

## **ORDINANCE NO. 2614**

AN ORDINANCE OF THE CITY OF ISSAQUAH, WASHINGTON, GRANTING TO XO COMMUNICATIONS SERVICES, INC., A WASHINGTON CORPORATION, A NON-EXCLUSIVE FRANCHISE TO INSTALL, OPERATE, AND MAINTAIN A COMMUNICATION SYSTEM IN, ON, OVER, UPON, ALONG, AND ACROSS CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF ISSAQUAH, WASHINGTON, PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS, AND CONDITIONS WITH RESPECT THERETO, AND ESTABLISHING AN EFFECTIVE DATE.

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WHEREAS, XO Communications Services, Inc. has made application to the City of Issaquah for a telecommunications franchise to construct, install, maintain, repair and operate a telecommunications system to provide telecommunications (data transport services) using specified portions of the Public Rights-of-Way; and

WHEREAS, the City Council has the authority under RCW 34A.47.040 and Issaquah Municipal Code Chapter 12.60 to grant telecommunications franchises for the use of its streets and other public properties; and

WHEREAS, XO Communications Services, Inc. is the successor company to NextLink Washington, Inc., which was granted a franchise effective April 3, 2000, under Ordinance 2266; and

WHEREAS, based on representations and information provided by XO Communications Services, Inc., and in response to its request for the grant of a franchise, the City Council has determined that the grant of a nonexclusive franchise, on the terms and conditions herein and subject to applicable law, is consistent with the public interest; and

WHEREAS, the City is authorized by applicable law to grant such nonexclusive franchise within the boundaries of the City;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ISSAQUAH, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Franchise. The franchise granted to NextLink Washington, Inc. by the Issaquah City Council on April 3, 2000 under Ordinance 2266 is hereby terminated and replaced in its entirety by this XO Communications Services, Inc. franchise. The term of the franchise shall be for five (5) years, commencing on the date the last party executes the franchise.

Section 2. Terms & Conditions. The terms and conditions governing the franchise specified in Section 1 shall be those set forth on Attachment A to this Ordinance and incorporated herein by this reference as if set forth in full.

Section 3. Deadline for Acceptance. The rights and privileges granted pursuant to this Ordinance shall not become effective until its terms and conditions are accepted by XO Communications Services, Inc. Such acceptance shall contain any required letter of credit, evidence of insurance, and any applicable application fee pursuant to Issaquah Municipal Code 3.65 and shall be filed with the City Clerk within sixty (60) days after the effective date of this Ordinance. Such instrument shall evidence the unconditional acceptance of the terms hereof and a promise to comply with and abide by the provisions, terms and conditions hereof.

Section 4. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

Section 5. Effective Date. This Ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

Passed by the City Council of the City of Issaquah the 16<sup>th</sup> day of May, 2011.

Approved by the Mayor of the City of Issaquah the 17<sup>th</sup> day of May, 2011.

APPROVED:

  
\_\_\_\_\_  
MAYOR, AVA FRISINGER

ATTEST/AUTHENTICATED:

  
\_\_\_\_\_  
CITY CLERK, CHRISTINE EGGER

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY:

BY Wayne Tanaka  
WAYNE D. TANAKA

## SUMMARY OF ORDINANCE NO. 2614

of the City of Issaquah, Washington

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On the 16th day of May, 2011, the City Council of the City of Issaquah, passed Ordinance No. 2614. A summary of the content of said ordinance, consisting of the title and a summary of each section, provides as follows:

AN ORDINANCE OF THE CITY OF ISSAQUAH, WASHINGTON, GRANTING TO XO COMMUNICATIONS SERVICES, INC., A WASHINGTON CORPORATION, A NON-EXCLUSIVE FRANCHISE TO INSTALL, OPERATE, AND MAINTAIN A COMMUNICATION SYSTEM IN, ON, OVER, UPON, ALONG, AND ACROSS CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF ISSAQUAH, WASHINGTON, PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS, AND CONDITIONS WITH RESPECT THERETO, AND ESTABLISHING AN EFFECTIVE DATE.

The full text of this Ordinance will be mailed upon request.

DATED this 17th day of May, 2011 ;

  
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CITY CLERK, CHRISTINE EGGERS

PUBLISHED: May 25, 2011  
EFFECTIVE DATE: May 30, 2011  
ORDINANCE NO.: 2614/AB 6248

**TELECOMMUNICATIONS FRANCHISE  
WITH  
XO COMMUNICATIONS SERVICES, INC.**

THIS TELECOMMUNICATIONS FRANCHISE (this "Franchise") is entered into on May 30, 2011, by and between the City of Issaquah ("City") and XO Communications Services, Inc., a Delaware corporation ("Grantee").

WHEREAS, the Grantee has requested that the City grant it the right to install, operate, maintain, use, lease, and transfer certain telecommunications facilities within the public ways of the City; and

WHEREAS, the Public Works Director has the authority, pursuant to Chapter 12.60 of the Issaquah Municipal Code ("IMC"), and is willing to grant the rights requested subject to certain terms and conditions; and

WHEREAS, XO Communications Services, Inc. is the successor corporation to NEXTLINK, Washington, Inc., which was granted a franchise effective April 3, 2000; and

WHEREAS, Grantee provides advanced communications services utilizing a combination of high-capacity nationwide and metro networks and broadband wireless capabilities, offering a broad range of managed voice, data and IP services; and

WHEREAS, the City and the Grantee desire to enter into an agreement authorizing the Grantee to use the public rights-of-way of the City and specifying the terms and conditions under which said use may be made;

NOW, THEREFORE, THE CITY AND THE GRANTEE AGREE AS FOLLOWS:

**Section 1. Authority Granted.** The City hereby grants to the Grantee, its heirs, successors, legal representatives, and assigns, subject to the terms and conditions hereinafter set forth, the right, privilege, and authority to construct, operate, maintain, replace, acquire, sell, lease, and use all necessary equipment and facilities thereto within the public rights-of-way of the City. Grantee's authorization shall extend to those telecommunications facilities (hereinafter "Facilities") described in Grantee's Application for Location of Telecommunications Facilities within City of Issaquah Right of Way, and such other facilities as Grantee may install in the future, consistent with the terms and conditions hereof and applicable City codes.

