

City of Tukwila

Washington

Ordinance No. 2283

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, GRANTING A NON-EXCLUSIVE FRANCHISE TO PAETEC HOLDING CORPORATION, AN IOWA CORPORATION LEGALLY AUTHORIZED TO CONDUCT BUSINESS IN THE STATE OF WASHINGTON, FOR THE PURPOSE OF CONSTRUCTING, OPERATING AND MAINTAINING A TELECOMMUNICATIONS SYSTEM IN CERTAIN PUBLIC RIGHTS-OF-WAY IN THE CITY; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, PAETEC Holding Corporation, hereinafter referred to as "PAETEC," is a telecommunications company that, among other things, provides voice and data services to customers, including those in the Puget Sound region; and

WHEREAS, PAETEC's desired route through the City of Tukwila, hereinafter referred to as "City," requires the use of certain portions of City rights-of-way for the installation, operation and maintenance of a telecommunications system; and

WHEREAS, the City Council has determined that the use of portions of the City's rights-of-way for installation of a telecommunications system is appropriate from the standpoint of the benefits to be derived by local business and the region as a result of such services; and

WHEREAS, the City Council also recognizes that the use of public rights-of-way must be restricted to allow for the construction of amenities necessary to serve the future needs of the citizens of Tukwila and that the coordination, planning and management of the City's rights-of-way is necessary to ensure that the burden of costs for the operations of non-municipal interests are not borne by the citizenry; and

WHEREAS, the Revised Code of Washington (RCW) authorizes the City to grant and regulate non-exclusive franchises for the use of public streets, right-of-ways and other public property for transmission of communications;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, HEREBY ORDAINS AS FOLLOWS:

Section 1. Non-exclusive Franchise Granted.

A. The City hereby grants to PAETEC, subject to the conditions prescribed in this ordinance ("Franchise Agreement"), the franchise rights and authority to construct, replace, repair, monitor, maintain, use and operate the equipment and facilities necessary for a telecommunications facility within the City-owned rights-of-way, generally described in Exhibit A, and hereinafter referred to as the "franchise area."

B. Such franchise shall not be deemed to be exclusive to PAETEC and shall in no way prohibit or limit the City's ability to grant other franchises, permits, or rights along, over or under the areas to which this franchise has been granted to PAETEC; provided, that such other franchises do not unreasonably interfere with PAETEC's exercise of franchise rights granted herein as determined by the City. This franchise shall in no way interfere with existing utilities or in any way limit, prohibit or prevent the City from using the franchise area or affect the City's jurisdiction over such area in any way.

Section 2. Authority. The Director of Public Works or his or her designee is hereby granted the authority to administer and enforce the terms and provisions of this

Franchise Agreement and may develop such lawful and reasonable rules, policies and procedures as he or she deems necessary to carry out the provisions contained herein.

Section 3. Franchise Term. The franchise rights granted herein shall remain in full force and effect for a period of three years from the effective date of this ordinance. This franchise shall not take effect and PAETEC shall have no rights under this franchise unless a written acceptance with the City is received pursuant to Section 4 of this agreement. If PAETEC requests a franchise renewal prior to the expiration date, the City may, at the City's sole discretion, extend the term of this franchise for up to one year beyond the expiration date to allow processing of renewal. If the City elects to extend the term of this franchise, written notice of the extension shall be provided to PAETEC prior to the franchise expiration date.

Section 4. Acceptance of Terms and Conditions. The full acceptance of this franchise and all the terms and conditions shall be filed with the City Clerk within 30 days of the effective date of this ordinance in the form attached hereto as Exhibit B. Failure on the part of PAETEC to file said consent within 30 days of the effective date of this ordinance shall void and nullify any and all rights granted under this Franchise Agreement.

Section 5. Construction Provisions and Standards. The following provisions shall be considered mandatory and failure to abide by any conditions described herein shall be deemed as non-compliance with the terms of this Franchise Agreement and may result in some or all of the penalties specified in Section 6.

