to remove or abate the same at the expense of the Franchisee.

- C. **Relocation of the Facilities** Franchisee shall continuously provide the Town a current map of the location of Franchisee's facilities within the Town. In the event that at any time during the period of this Franchise the Town shall elect to alter or change the grade of any Right-of-Way, the Franchisee, upon reasonable notice by the Town, shall begin removing and/or relocating as necessary, its poles, wires, cables, underground conduits, manholes and other fixtures at the Franchisee's expense, provided, if Franchisee's wires, cable, or other fixtures are placed within or attached to conduit, poles, or appliances owned or maintained by others, such as utility poles of a public utility pursuant to a pole attachment agreement, Franchisee shall undertake such removal or relocation in cooperation with the public utility. If Franchisee fails or refuses to act within thirty days (30), of notice from the Town, the Town shall have the power to remove or abate the same at the expense of the Franchisee.
- D. **Interference with utilities** The Franchisee with the consent of the Public Works Director shall place poles, equipment or other fixtures in such a manner that does not unreasonably interfere with existing gas, electric or telephone facilities, traffic control signalization, street lights, fire alarm lines or communications lines, or obstruct or hinder in any manner the various utilities serving the residents of the Town.
- E. **Additional Easements** If additional private easements are necessary it shall be the Franchisee's responsibility to secure the same. The grant of this Franchise is limited to the Town's control of its Rights-of- Way and does not extend to any other public or private property.
- F. **Cooperation with Building Movers** The Franchisee shall, at the request of any person holding a building-moving permit issued by the Town, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same, and the Franchisee shall have the authority to require such payment from such person in advance. Unless otherwise agreed, the Franchisee shall be given not less than fourteen (14) calendar days advance notice to arrange for such temporary wire changes.

G. Construction and Maintenance; Excavation

1. The route of any underground portions of the system shall be subject to review and approval by the Town. Engineering plans for construction in Rights-of-Way shall be submitted to the Town prior to construction.
2. Except in an emergency, the Franchisee shall comply with generally applicable Town ordinances, policies and rules pertaining to notification when excavating pavement in any Right-of-Way.

H. Coordination of Placement of Manholes The Franchisee shall coordinate the placement of its manholes, if any, with the affected Town Departments.

I. Movement of Facilities During Emergencies During emergencies, the Town may move the Franchisee's Facilities, but shall first make reasonable attempts to notify the Franchisee.

J. Payment of the Town's Locate Costs The Franchisee shall only pay for the Town's locate costs that specifically relate to the Franchisee and so long as those costs are not already included in the permit fees. The Franchisee shall be required to obtain verifiable locates prior to any digging, trenching or excavation.

K. Acquisition of Facilities Upon the Franchisee's acquisition of Facilities in any Right-of-Way, or upon the addition or annexation of any area in which the Franchisee owns or operates any Facility, the Franchisee shall, at the Town's request, submit to the Town a statement describing all Facilities involved, whether authorized by the Franchise, permit, license or other prior right, and specifying the location of all such Facilities to the extent the Franchisee has possession of such information. Such Facilities shall immediately be subject to the terms of this Franchise.

L. Discontinuing Use of Facilities Whenever the Franchisee intends to discontinue using any Facility within the Rights-of-Way, the Franchisee shall submit for the Town's approval a complete description of the Facility and the date on which the Franchisee intends to discontinue using the Facility. The Franchisee may remove the Facility or request that the Town permit it to remain in place. Notwithstanding the Franchisee's request that any such Facility remain in place, the Town may require the Franchisee to remove the Facility from the Right-of-Way or modify the Facility as a condition of its remaining in place to protect the public health, welfare, safety or convenience, or otherwise serve, the public interest. The Franchisee shall complete such removal or modification in accordance with a schedule to be mutually agreed upon but in no event shall Franchisee fail to remove said facility

within ninety (90) days of written demand by the Town. Until such time as the Franchisee removes or modifies the Facility, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, the Franchisee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance of the Right-of-Way, in the same manner and degree as if the Facility were in active use, and the Franchisee shall retain all liability for such Facility.

M. Hazardous Substances

1. The Franchisee shall comply with all applicable local, state and federal laws, statutes, regulations, ordinances and orders concerning hazardous substances relating to the Franchisee's System in the Rights-of-Way.
2. The Franchisee shall maintain and inspect its System located in the Rights-of-Way. At any time, the Town may inspect the Franchisee's Facilities in the Rights-of-Way to determine if any release of hazardous substances has occurred, or may occur, from or related to the Franchisee's System. In removing or modifying the Franchisee's Facilities as provided in this Franchise, the Franchisee shall also remove and properly dispose of all residue of hazardous substances related thereto.
3. The Franchisee shall indemnify and hold the Town harmless against any and all liability, claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the Town arising out of a release of hazardous substances caused by the Franchisee's System in the Rights-of-Way.