**Section 2. Authority Limited to Occupation of Public Rights-of-Way.** Except as provided in IMC Chapter 12.60 and herein, the authority granted herein is a limited authorization to occupy and use specific public ways of the City for the purpose of providing telecommunications services. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the public rights-of-way of the City to the Grantee. As described in Section 9, Work in Public Ways, construction is not authorized without the appropriate Land Use Permits. This Franchise does not and shall not convey any right to Grantee to install its Facilities on, under, over, across or to otherwise use City owned or leased properties of any kind outside of

the area shown on Exhibit "A" or to install Facilities on, under, over, across or otherwise use any City owned or leased property other than public roads, streets, avenues, alleys and highways. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the public ways of the City to the Grantee. No substantive expansions, additions to or modifications or relocation of any of the Facilities shall be permitted without first having received prior authorization from the City through an amendment to this Franchise. Written determination by the City granting or denying any proposed amendment to this Franchise shall not be unreasonably withheld or delayed. Under this Franchise, the Facilities shall not be used for Cable Services as that term is defined in 47 U.S.C § 522(6).

**Section 3. Terms Conditions, and Provisions of IMC Chapter 12.60 Incorporated by Reference.** The terms, conditions, and provisions of IMC Chapter 12.60 are incorporated herein by reference. All rights granted hereunder are subject to the terms, conditions, and requirements of IMC Chapter 12.60 unless this Franchise specifically provides to the contrary. In the event that a conflict exists between the terms of this Franchise and the terms of IMC Chapter 12.60, the terms of this Franchise shall control.

**Section 4. Term of Franchise.** The term of this Franchise shall be for a period of five (5) years from the date the last party signs the same, unless sooner terminated as provided in Section 22 hereof. This Franchise may be renewed pursuant to the provisions of IMC Section 12.60.190.

**Section 5. Non-Exclusive Grant.** This Franchise shall not in any manner prevent the City from entering into other similar agreements or franchises in, under, on, across, over, through, along or below any public ways of the City. Further, this Franchise shall in no way prevent or prohibit the City from using any of its public ways or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvements, and dedication of the same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new public ways.

**Section 6. Relocation of Facilities.**

A. The Grantee agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate, or remove from any public way any of its Facilities when so required by the Public Works Director upon his/her determination that such relocation or removal of Facilities is reasonably necessary for 1) the construction, repair, maintenance or installation of any City or other public improvement in or upon the public ways or 2) the operations of the City or other governmental entity in or upon the public ways. The City shall provide the Grantee at least thirty (30) days written notice prior to such relocation or removal of Facilities.

B. Upon request of the Public Works Director and in order to facilitate the design of City street and right-of-way improvements, the Grantee agrees, at its sole cost and expense, to locate, and if reasonably determined necessary by the City, to excavate and expose its Facilities for inspection so that the location of the same may be taken into account in the improvement design. The decision as to whether said Facilities need to be relocated in order to accommodate

the City's improvements shall be made by the Public Works Director upon review of the location and construction of the Grantee's Facilities.

C. If the Public Works Director determines that the project necessitates relocation of the Grantee's Facilities, the City shall:

1. Within a reasonable time, which shall be no less than thirty (30) days, prior to the commencement of such improvement project, provide the Grantee with written notice requiring such relocation; provided, however, that in the event of an emergency posing a threat to the public safety or welfare, or in the event of an emergency beyond the control of the City and which will result in severe financial consequences to the City, the City shall give the Grantee written notice as soon as practicable; and

2. Provide the Grantee with copies of pertinent information for such improvement project and a proposed location for the Grantee's Facilities so that the Grantee may relocate its Facilities in other public rights-of-way in order to accommodate such improvement project.

3. After receipt of such notice and such pertinent information, the Grantee shall complete relocation of its Facilities at no charge or expense to the City so as to accommodate the improvement project at least ten (10) days prior to commencement of the project. In the event of an emergency as described in Section 6(C)(1), the Grantee shall relocate its Facilities within the time period specified by the Public Works Director.

D. The Grantee may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the Grantee in writing as soon as practicable if one or more of the alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the Facilities. If so requested by the City, the Grantee shall submit additional relevant information to assist the City in making such evaluation. The City shall give each alternative proposed by the Grantee full and fair consideration, within a reasonable time so as to allow for the relocation work to be performed in a timely manner. In the event the City ultimately determines that there is no other reasonable alternative, the Grantee shall relocate its Facilities as otherwise provided in this Section.

E. The provisions of this Section shall in no manner preclude or restrict the Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City, where the Facilities to be constructed by said person or entity are not or will not become city-owned, operated or maintained Facilities provided that such arrangements do not unduly delay a City construction project.

F. The Grantee will indemnify, hold harmless, and pay the costs of defending the City against any and all claims, suits, actions, damages, or liabilities for delays on City construction projects caused by or arising out of the failure of the Grantee to remove or relocate its Facilities in a timely manner; provided, that the Grantee shall not be responsible for damages

due to delays caused by circumstances beyond the control of the Grantee or the negligence, willful misconduct, or unreasonable delay of the City.

#### **Section 7. Undergrounding of Facilities.**

A. The undergrounding requirements of this Section shall apply where the Grantee's Facilities consist of cable or any other facilities which are capable of being placed underground. Further, the Grantee shall be subject to any existing or future ordinances adopted by the City which require undergrounding of utility and/or telecommunication facilities. This Section shall not apply to antennas or other facilities which are required to remain above ground in order to be functional.

B. In any area of the City in which there are no aerial facilities other than antennas or other facilities required to remain above ground in order to be functional, or in any public way in which the telephone, electric power wires and cables capable of undergrounding have been placed underground, the Grantee shall not be permitted to erect poles or to run or suspend wires, cables or other facilities thereon, but shall lay such wires, cables or other facilities underground in the manner required by the City. The Grantee acknowledges and agrees that if the City does not require the undergrounding of its facilities at the time of initial installation, the City may, at any time in the future, require the conversion of the Grantee's above-ground and/or aerial facilities to underground installation at the Grantee's expense as provided by IMC Section 12.60.310, or as such Section may hereafter be amended.

C. Whenever the City requires the undergrounding of above-ground and/or aerial utilities in any area of the City which the City has the legal authority to require the Grantee to underground without the payment of costs under any tariff, the Grantee shall underground its above-ground and/or aerial Facilities in the manner specified by the City, concurrently with and in the area of all the other affected utilities. The location of any such relocated and underground utilities shall be approved by the City. The Grantee shall underground its Facilities at its own expense, but the Grantee is encouraged to contact and agree with other affected utilities so that all costs for common trenching, common utility vaults and other costs not specifically attributable to the undergrounding of any particular facility are borne fairly and proportionately by all the utilities involved in the underground project. The provisions of this Section shall survive the expiration, revocation, or termination of this Franchise. Nothing in this paragraph shall be construed as requiring the City to pay any costs of undergrounding any of the Grantee's Facilities.

D. Pursuant to IMC Section 12.60.310, the Grantee shall underground its Facilities in all new developments and subdivisions.

#### **Section 8. Grantee Maps and Records.**

A. After construction is complete, the Grantee shall provide the City with accurate copies of all as-built plans, maps, and records. These plans, maps, and records shall be provided at no cost to the City, and shall conform to the requirements of IMC Section 12.60.440. At such time as the Grantee develops or employs Geographic Information System ("GIS") technology,



Grantee shall submit information in digital GIS format, showing the location of its Facilities. The Grantee shall provide the City with updated maps annually.

B. Within ten (10) days of a written request from the Public Works Director, the Grantee shall furnish the City with information sufficient to demonstrate: 1) that the Grantee has complied with all applicable requirements of IMC Chapter 12.60 and this Franchise; and 2) that all sales, utility and/or telecommunications taxes due the City in connection with the Grantee's services and facilities provided by the Grantee have been properly collected and paid by the grantee.

C. All books, records, maps and other documents, maintained by the Grantee with respect to its Facilities within the public ways shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this Section shall be construed to require the Grantee to violate state or federal law regarding subscriber privacy, nor shall this Section be construed to require the Grantee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.

#### **Section 9. Work in the Public Ways.**

A. During any period of relocation, construction, or maintenance, all surface structures, if any, shall be erected and used in such places and positions within the public ways and other public properties so as to interfere as little as possible with the free passage of traffic and the free use of adjoining property, and the Grantee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by IMC Section 12.60.430, general ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

B. Whenever the Grantee shall commence any work within a public way, regardless of whether excavation is required, it shall apply to the City for a Construction Permit to do so as provided in IMC Chapter 12.60. The Grantee shall file plans or maps with the City showing the proposed location of its Facilities and pay all duly established permit and inspection fees associated with the processing of the Permit. In no case shall any work commence within any public way without said Permit, except as otherwise provided in this Franchise or IMC Chapter 12.60. During the progress of the work, the Grantee shall not unnecessarily obstruct the passage or proper use of the public ways, and all work by the Grantee in any area covered by this Franchise and as described in this Section shall be performed in accordance with applicable City standards and specifications and warranted for a period of two (2) years.

C. If the City has plans to improve any public way to which this Franchise applies within 2 years of the Grantee's application for a Construction Permit to locate its facilities in such public way, the Grantee may be allowed to install its facilities above ground, to the extent feasible, until such time as the City's improvements occur, at which time the Grantee shall underground its facilities concurrent with the City's improvement project.

D. The Grantee or any person acting on its behalf shall use suitable barricades, flags, flaggers, lights, flares and other measures as required for the safety of all members of the general

public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such ways or property.

E. Prior to doing any work in the rights-of-way, the Grantee shall follow established procedures, including contacting the Utility Notification Center in Washington and comply with all applicable State statutes regarding the One Call Locator Service pursuant to RCW 19.122.

F. Grantee shall provide a notice indicating the nature and location of the work to be performed at least twenty-four (24) hours prior to entering private property or streets or public easements adjacent to or on such private property. Such notice shall be physically posted upon the affected property by the Grantee, a door hanger is permissible. The Grantee shall make a good faith effort to comply with the property owner/resident's preferences, if any, on location or placement of underground installations (excluding aerial cable lines utilizing existing poles and existing cable paths), consistent with sound engineering practices.