N. Completion of Work by the Town On failure of the Franchisee to commence, pursue or complete any work required by law or by the provisions of this Franchise or any applicable permit to be done in any Right-of-Way, within the time prescribed and to the satisfaction of the Town, the Town may at its discretion cause the work to be done. The Franchisee shall pay to the Town the reasonable costs of the work in the itemized amount reported by the Town to the Franchisee within thirty (30) days after receipt of the itemized report.

SECTION 2. USE OF FRANCHISEE FACILITIES

The Town shall have the right, at no cost, during the life of this Franchise, to make additional use, for any public purpose, of any poles controlled or maintained exclusively by or for the Franchisee, providing that such uses do not unreasonably interfere with the operations of the Franchisee.

SECTION 3. JOIN USE OF POLES, TRENCHES AND CONDUITS

- A. The Franchisee may be required to attach its wires to poles owned and maintained by another person or entity, or to permit the wires of another person or entity to be attached to the poles owned by the Franchisee, upon reasonable terms and for just compensation. All of the Franchisee's requirements pertaining thereto must be in accordance with applicable law.
- B. Lines shall be located on poles in compliance with applicable safety standards and shall not interfere with the erection, replacement, operation, repair, or maintenance of the wires and appurtenances of the persons or entities occupying the poles.
- C. The Franchisee may be required by the Town to share trench space with another person or entity for the placement of facilities underground. Compensation to the Franchisee as well as terms of sharing trench space shall be resolved between the affected entities. Ducts, cables, or wires shall be placed in trenches in compliance with applicable safety standards and, pursuant to the space allocation plan of the Town.

SECTION 4. CHANGES FOR GOVERNMENTAL PURPOSES

- A. Whenever by reason of changes in the grade of any Right-of-Way or in the location or manner of construction any water pipe, gas pipe, sewer or other underground or overhead structure for any governmental purpose whatsoever, it shall be deemed necessary by the Director of Public Works of the Town to remove, alter, change, adapt, or conform the underground or overhead facilities of the Franchisee, such alterations or changes shall be made as soon as practicable by the Franchisee and begin within thirty (30) days of notice from the Town, without claim for reimbursement or damages against the Town; provided, however, if said requirements impose a financial hardship upon the Franchisee, the Franchisee shall have the right to present alternative proposals for the Town's consideration, provided, further if Franchisee's wires, cable, or other fixtures are placed within or attached to poles, conduits, or appliances owned or maintained by others, such as utility poles of a public utility pursuant to a pole attachment agreement, Franchisee shall undertake such removal, alteration, change or adaption in cooperation with the public utility. Except for Franchisee revocation or termination or System abandonment, the Town shall not require Franchisee to remove its facilities entirely from a Right-of-Way unless suitable alternatives are available for relocation at a reasonable cost. If Franchisee fails or refuses to begin such alterations or changes within such thirty (30) day period the Town shall have the power to remove or abate the same at the expense of the Franchisee, all without compensation or liability for damages to the Franchisee.

- B. In cases of emergency the Town may require relocation of the Franchisee's facilities at the Franchisee's expense in the event the emergency creates an immediate threat to the public safety, health and welfare.

SECTION 5. WORK BY OTHERS

- A. The Town reserves the right to lay, and permit to be laid, sewer, electric, phone, gas, water, and other pipelines, cables, conduits and related appurtenances, and to do and permit to be done any underground or overhead work in, across, along, over, or under a Right-of-Way or other public place occupied by the Franchisee. The Town also reserves the right to construct new streets and to alter the design of existing streets. In performing such work, provided the Town complies with notification requirements of the Northwest Utility Notification Center ("call before you dig"), the Town shall not be liable to the Franchisee for any damage so occasioned but nothing herein shall relieve any other person or entity from the responsibility for damages to the facilities of the Franchisee.
- B. In the event that the Town subsequently authorizes someone other than the Franchisee to occupy space under the surface of a Right-of-Way, such grant shall be subject to the rights herein granted or heretofore obtained by the Franchisee. In the event that the Town shall close or abandon any Right-of-Way which contains existing facilities of the Franchisee, any conveyance of land within such closed or abandoned Right-of-Way shall be subject to the rights herein granted or heretofore obtained by Franchisee; provided, that the Franchisee may be ordered to vacate any land so conveyed if an alternate route is practicable and if the Franchisee is reimbursed by the person to whom the property is conveyed for the reasonable costs of service disruptions, removal and relocation of facilities.
- C. If the Town shall require the Franchisee to adapt or conform its facilities or in any way or manner to alter, relocate, or change its facilities to enable any other entity or person, except the Town, to use, or use with greater convenience, said Right-of-Way, the Franchisee shall not be bound to make any such changes until such other entity or person shall have undertaken, with good and sufficient bond, to reimburse the Franchisee for any costs, loss, or expense which will be caused by, or arise out of such change, alteration, or relocation of Franchisee's property; provided, however, that the Town shall never be liable for such reimbursement.