G. The Grantee agrees to comply with the cooperation requirements set forth in IMC 12.60.510.

**Section 10. Restoration after Construction.** The Grantee shall, after installation, construction, relocation, maintenance, removal, or repair of its Facilities within the public ways, restore the surface of said public ways and any other City-owned property which may be disturbed by the work, to at least the same condition the public way was in immediately prior to any such installation, construction, relocation, maintenance, or repair. The Public Works Director shall have final approval of the condition of such public ways after restoration. All survey monuments which are to be disturbed or displaced by such work shall be referenced and restored, as per WAC 332-120, as the same now exists or may hereafter be amended, and all pertinent federal, state and local standards and specifications. The Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the public ways or other affected area at its sole cost and expense according to the time and terms specified in the Construction Permit issued by the City. The provisions of this Section shall survive the expiration, revocation, or termination by other means of this Franchise. All work by the Grantee pursuant to this Section shall be performed in accordance with applicable City standards and warranted for a period of 2 years. In the event the Grantee does not repair a right-of-way or an improvement in or to a right-of-way, the City may repair the damage and shall be reimbursed within thirty (30) days of submitting an invoice to Grantee.

#### **Section 11. Emergency Work -- Permit Waiver.**

A. In the event of any emergency in which any of the Grantee's Facilities located in, above, or under any public way breaks, are damaged, or if the Grantee's construction area is otherwise in such a condition as to immediately endanger the property, life, health, or safety of any individual, the Grantee shall immediately take the proper emergency measures to repair its Facilities, to cure or remedy the dangerous conditions for the protection of property, life, health, or safety of individuals without first applying for and obtaining a Construction Permit as required by this Franchise. However, this shall not relieve the Grantee from the requirement of notifying the City of the emergency work and obtaining any permits necessary for this purpose after the emergency work. The Grantee shall notify the City by telephone immediately upon learning of

the emergency and shall apply for all required permits not later than the second succeeding day during which the City's Public Works Department is open for business.

B. The City retains the right and privilege to cut or move any Facilities located within the public ways of the City, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. The City shall not be liable to the Grantee or any other party for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the City's actions under this Section.

**Section 12. Dangerous Conditions, Authority for City to Abate.** Whenever construction, installation, or excavation of Facilities authorized by this Franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining public way, street, or public place, or endangers the public, street utilities, or City-owned property, the Public Works Director may direct the Grantee, at the Grantee's own expense, to take action to protect the public, adjacent public places, City-owned property, streets, utilities, and public ways. Such action may include compliance within a prescribed time.

In the event that the Grantee fails or refuses to promptly take the actions directed by the City, or fails to comply with such directions, or if emergency conditions exist which require immediate action, the City may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, utilities, public ways, to maintain the lateral support thereof, or actions regarded as necessary safety precautions; and the Grantee shall be liable to the City for the costs thereof. The provisions of this Section shall survive the expiration, revocation, or termination of this Franchise.

**Section 13. Recovery of Costs.** The Grantee shall be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise or under the laws of the City. Where the City incurs reasonable costs and expenses for review, inspection, or supervision of activities undertaken through the authority granted in this Franchise or any ordinances relating to the subject for which a permit fee is not established, including but not limited to attorneys, consultants, City Staff and City Attorney's Office, the Grantee shall reimburse the City directly for any and all costs after receiving an invoice documenting said costs and expenses in sufficient detail to demonstrate that they were reasonably necessary to perform the aforementioned actions.

In addition to the above, the Grantee shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency involving the Grantee's Facilities.

Finally, the Grantee shall reimburse the City within sixty (60) days of submittal by the City of an itemized billing for reasonably incurred costs, itemized by project, for the Grantee's proportionate share of all actual, identified expenses incurred by the City in planning, constructing, installing, repairing, altering, or maintaining any City facility as the result of the presence in the public ways of the Grantee's Facilities. Such costs and expenses shall include but not be limited to the Grantee's proportionate cost of City personnel assigned to oversee or engage in any work in the public ways as the result of the presence of the Grantee's Facilities in the public ways. Such costs and expenses shall also include the Grantee's proportionate share of any time spent reviewing construction plans in order to either accomplish the relocation of the

Grantee's Facilities or the routing or rerouting of any utilities so as not to interfere with the Grantee's Facilities.

The time of City employees shall be charged at their respective rate of salary, including overtime if applicable, plus benefits and reasonable overhead. Any other costs will be billed proportionately on an actual cost basis. All billings will be itemized so as to specifically identify the costs and expenses for each project for which the City claims reimbursement. A charge for the actual costs incurred in preparing the billing may also be included in said billing. The billing may be on an annual basis, but the City shall provide the Grantee with the City's itemization of costs at the conclusion of each project for information purposes.

**Section 14. Reservation of Rights.** Pursuant to RCW Section 35.21.860, the City is precluded from imposing a fee on a "telephone business", as defined in RCW 82.04.065, except for administrative expenses or any applicable tax authorized by RCW 35.21.865. If the Grantee is a telephone business, the rights granted under this Franchise are not conditioned upon payment of compensation in addition to reimbursement for administrative costs as set forth in Section 13 herein and payment of the utility tax set forth in IMC Chapter 5.32, if applicable. The City hereby reserves its right to impose a fee on the Grantee, to the extent authorized by law, for purposes other than to recover its administrative expenses, if the Grantee's operations are not those of a telephone business, if the Grantee's operations now fall within such category and changes in the future, if a court with jurisdiction determines that such fees are permissible, or if statutory and regulatory prohibitions on the imposition of such fees are removed. The City also reserves its right to require that the Grantee obtain a separate Franchise for its change in use, which Franchise may include provisions intended to regulate the Grantee's operations, as allowed under applicable law.

**Section 15. Tree Trimming.** The Grantee may trim trees upon an overhanging on public ways, streets, alleys, sidewalks, and other public places of the City so as to prevent the branches of such trees from coming in contact with the Grantee's wires and cables. All trimming is to be done after the explicit prior written notification and approval of the City and at the expense of the Grantee. The Grantee may contract for such services, however, any firm or individual so retained shall receive City approval prior to commencing such trimming.

**Section 16. Indemnification.**

A. Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person arising from injury, sickness, or death of any person or damage to property:

1. For which the negligent acts or omissions of Grantee, its agents, servants, officers or employees in performing the activities authorized by this Franchise are the proximate cause;
2. By virtue of Grantee's exercise of the rights granted herein;

3. By virtue of the City's permitting Grantee's use of the City's public rights-of-way or other public property;

4. Based upon the City's inspection or lack of inspection of work performed by Grantee, its agents and servants, officers or employees in connection with work authorized on the Facility or property over which the City has control, pursuant to this Franchise or pursuant to any other permit or approval issued in connection with this Franchise;

5. Arising as a result of the negligent acts or omissions of Grantee, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work upon the Grantee's Facilities, in any public way, or other public place in performance of work or services permitted under this Franchise;

6. Based upon radio frequency emissions or radiation emitted from Grantee's equipment, if any, located within the public rights-of-way, regardless of whether Grantee's equipment complies with applicable federal statutes and/or FCC regulations related thereto.

B. Grantee's indemnification obligations pursuant to Subsection A of this Section shall include assuming potential liability for actions brought by Grantee's own employees and the employees of Grantee's agents, representatives, contractors, and subcontractors even though Grantee might be immune under Title 51 RCW from direct suit brought by such an employee. It is expressly agreed and understood that this assumption of potential liability for actions brought by the aforementioned employees is limited solely to claims against the City arising by virtue of Grantee's exercise of the rights set forth in this Franchise. The obligations of Grantee under this Subsection B have been mutually negotiated by the parties hereto, and Grantee acknowledges that the City would not enter into this Franchise without Grantee's waiver thereof. To the extent required to provide this indemnification and this indemnification only, Grantee waives its immunity under Title 51 RCW as provided in RCW 4.24.115.

C. Inspection or acceptance by the City of any work performed by Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Provided that Grantee has been given prompt written notice by the City of any such claim, said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation. The City has the right to defend or participate in the defense of any such claim, and has the right to approve any settlement or other compromise of any such claim, provided that Grantee shall not be liable for such settlement or other compromise unless it has consented thereto.

D. In the event that Grantee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to this Section, and said refusal is subsequently determined by a court having competent jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Grantee, then if Grantee does not immediately tender defense, Grantee shall pay all of the City's reasonable costs for defense of the action, including, if incurred, all reasonable expert witness fees, and

reasonable attorneys' fees, and the reasonable costs of the City, and reasonable attorneys' fees of recovering under this Subsection.

E. The obligations of Grantee under the indemnification provisions of this Section shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the concurrent negligence of the City, its officers, agents, employees or contractors. The provisions of this Section, however, are not to be construed to require the Grantee to hold harmless, defend or indemnify the City as to any claim, demand, suit or action which arises out of the sole negligence, willful misconduct, or criminal acts of the City. In the event that a court of competent jurisdiction determines that this Franchise is subject to the provisions of RCW 4.24.115, the parties agree that the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein.

F. Notwithstanding any other provisions of this Section, Grantee assumes the risk of damage to its Facilities located in the public rights-of-way and upon City-owned property from activities conducted by the City, its officers, agents, employees, volunteers, elected and appointed officials, and contractors, except to the extent any such damage or destruction is caused by or arises from any willful, malicious, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. Grantee releases and waives any and all such claims against the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. Grantee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of Grantee's facilities as the result of any interruption of service due to damage or destruction of Grantee's facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors, except to the extent any such damage or destruction is caused by or arises from the sole negligence or any willful, malicious, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors.

G. The provisions of this Section shall survive the expiration, revocation, or termination of this Franchise.

**Section 17. Insurance.** The Grantee shall procure and maintain for the duration of the Franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to the Grantee, its agents, representatives or employees. The Grantee shall provide an insurance certificate naming the City, its officers, elected officials, agents, employees, representatives, engineers, consultants and volunteers as additional insureds, to the City for its inspection prior to the commencement of any work or installation of any facilities pursuant to this Franchise, and such insurance certificate shall evidence:

A. Comprehensive general liability insurance, inclusive of excess liability policies, written on an occurrence basis, with total limits not less than:

1. \$5,000,000.00 per occurrence for bodily injury or death to each person and property damage;

2. \$5,000,000.00 general aggregate for bodily injury or death to each person and property damage;

3. \$5,000,000 for comprehensive form premises-operations, explosions, explosions and collapse hazard, underground hazard and products completed operations.