SECTION 6. CONSTRUCTION PROVISIONS

- A. **Standards** The Franchisee's System constructed within the Town shall comply with all applicable federal, state and local laws.

- B. **Tree Trimming and Removal** To the extent permitted by law, the Franchisee shall have the authority after obtaining any consent legally required from any affected property owner to trim trees or other natural growth overhanging any of its Cable System in the Town so as to prevent branches from coming in contact with the Franchisee's wires, cables, or other equipment. The Franchisee shall reasonably compensate the Town or property owner for any damages caused by such trimming, or shall, at its own cost and expense, reasonably replace all trees or shrubs damaged as a result of any construction, operation or maintenance of the System. The Franchisee shall make reasonable efforts not to harm such trees or shrubs. Any pruning or removal of trees or shrubs in the Town shall comply with practices outlined in the American National Standards Institute, Inc., (ANSI) Tree Care Operations - Tree, Shrub, and Other Woody Plant Maintenance Standard Practices and with Town Code provisions, including licensing and permitting provisions, and shall be done by a qualified, professional arborist.
- C. **Inspection** The Town shall have the right, but not a duty, to inspect all construction and installation work performed by the Franchisee pursuant to this Franchise as it shall find necessary to ensure compliance by the Franchisee. Such inspection shall be in accordance with the provisions of this Franchise.
- D. **Restoration of Town Property** The Franchisee at its own cost and expense and in the manner approved by the Town shall replace and restore all Town property, including Right-of-Way, which is disturbed by the Franchisee's construction, installation, maintenance or operation of its Facilities, in accordance with the Town's Design Standards and Standard Construction Specifications. Nothing herein shall prevent the Town from charging the Franchisee its usual and customary fees of general applicability for inspection of such restoration or replacement work. The Franchisee shall be solely responsible for protecting the public health, safety and welfare on such Town property from the time of disturbance until proper restoration. Failure of the Franchisee to replace or restore such Town property within a reasonable time period after written notification by the Town shall entitle the Town to cause the proper restoration to be made at the Franchisee's expense. The Franchisee shall pay to the Town the cost thereof, in the itemized amounts reported by the Town to the Franchisee, within 30 days after receipt of such itemized report. Such payment shall not excuse a breach of the Franchise caused by the Franchisee's failure to commence, pursue or complete the required work.
- E. **Restoration of Property** Whenever the Franchisee shall cause or any person acting on its behalf shall cause any disturbance, injury or damage to any private property or Town property by or because of the installation, maintenance or operation of its Facilities, such disturbance, injury or damage shall be remedied fully by the

Franchisee at its expense. Further, the Franchisee shall, at its own cost and expense, replace and restore the respective property in accordance with the Town's Design Standards and Standard Construction Specifications within a reasonable time of the disturbance, injury or damage.

- F. **Construction Necessary For Operation** Subject to applicable laws, regulations and ordinances of the Town and the provisions of this Franchise, the Franchisee may perform all construction necessary for the operation of its System. All construction and maintenance of any and all Facilities within the Right-of-Way incident to the Franchisee's Cable System shall, regardless of who performs the construction, be and remain the Franchisee's responsibility.
- G. **Joint Trenching and Boring** The Franchisee may make excavations in the Rights-of-Way for any Facility needed for the maintenance or extension of the Franchisee. Prior to doing such work:, the Franchisee shall give appropriate notice to the Town and the notification association in accordance with applicable law (namely the Northwest Utility Notification Center). When obtaining a permit, the Franchisee shall inquire in writing about other construction currently in progress, planned or proposed, in order to investigate thoroughly all opportunities for joint trenching or boring. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts, the Franchisee shall work with other providers, licensees, permittees, and franchisees so as to reduce so far as possible the number of street cuts within the Town. If the Franchisee reasonably anticipates that trenching will encounter tree roots, the Franchisee shall consult with the Town prior to trenching.
- H. **Emergency Repairs** In the event that emergency repairs are necessary to any part of its System, the Franchisee shall immediately notify the Town of the need for such repairs. The Franchisee may initiate such emergency repairs, and shall apply for appropriate permits within seventy-two (72) hours after discovery of the emergency. The Franchisee shall comply with all applicable Town regulations relating to such excavations or construction, including the payment of permits or license fees, and shall reimburse the Town for any damage to Town utilities as a result of the emergency repairs. Likewise, in the event emergency repairs are necessary to any underground municipal utility to ameliorate a serious risk to the public health and/or safety, if the Town knows or has reason to believe part of Franchisee's system is buried in the area which is to be excavated, the Town shall immediately notify Franchisee of the Town's intent to excavate. Such notification shall be done in such manner as may be reasonably calculated under the circumstances of the emergency to provide Franchisee with an opportunity to identify the location of any part of its system buried within the proposed excavation site. If the Town then damages the system while making the emergency

excavation, so long as its actions are not wanton, the Town and its officers, employees, and contractor shall have no liability for the damage.