B. Automobile liability for owned, non-owned and hired vehicles with a limit of \$3,000,000.00 for each person and \$3,000,000.00 for each accident;

C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.00;

The liability insurance policies required by this Section shall be maintained by the Grantee throughout the term of this Franchise, and such other period of time during which the Grantee is operating without a Telecommunications Right-of-Way Use Permit, or is engaged in the removal of its Facilities. The Grantee shall provide an insurance certificate, together with an endorsement naming the City, and its elected and appointed officers, officials, agents, employees, representatives, engineers, consultants, and volunteers as additional insureds, to the City prior to the commencement of any work or installation of any facilities pursuant to this Franchise. Any deductibles or self-insured retentions must be declared to and approved by the City. Payment of deductibles and self-insured retentions shall be the sole responsibility of the Grantee. The insurance certificate required by this Section shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. The Grantee's insurance shall be primary insurance with respect to the City, its officers, officials, employees, agents, consultants, and volunteers. Any insurance maintained by the City, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of the Grantee's insurance and shall not contribute with it;

In addition to the coverage requirements set forth in this Section, each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 60 days after receipt by the City, by registered mail, of a written notice addressed to the Public Works Director of such intent to cancel or not to renew."

Within thirty (30) days after receipt by the City of any insurance cancellation notice, and in no event later than fifteen (15) days prior to said cancellation or intent not to renew, the Grantee shall obtain and furnish to the City replacement insurance policies meeting the requirements of this Section.

**Section 18. Abandonment and Removal of the Grantee's Facilities.** Upon the expiration, termination, or revocation of the rights granted under this Franchise, and consistent with the provisions of IMC Section 12.60.400, the Grantee shall remove all of its Facilities from the public rights-of-way within thirty (30) days of receiving notice from the Public Works

Director. Provided, however, that the City may permit the Grantee's improvements to be abandoned and placed in such a manner as the City may prescribe. Upon permanent abandonment, and the Grantee's agreement to transfer ownership of the Facilities to the City, the Grantee shall submit to the City a proposal and instruments for transferring ownership to the City. Any such Facilities which are not permitted to be abandoned in place which are not removed within thirty (30) days of receipt of said notice shall automatically become the property of the City. Provided, however, that nothing contained within this Section shall prevent the City from compelling the Grantee to remove any such Facilities through judicial action when the City has not permitted the Grantee to abandon said Facilities in place. Except as specifically provided by IMC Chapter 12.60, the Grantee shall not be allowed to abandon any of its Facilities within the public rights-of-way.

**Section 19. Construction and Completion Bond.** As required by City of Issaquah standards and specifications, Grantee shall furnish a construction and completion bond written by a corporate surety acceptable to the City equal to at least 150% of the estimated cost of constructing the grantee's telecommunications facilities within the public ways of the City prior to commencement of any such work. The bond shall guarantee the following: (1) timely completion of construction; (2) construction in compliance with all applicable plans, permits, technical codes, and standards; (3) proper location of the facilities as specified by the City; (4) restoration of the public ways and other properties affected by the construction; (5) submission of as-built drawings after completion of construction; and, (6) timely payment and satisfaction of all claims, demands, or liens for labor, materials, or services provided in connection with the work which could be asserted against the City or City property. Said bond shall be required to remain in full force until sixty (60) days after completion of the construction and shall warrant all such restoration work for a period of 2 years.

**Section 20. Security Fund.** Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this Franchise, the Grantee shall establish a security fund in the amount of \$15,000.00 as an unconditional letter of credit, or other instrument acceptable to the City to guarantee the full and complete performance of the requirements of this Franchise, the requirements of IMC Chapter 12.60, and to guarantee payment of any costs, expenses, damages, or loss the City pays or incurs, including civil penalties, because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations, or permits of the City. Prior to withdrawal of any funds from the security fund, the City shall comply with the provisions of IMC Section 12.60.490 as that section presently exists or is hereafter amended. The Grantee shall replenish the security fund within fourteen (14) days after written notice from the City that there is a deficiency in the amount of the fund.

**Section 21. Modification.** The City and the Grantee hereby reserve the right to alter, amend or modify the terms and conditions of this Franchise upon written agreement of both parties to such alteration, amendment or modification.

**Section 22. Forfeiture and Revocation.** The rights granted under this Franchise may be revoked or forfeited as provided in IMC Chapter 12.60. Provided that the City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain



an order from the superior court having jurisdiction compelling the Grantee to comply with the provisions of this Franchise and to recover damages and costs incurred by the City by reason of the Grantee's failure to comply. The Grantee shall be provided an opportunity to cure or provide evidence pursuant to IMC Section 12.60.550.

**Section 23. Non-Waiver.** The failure of the City to insist upon strict performance of any of the covenants and agreements of this Franchise or to exercise any option herein conferred in any one or more instances, shall not be construed to be a waiver or relinquishment of any such covenants, agreements or option or any other covenants, agreements or option.

**Section 24. Remedies to Enforce Compliance.** In addition to any other remedy provided in this Franchise or within IMC Chapter 12.60, the City reserves the right to pursue any remedy to compel or force the Grantee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

**Section 25. City Ordinances and Regulations.** Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Franchise, including any ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, manner of construction and maintenance of any Facilities by the Grantee, and the Grantee shall promptly conform with all such regulations, unless compliance would cause the Grantee to violate other requirements of law.

**Section 26. Survival.** All of the provisions, conditions and requirements of Section 7, Undergrounding of Facilities; Section 9, Work in the Public rights-of-way; Section 10, Restoration after Construction; Section 12, Dangerous Conditions; Section 16, Indemnification; Section 17, Insurance; and Section 18, Abandonment and Removal of Facilities, of this Franchise shall be in addition to any and all other obligations and liabilities the Grantee may have to the City at common law, by statute, or by contract, and shall survive the expiration or termination of this Franchise, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Grantee and all privileges, as well as all obligations and liabilities of the Grantee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Grantee is named herein. Provided, however, that Grantee's obligation referenced in this Section shall cease if the City permits Grantee to abandon its Facilities in place as permitted by IMC Section 12.60.400. Provided, further, that Grantee's obligation to indemnify the City against claims, as referenced in Section 16, shall cease only with respect to claims arising after approval of Grantee's in-place abandonment.