I. **Location of Facilities** The Franchisee shall be a member of the Northwest Utility Notification Center. After any Town department, franchisee, licensee, permittee notifies the Franchisee of a proposed street excavation, in accordance with the rules applicable to such a member, the Franchisee shall, at the Franchisee's expense:

1. Mark on the surface all of its locatable underground Facilities within the area of the proposed excavation;

2. Notify the excavator of any unlocatable underground Facilities in the area of the proposed excavation; or

3. Notify the excavator that the Franchisee does not have any underground Facilities in the vicinity of the proposed excavation.

J. **Restoration of Streets** If the Franchisee excavates the surface of any Right-of-Way, the Franchisee shall be responsible for restoration of the Right-of-Way in accordance with generally applicable specifications and regulations of the Town. The Town may, after providing notice to the Franchisee, resurface any opening made by the Franchisee in the Right-of-Way, and the expense thereof shall be paid by the Franchisee. The Town may, after providing notice to the Franchisee, remove and/or repair any work done by the Franchisee which, in the determination of the Town, is inadequate or unsatisfactory. The cost thereof, including the costs of inspection and supervision, shall be paid by the Franchisee. All of the Franchisee's work under this Franchise, and this Section, in particular shall be performed and completed in strict compliance with all generally applicable rules, regulations and ordinances of the Town.

K. **Reservation of Town Rights** Nothing in this Franchise shall prevent the Town from constructing or establishing any public work or improvement. All such work shall be done, insofar as practicable, so as not to obstruct, injure or prevent the use and operation of the Franchisee's System. However, if any of the Franchisee's System unreasonably interferes with the construction, maintenance or repair of any public improvement, the Franchisee's System shall be removed or replaced.

Any and all such removal or replacement shall be at the expense of the Franchisee. Should the Franchisee fail to remove, adjust or relocate its Facilities by the date established by the Town's written notice to the Franchisee, the Town may affect such removal, adjustment or relocation, and the expense thereof shall be paid by the Franchisee.

L. BUILDING CODES

1. The Franchisee shall strictly adhere to all building and zoning codes currently or hereafter in effect. The Franchisee shall arrange its lines, cables, and other appurtenances, on both public and private property, in such a manner as to cause no unreasonable interference with the use of said public or private property by any person. In the event of such interference, the Town may require the removal or relocation of the Franchisee's lines, cables, and other appurtenances from the property in question.
2. All plans for aerial crossings near existing or proposed traffic signals, signs, flashers, or other traffic control devices shall be submitted to the Town for approval. No crossings shall be permitted that obstruct traffic signals or other official traffic control devices.

M. UNDERGROUND AND OVERHEAD CONSTRUCTION

1. **Preference for underground installation.** In all sections of the Town where the cables, wires, utilities or other like facilities are placed underground, the Franchisee shall place its wires, or other like facilities underground. If at any time the Town determines that existing wires, cables, utilities or other like facilities anywhere in the Town shall be changed from an overhead to an underground installation, the Franchisee shall, convert its facilities to an underground installation. If Franchisee' s wire, cable, utilities or other facilities are to be placed underground in a common trench or bore shared by others, Franchisee shall share equally the expense of the trenching and/or boring in proportion to the number of joint users. The Franchisee shall pay for all cable, wire conduit, or facilities installed for Franchisee's own use. If the Franchisee owns the aerial supporting structures, the additional incremental cost of undergrounding compared to aerial allocation will be paid by the Town. Where no overhead poles exist, all wires and facilities shall be constructed underground.
2. **Overhead.** In areas of the Town where electrical or telephone systems are installed on poles above ground, the Franchisee shall have the option of installing its System in like manner above ground or, alternatively, underground.

N. RIGHTS-OF-WAY OCCUPANCY

1. Nothing in this Franchise shall give the Franchisee the right to attach its Cable System to structures or poles owned by the Town without consent of the Town.

2. The Franchisee shall:

(a) Locate and install all transmission lines, equipment and structures so as to cause minimum interference with the rights and reasonable convenience of property owners;

(b) Keep and maintain all transmission lines, equipment and structures in a safe condition, and in good order and repair;

(d) Place any fixtures in any Right-of-Way in such manner as not to interfere with the usual travel of the Right-of-Way or cause unsafe conditions of any sort;

(e) Submit a traffic control plan to the Town for approval and receive such approval at least 48 hours prior to commencing construction except in the case of emergency. Such traffic control plan shall be available for public inspection on the construction site at all times; and

(f) Notify adjacent property owners, businesses, residents, and others specified by the Town prior to construction and major maintenance projects.