**Section 27. Severability.** In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provisions of this Franchise.

## **Section 28. Assignment.**

A. This agreement may not be assigned or transferred unless approved in writing by the Public Works Director, except that the Grantee may freely assign this Franchise in whole or in part to a parent, subsidiary, or affiliated corporation. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. All assignments or transfers must comply with the provisions of IMC Sections 12.60.520 and 12.60.530. The Grantee shall provide prompt, written notice to the City of any such assignment. The assignee or transferee must have the legal, technical, financial and other requisite qualifications to own, hold and operate the Grantee's telecommunications system. The Grantee shall reimburse the City for all direct and indirect costs and expenses reasonably incurred by the City in considering a request to transfer or assign this permit and shall pay the applicable application fee as described in IMC Section 3.65.

B. Any transactions which singularly or collectively result in a change of fifty percent (50%) or more of the ownership or working control of the Grantee, of the ownership or working control of the Facilities, of the ownership or working control of affiliated entities having ownership or working control of the Grantee or of the Facilities, or of control of the capacity or bandwidth of the Grantee's Facilities or substantial parts thereof, shall be considered an assignment or transfer requiring City approval pursuant to IMC Section 12.60.530. Transactions between affiliated entities are not exempt from City approval. The Grantee shall promptly notify the City prior to any proposed change in, or transfer of, or acquisition by any other party of control of the Grantee's company. Every change, transfer, or acquisition of control of a grantee's company shall cause a review of the proposed transfer. In the event that the City adopts a resolution denying its consent and such change, transfer or acquisition of control has been effected, the City may cancel this Franchise.

C. The Grantee may, without prior consent from the City: (i) lease the Facilities, or any portion thereof, to another person; (ii) grant an indefeasible right of user interest in the Facilities, or any portion thereof, to another person; or (iii) offer to provide capacity or bandwidth in its Facilities to another person, provided further, that Grantee shall at all times retain exclusive control over its Facilities and remain fully responsible for compliance with the terms hereof, the Grantee furnishes, upon request from the City, a copy of any such lease or agreement, and the lessee complies, to the extent applicable, with the requirements of IMC Chapter 12.60 and applicable City codes.

**Section 29. Notice.** Any notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

City:

City of Issaquah  
Director of Public Works  
P.O. Box 1307  
Issaquah, WA 98027

Grantee:

XO Communications  
Attn: Barbara Arron  
1000 Denny Way, Suite 200  
Seattle, WA 98109

Notice shall be deemed given upon receipt in the case of personal delivery, three days after deposit in the United States Mail in the case of regular mail, or the next day in the case of overnight delivery.

**Section 30. Notice of Tariff Changes.** The Grantee shall, when making application for any changes in tariffs affecting the provisions of this Franchise, notify the City in writing of the application and provide the Public Works Director with a copy of the submitted application within three days of filing with the Washington Utilities and Transportation Commission or other regulatory body. The Grantee shall further provide the Public Works Director with a copy of any actual approved tariff change affecting the provisions of this Franchise.

**Section 31. Entire Agreement.** This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution of this Franchise.

**Section 32. Eminent Domain.** The existence of this Franchise shall not preclude the City from acquiring by condemnation in accordance with applicable law, all or a portion of the Grantee's Facilities for the fair market value thereof. In determining the value of such Facilities, no value shall be attributed to the right to occupy the area conferred by this Franchise.

**Section 33. Vacation.** If at any time the City, by ordinance, vacates all or any portion of the area affected by this Franchise, the City shall not be liable for any damages or loss to the Grantee by reason of such vacation. The City shall notify the Grantee in writing not less than sixty (60) days before vacating all or any portion of any such area. The City may, after sixty (60) days written notice to the Grantee, terminate this Franchise with respect to such vacated area.

**Section 34. Light, Signs and Symbols.** All lights, signs or symbols placed by the Grantee shall be subject to the prior approval of the City. In the event the Grantee shall place lights, signs or symbols where they are visible from the street and not acceptable to the City, the City may demand the immediate removal of such lights, signs or symbols and the refusal of the Grantee to comply with such demand within twenty four (24) hours will constitute a breach of this Franchise, thereby entitling the City to exercise any available legal remedy and to remove the light, signs or symbols.

**Section 35. Compliance with All Applicable Laws.** The Grantee agrees to comply with all present and future federal, state and local laws, ordinances, rules and regulations. This Franchise is subject to ordinances of general applicability enacted pursuant to the City's police powers. The Grantee further agrees to save and hold the City harmless from damage, loss or expense, arising out of the said use or work, unless caused by the City's sole negligence and to remove all liens and encumbrances arising as a result of said use or work. The Grantee shall, at its own expense, maintain its Facilities in a safe condition, in good repair and in a manner suitable to the City. Additionally, the Grantee shall keep its Facilities free of debris and anything of a dangerous, noxious or offensive nature or which would create a hazard or undue vibration, heat, noise or any interference with City services.

**Section 36. Attorneys' Fees.** If a suit or other action is instituted in connection with any controversy arising out of this Franchise, the prevailing party shall be entitled to recover all of its costs and expenses, including such sum as the Court may judge as reasonable for attorneys' fees, costs, expenses and attorneys' fees upon appeal of any judgment or ruling.