3. The Franchisee shall not make street cuts or curb cuts unless absolutely necessary, and only after a permit has been obtained from the Town under such conditions as the Town shall in its sole discretion determine.

4. Before beginning any excavation or other construction activity on a Right-of-Way which crosses or abuts any private property, the Franchisee shall clearly mark and delineate with flags, stakes or non-polluting water-soluble spray paint the boundaries of that Right-of-Way where it abuts or crosses the private property. After such excavation or other construction activity, the Franchisee shall restore such property to not less than the Town's standards.

5. The Franchisee shall locate, mark and map any of its installed System for the Town at no expense to the Town. The Franchisee shall install underground warning tape with a metallic tracer at least twelve (12) inches above all feeder and trunk lines and above all fiber optic cable.

0. STOP WORK

1. On notice from the Town that any work is being performed contrary to the provisions of this Franchise, or in an unsafe or dangerous manner as determined by the Town, or in violation of the terms of any applicable permit, laws, regulations, ordinances, or standards, the work may immediately be stopped by the Town.

- P. **Franchisee's Contractors** The Franchisee and its contractors shall be licensed and bonded in accordance with the Town's ordinances, regulations and requirements for any contractors working in the Rights-of-Way. Any act or omission of any contractor of the Franchisee which violates any provision of this Franchise shall be considered an act or omission of the Franchisee for the purposes of this Franchise.
- Q. **Private Property** Except in the case of an emergency involving public safety or service interruption to a large number of subscribers, the Franchisee shall give reasonable notice to the property owners or legal tenants prior to entering upon any private premises, and said notice shall specify the work to be performed; provided that in the case of construction operations, such notice shall be delivered or provided at least forty-eight (48) hours prior to entry. If any damage is caused by any Franchisee activity or omission, the Franchisee shall reimburse the property owner one hundred percent (100%) of the cost of the damage or replace the damaged property. In the case of an emergency, the Franchisee shall attempt to contact the property owner or legal tenant in person, and shall leave a door hanger notice in the event personal contact is not made.

ARTICLE IV. ADMINISTRATION AND REGULATION

SECTION 1. TRANSFER OF OWNERSHIP OR CONTROL.

- A. This Franchise shall not be assigned or transferred, leased or disposed of either in whole or in part by voluntary sale or involuntary sale, merger or consolidation, either legal or equitable or any right, interest or property therein, pass to or vest in any person, or entity without the prior written consent of the Town Council, which consent shall not be unreasonably withheld. No consent will be required for a transfer in trust, mortgage, or other hypothecation as a whole or in part to secure an indebtedness.
- B. The Franchisee shall promptly notify the Town of any actual or proposed change in, or transfer of, or disposition of or acquisition by any other party of, control of the Franchisee. The word "control" as used herein is not limited to major stockholders but includes actual working control in whatever manner exercised. Every change, transfer, or acquisition of control of the Franchisee shall make the Franchise subject to cancellation unless and until the Town Council shall have consented thereto, which consent will not be unreasonably withheld. For the purpose of determining whether it shall consent to such change, transfer, disposition, or acquisition of control the Town Council may inquire into the qualifications of the prospective controlling party, and the Franchisee shall assist the Town Council in any such inquiry.

- C. The proposed assignee must show its legal and technical qualifications and its financial responsibility as determined by the Town Council and must agree to comply with all the provisions of the Franchise. Unless the Franchisee and the Town Council otherwise agree on an extension of time, the Town Council shall be deemed to have consented to a proposed transfer or assignment in the event it has not acted within ninety (90) days of notice.
- D. The consent or approval of the Town Council to any transfer of the Franchise shall not constitute a waiver or release of the right of the Town in and to the Rights-of-Way, and any transfer shall by its terms, be expressly subordinate to the terms and conditions of this Franchise.
- E. By its acceptance of this Franchise, the Franchisee specifically agrees that any such transfers occurring without prior approval of the Town Council shall constitute a violation of this Franchise by the Franchisee. In no event shall a transfer of ownership or change of control be approved without the successor in interest becoming a signatory to this Franchise.
- F. Within 30 days of any transfer or sale and upon request, if approved or deemed granted by the Town, the Franchisee shall file with the Town a copy of the deed, agreement, or other written instrument evidencing such sale or transfer of ownership or control certified and sworn to as correct by the Franchisee.
- G. **Standards** The Town may inquire into the legal, technical and financial qualifications of the prospective controlling party or transferee, and the Franchisee shall assist the Town in so inquiring. The Town may condition said sale or transfer upon such terms and conditions as it deems reasonably appropriate; provided, however, the Town shall not unreasonably withhold its approval and any such terms and conditions so attached shall be related to the legal, technical, and financial qualifications of the prospective controlling party or transferee and to the resolution of outstanding and unresolved issues of noncompliance with the terms and conditions of this Franchise by the Franchisee.
- H. **Common Control Exemption** Notwithstanding anything to the contrary in this Section, the prior written approval of the Town Council shall not be required for any sale, assignment or transfer of the Franchise, the System or ownership to an entity controlling, controlled by, or under the same common control as the Franchisee.