**Section 37. Hazardous Substances.** The Grantee shall not introduce or use any hazardous substances (chemical or waste), in violation of any applicable law or regulation, nor shall the Grantee allow any of its agents, contractors or any person under its control to do the same. The Grantee will be solely responsible for and will defend, indemnify and hold the City, its agents and employees harmless from and against any and all direct claims, costs and liabilities including reasonable attorneys' fees and costs, arising out of or in connection with the cleanup or restoration of the property associated with the Grantee's use, storage, or disposal of hazardous substances or the use, storage or disposal of such substances by the Grantee's agents, contractors or other persons acting under the Grantee's control.

**Section 38. Licenses, Fees and Taxes.** Prior to constructing any improvements, the Grantee shall obtain a business or utility license from the City. The Grantee shall pay promptly and before they become delinquent, all taxes on personal property and improvements owned or placed by the Grantee and shall pay all license fees and public utility charges relating to the conduct of its business; shall pay for all permits, licenses and zoning approvals, shall pay any other applicable tax unless documentation of exemption is provided to the City and shall pay utility taxes and license fees imposed by the City.

**Section 39. Miscellaneous.**

A. City and the Grantee respectively represent that its signatory is duly authorized and has full right, power and authority to execute this Right-of-Way Use Permit.

B. This Franchise shall be construed in accordance with the laws of the State of Washington. Venue for any dispute related to this Franchise shall be the United States District Court for the Western District of Washington, or King County Superior Court.

C. Section captions and headings are intended solely to facilitate the reading thereof. Such captions and headings shall not affect the meaning or interpretation of the text herein.

D. Where the context so requires, the singular shall include the plural and the plural includes the singular.

E. The Grantee shall be responsible for obtaining all other necessary approvals, authorizations and agreements from any party or entity and it is acknowledged and agreed that the City is making no representation, warranty or covenant whether any of the foregoing approvals, authorizations or agreements are required or have been obtained by the Grantee by any person or entity.

F. This Franchise may be enforced at both law and equity.

G. This Franchise may be executed in duplicate counterparts, each of which shall be

deemed an original.


H. The Grantee acknowledges that it, and not the City, shall be responsible for the premises and equipment's compliance with all marking and lighting requirements of the FAA and the FCC. The Grantee shall indemnify and hold the City harmless from any fines or other liabilities caused by the Grantee's failure to comply with such requirements. Should the Grantee or the City be cited by either the FCC or the FAA because the premises or the Grantee's equipment is not in compliance and should the Grantee fail to cure the conditions of noncompliance within the timeframe allowed by the citing agency, the City may either terminate this Franchise immediately on notice to the Grantee or proceed to cure the conditions of noncompliance at the Grantee's expense.

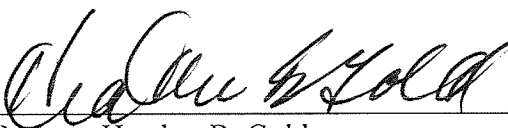
**Section 40. Acceptance.** This Franchise and the rights, privileges and authority granted hereunder shall take effect and be in force from and after the effective date of this Franchise as described in Section 41 below. Within sixty (60) days after the City's execution of this Franchise, the Grantee shall signify its acceptance by execution of the Franchise. Such written acceptance shall be accompanied by the certificates of insurance specified in Section 17. This Franchise is voidable unless accepted in writing with the required certificates of insurance by the Grantee within this sixty (60) days.

**Section 41. Effective Date.** This Franchise, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after the passage and publication of an approved summary thereof consisting of the title.

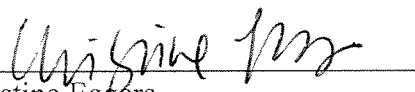
CITY OF ISSAQUAH

GRANTEE:


By:   
Name: AVA FRISINGER  
Title: Mayor  
Date: May 19, 2011

By:   
Name: Heather B. Gold  
Title: SVP, External Affairs  
Date: March 3, 2011

ATTEST/AUTHENTICATED:

  
Christine Eggers  
City Clerk/CMC

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY:

By: 

## EXHIBIT A



EXHIBIT A

**DISTRIBUTION SCHEDULE  
City of Issaquah**

**Ordinance No. 2614**

AB 6248

Subject: Franchise Agreement, XO Communication

<u>05-16-11</u>	Date passed by City Council
<u>05-19-11</u>	Signed by Mayor
<u>n/a</u>	Signed by Council President
<u>05-19-11</u>	Signed by City Clerk
<u>05-19-11</u>	Date posted
<u>05-25-11</u>	Date(s) published (normally by title only)
<u>05-30-11</u>	Date effective

Copies of executed document distributed as follows:

<u>x</u>	Ordinance/Resolution file (original)
<u>x</u>	MRSC (per RCW 35A.39.010) - (electronic copy only)
<u>x</u>	Code Publishing Co. (upload files to their website; followed by hard copy)
<u>x</u>	City Attorney (electronic copy only)
<u>x</u>	Originating Department: <u>PWE, Bob Brock</u>
<u>(1)</u>	Other: <u>NOA - XO Communications</u>
<u>2</u>	Posting City Hall Lobby and KC Library
<u>0</u>	Certified Copies: _____
<u>2</u>	Total <b>photocopies</b> needed

\* Contract Sheet not needed since ordinance is codified

(Reviewed by City Clerk all) (Date 5/19/11)

Deanne Mearns  
(Signed)

5-19-11  
(Date)

\* If ordinance includes exhibit(s) – make sure you label the last page of the ordinance, explaining that the exhibit(s) is(are) on file with the City Clerk.