ARTICLE V. FINANCIAL AND INSURANCE REQUIREMENTS

SECTION 1 LIABILITY INSURANCE

- A. **General Requirement** The Franchisee must have adequate insurance during the entire term of the Franchise to protect against claims for injuries to persons or damages to property which in any way relate to, arise from, or are connected with this Franchise or involve the Franchisee, its agents, representatives, contractors, subcontractors and their employees.
- B. **Verification of Coverage.** If requested, the Franchisee shall furnish the Town with certificates of insurance and endorsements or a copy of the page of the policy reflecting blanket additional insured status. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices. The Franchisee hereby warrants that its insurance policies satisfy the requirements of this Franchise.
- C. **Other Insurance** The Franchisee shall also provide Workers Compensation Insurance as required by Washington law.
- D. **Insurance - No Limitation.** The Franchisee's maintenance of insurance policies required by this Franchise shall not be construed to excuse unfaithful performance by the Franchisee or to limit the liability of the Franchisee to the coverage provided in the insurance policies, or otherwise to limit the Town's recourse to any other remedy available at law or in equity.

SECTION 2 INDEMNITY

The Franchisee shall, at its sole cost and expense, indemnify and hold harmless the Town, Town Council, and any officers, employees and agents who have acted in their official capacities, boards and commissions, (collectively referred to as the "Town" in this Section) and shall pay all damages and penalties which the Town may be legally required to pay as a result of any act or omission by the Franchisee in the operation of the System throughout the term of this agreement. Such damages and penalties shall include, without limitation, damages arising out of copyright infringements, and the construction, erection, operation, maintenance and repair of the System, whether or not any act or omission complained of is authorized, allowed or prohibited by this Franchise. If legal action is filed against the Town, to recover for any claim or damages as a result of any act or omission by the Franchisee in the operation of the System, the Franchisee, upon notice to it by the Town, shall defend the Town against the action. The Franchisee shall have the right to defend, settle or compromise any claims arising hereunder. In the event of a final judgment

being obtained against the Town as a result of any act or omission by the Franchisee in the operation of the System, the Franchisee shall pay the judgment and all costs and hold the Town harmless there from. Nothing in this Franchise shall be interpreted to abridge or otherwise affect the Town's right to intervene or participate in any suit, action or proceeding involving any provisions of this Franchise. The Franchisee shall pay all expenses incurred by the Franchisee and the Town in defending with regard to all damages as set forth in this Section. These expenses shall include, without limitation, all out-of-pocket expenses, reasonable attorneys' fees, witness and discovery costs and the reasonable value of any services rendered by the Town Attorney and its office, and any other agents and employees of the Town.

The Franchisee will not be required to indemnify the Town for the negligent acts of the Town or its officials, boards, commissions, agents or employees. The Town will indemnify and hold the Franchisee harmless from any claims or causes of action arising from any acts by the Town involving the Town's use of the access channel(s) or the emergency alert system.

ARTICLE VI. ENFORCEMENT AND TERMINATION

SECTION 1. FORFEITURE AND TERMINATION

- A. In addition to all other rights and powers retained by the Town under this Franchise or otherwise, the Town reserves the right (after notice and the opportunity to cure as provided by Subsection C, below) to forfeit and terminate the Franchise and all rights and privileges of the Franchisee hereunder in the event of a material breach of this Franchise's terms and conditions. A material breach by Franchisee shall include, but shall not be limited to the following:
1. Violation of any material provision of the Franchise or any material rule, order, regulation or determination of the Town Council made pursuant to the Franchise;
 2. Attempt to evade any material provision of the Franchise or practice any fraud or deceit upon the Town;
 3. The Franchisee abandons the system or terminates the system's operations;
- B. The foregoing shall not constitute a breach if the violation occurs but it is without fault of the Franchisee. The Franchisee shall not be excused by mere economic hardship nor by misfeasance or malfeasance of its directors, officers or employees.
- C. The Town shall make a written demand that the Franchisee comply with any such provision, rule, order, or determination under or pursuant to this Franchise. If the

violation by the Franchisee continues for a period of thirty (30) days following such written demand without written proof that the corrective action has been taken or is being actively and expeditiously pursued, the Town Council may appoint a hearing examiner to take under consideration the issue of termination of the Franchise. The Town shall cause to be served upon the Franchisee, at least twenty (20) days prior to the date of such hearing, a written notice of intent to request such termination and the time and place of the hearing. Public notice shall be given of the hearing and issue(s) which the Town Council or hearing examiner is to consider.

- D. The Town Council or hearing examiner, if appointed, shall hear and consider the issue(s) and hear any person interested therein, and determine in its discretion, whether or not any violation by the Franchisee has occurred. The Franchisee shall be entitled to participate fully in the hearing process, including a presentation of evidence and questioning of witnesses, so that the record will include all information pertaining to the alleged violation.
- E. If the Town Council or hearing examiner, if appointed, shall determine the violation by the Franchisee was the fault of the Franchisee and within its control, the Town Council or hearing examiner, if appointed, shall determine if the violation can be cured. If the violation cannot be cured, the Franchisee may be forfeited or terminated. If the violation can be cured, the Town Council or hearing examiner, if appointed, shall specify the action or actions to be taken by the Franchisee to cure the violation and set a compliance date. If there is no compliance within the period stated, then the Town Council may terminate the Franchisee. Such determination shall be subject to judicial review.

SECTION 2 FORECLOSURE

Upon the foreclosure or other judicial sale of all or a substantial part of the System, or upon the termination of any lease covering all or a substantial part of the System, the Franchisee shall notify the Town of such fact, and such notification shall be treated as a notification that a change in control of the Franchisee has taken place, and the provisions of this Franchise governing the consent of the Town Council to such change in control of the Franchisee shall apply.

SECTION 3. RECEIVERSHIP

The Town shall have the right to cancel this Franchise one hundred twenty (120) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Franchisee, whether in receivership, reorganization, bankruptcy or other action or

proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless:

- A. Within one hundred twenty (120) days after the election or appointment of a receiver or trustee, such receiver or trustee shall have fully complied with all the provisions of this Franchise and remedied all defaults hereunder; and,
- B. Such receiver or trustee, within said one hundred twenty (120) days, shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Franchise.

SECTION 4. BANKRUPTCY

The Town shall have the right to cancel this Franchise immediately should the Franchisee liquidate, become insolvent, make a transfer for the benefit of creditors, or reorganize and enter into an arrangement for the benefit of creditors or file a voluntary petition in bankruptcy; or an involuntary petition in bankruptcy is filed against the Franchisee and is not dismissed within one hundred twenty (120) days after the filing.

SECTION 5. REMOVAL OF SYSTEM

At the expiration of the term for which this Franchise has been granted, or upon its lawful termination or revocation as provided herein, the Franchisee shall forthwith, upon notice by the Town, remove at the Franchisee's own expense all designated portions of the System from all Rights-of-Way within the Town, and shall restore said Rights-of-Way in accordance with the Town's Design Standards and Standard Construction Specifications; provided, however, the Franchisee shall have the right to sell its physical plant to a subsequent franchisee, subject to Town approval as provided in Article IV, Section 2, in which case said plant need not be removed and the Franchisee shall continue to operate the System during such interim period prior to the sale. If the Franchisee fails to commence removing or operating its Facilities within thirty (30) days of request and proceeds diligently with the removal, the Town may perform the work at the Franchisee's expense. Any property of the Franchisee remaining in place in any Right-of-Way one hundred eighty (180) days after the expiration, termination or revocation of this Franchise shall be considered permanently abandoned and may become the property of the Town at the Town's discretion.

ARTICLE VII. MISCELLANEOUS PROVISIONS

SECTION 1. Notices

All notices from the Franchisee to the Town pursuant to this Franchise shall be to the Mayor, Town of Garfield, P.O. Box 218, Garfield, Washington, 99130, or to another person as designated by the Town. All notices to the Franchisee pursuant to this Franchise shall be sent to:

Port of Whitman, W. 105 Island Street, Colfax, WA 99111 Attn: Executive Director or to such other person or address designated by the Franchisee. The Franchisee shall maintain with the Finance Director, throughout the term of the Franchise, an address for service of notices by mail. The Franchisee shall also maintain with the Town, an office address and telephone number for the conduct of matters related to this Franchise during normal business hours. A new address and telephone number of the office shall be furnished to the Town Treasurer within fifteen (15) days after any change thereof.

SECTION 2. Time Limits Strictly Construed

Whenever this Franchise sets forth a time for any act to be performed by the Franchisee, such time shall be deemed to be of the essence, and any failure of the Franchisee to perform within the allotted time may be considered a material violation of this Franchise and sufficient grounds for the Town to invoke any relevant remedy. However, in the event that the Franchisee is prevented or delayed in the performance of any of its obligations under this Franchise by reason of force majeure, the Franchisee's performance shall be excused during the force majeure occurrence and the Franchisee thereafter shall, under the circumstances, promptly perform the affected obligations under this Franchise or procure a substitute which is satisfactory to the Town.

SECTION 3. Cumulative Provision

The rights and remedies reserved to the Town and the Franchisee by this Franchise are cumulative and shall be in addition to and not in derogation of any other rights or remedies which the Town and the Franchisee may have with respect to the subject matter of this Franchise, and a waiver thereof at any time shall have no effect on the enforcement of such rights or remedies at a future time. Further, either the Town or the Franchisee may seek any legal or equitable relief allowed by law provided that, if both parties agree, the Town and the Franchisee may seek methods of alternative dispute resolution.

SECTION 4. Compliance with Federal, State, and Local Laws.

The Franchisee, its contractors, subcontractors, employees, and agents shall comply with all applicable federal, state, and local laws, rules, and regulations issued

pursuant thereto. The Franchisee and the Town have carefully reviewed this Franchise and believe that all provisions hereof are enforceable and in full compliance with all applicable local, state, and federal laws and regulations in effect on the date of execution. If the Franchisee shall discover that any significant aspect of the operation or of any provision of the plans, specifications, or configurations of the Franchisee's System is contrary to or inconsistent with any applicable law, ordinance, rule, or regulation, the Franchisee shall promptly report such fact to the Town in writing. The Franchisee and the Town shall also be entitled to all rights and be bound by all changes in applicable local, state, and federal law which occur subsequent to the date of this Franchise. The Franchisee and the Town acknowledge that their rights and obligations under this Franchise are explicitly subject to all such changes.

SECTION 5. Captions

The captions to sections and subsections contained herein are intended solely to facilitate the reading thereof. Such captions shall not affect the meaning or interpretation of the text herein.

SECTION 6. Construction of Agreement

This Franchise shall be governed, construed, and enforced in accordance with the laws of the State of Washington (as amended), and any other applicable local, state and federal laws, rules, regulations, legislation, or orders (as such now exist, are later amended or subsequently adopted).

SECTION 7 No Joint Venture

Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner which would indicate any such relationship with the other.

SECTION 8. Entire Agreement

This Franchise and all attachments represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersede all prior oral and written negotiations between the parties. This Franchise can be amended, supplemented, modified, or changed only by an agreement in writing which makes specific reference to this Franchise or to the appropriate attachment and which is signed on behalf of both parties.

SECTION 9. Actions of The Town or The Franchisee

In any action by the Town or the Franchisee mandated or permitted under the terms hereof, it shall act in a reasonable, expeditious, and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

SECTION 10. Severability, Preemption, and Precedence

- A. If any section, subsection, sentence, clause, phrase, provision, or portion of this Franchise is for any reason held invalid or unenforceable by any court of competent jurisdiction, or any state or federal regulatory agency having jurisdiction thereof, the remainder of this Franchise shall not be affected thereby, and each remaining section, subsection sentence, clause, phrase, provision, and portion of this Franchise shall be valid and enforceable to the fullest extent permitted by law.
- B. In the event that federal or state laws, rules or regulations preempt a provision or limit the enforceability of a provision of this Franchise, then the provision shall be read to be preempted to the extent and for the time required by law. In the event such federal or state law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the Town or Franchisee, and any amendments to this Franchise negotiated as a result of such provision being preempted shall no longer be of any force or effect with respect to that provision.

SECTION 11. Venue,

Any action concerning a dispute arising under this Franchise shall be convened in Whitman County, Washington.

SECTION 12 Interpretation

As a further condition of this Franchise, the parties acknowledge that this Franchise shall be deemed and construed to have been prepared mutually by both parties.

SECTION 13 Attorneys Fees.

In the event that either party shall take action, whether judicial or otherwise, to enforce or interpret any of the provisions of this Franchise, the prevailing party shall be entitled to recover from the other party all expenses which it may reasonably

incur in such action, including attorneys' fees and costs, whether incurred in a court of law or otherwise.

SECTION 14. Effective Date

This Franchise shall be in full force and effect five (5) days after publication as required by law, and acceptance by the Franchisee.

INTRODUCED AND PRESENTED TO THE TOWN COUNCIL AT ITS REGULAR MEETING OF _____, 2011, AND PASSED BY THE TOWN COUNCIL OF THE TOWN OF GARFIELD AT ITS SECOND READING BY _____ MEMBERS OF THE TOWN COUNCIL AT ITS REGULAR MEETING OF THE _____ DAY OF _____, 2011.

PASSED BY THE CITY COUNCIL OF THE TOWN OF GARFIELD, this ____ day of _____ 2011

TOWN OF GARFIELD
Whitman County, Washington

Mayor

Attest:

By _____
Town Clerk

APPROVED AS TO FORM:

Town Attorney