A. Permit Required. No construction, maintenance or repairs (except for emergency repairs) shall be undertaken in the franchise area without first obtaining appropriate permits from the City of Tukwila, Department of Public Works. In case of an emergency, PAETEC shall, within 24 hours of the emergency, obtain a permit from the City of Tukwila Department of Public Works.

B. Coordination. All capital construction projects performed by PAETEC within the franchise area shall be inspected by a City inspector. All work and inspection shall be coordinated with the Engineering Division of the Public Works Department to ensure consistency with City infrastructure, future Capital Improvement Projects, all developer improvements, and pertinent codes and ordinances.

C. Construction Standards. Any construction, installation, maintenance and restoration activities performed by or for PAETEC within the franchise area shall be constructed and located so as to produce the least amount of interference with the free passage of pedestrian and vehicular traffic. All construction, installation, maintenance and restoration activities shall be conducted such that they conform to City's development guidelines and standards and comply with Title 11 of the Tukwila Municipal Code.

D. Underground Installation Required. All telecommunications cables and junction boxes or other vaulted system components shall be installed underground unless otherwise exempted from this requirement, in writing, by the Director of Public Works.

E. Relocation.

1. Whenever the City causes a public improvement to be constructed within the franchise area, and such public improvement requires the relocation of PAETEC's facilities, the City shall provide PAETEC with written notice requesting such relocation, along with plans for the public improvement that are sufficiently complete to allow for the initial evaluation, coordination and the development of a relocation plan. The City and PAETEC shall meet at a time and location determined by the City to discuss the project requirements including critical timelines, schedules, construction standards, utility conflicts, as-built requirements, and other pertinent relocation plan details.

2. To ensure timely execution of relocation requirements, PAETEC shall, upon written request from the City, provide at PAETEC's expense, base maps, current as-built information, detailed relocation plan (including detailed schedule of relocation activities, identification of critical path, identification of facilities, and relocation

procedures), and other design, technical or operational requirements within the timeframe specified by the City.

3. PAETEC may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation within the time specified by the City. Such alternatives shall include the use and operation of temporary facilities in adjacent rights of way. The City shall evaluate such alternatives and advise PAETEC in writing if one or more of the alternatives are suitable to accommodate the work, which would otherwise necessitate relocation of the facilities. If requested by the City, PAETEC shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by PAETEC full and fair consideration. In the event the City ultimately determines there is no other reasonable alternative, PAETEC shall relocate its facilities as otherwise specified in Section 5.E.

4. Upon final approval of the relocation plan by the City, PAETEC shall, at its own expense, unless otherwise prohibited by statute, and at the timeframe specified by the City, temporarily or permanently remove, relocate, place underground, change or alter the position of any facilities or structures within the right-of-way whenever the City has determined that such removal, relocation, undergrounding, change or alteration is reasonably necessary for the construction, repair, maintenance, installation, public safety, or operation of any public improvement in or upon the rights-of-way.

5. If during the construction, repair, or maintenance of City's public improvement project an unexpected conflict occurs from PAETEC's facilities, PAETEC shall upon notification from the City, respond within 24 hours to resolve the conflict.

F. Removal or Abandonment. Upon the removal from service of any service antennas or other associated structures, facilities and amenities, PAETEC shall comply with all applicable standards and requirements prescribed by the City of Tukwila Public Works Department for the removal or abandonment of said structures and facilities. No facility constructed or owned by PAETEC may be abandoned without the express written consent of the City.

G. Bond. Before undertaking any of the work, installation, improvements, construction, repair, relocation, or maintenance authorized by this Franchise Agreement, PAETEC shall, upon the request of the City, furnish a bond executed by PAETEC and a corporate surety authorized to operate a surety business in the State of Washington, in such sum as may be set and approved by the City as sufficient to ensure performance of PAETEC's obligations under this Franchise Agreement, provided, however, that such sum shall not exceed 150% of the cost of the telecommunications system to be installed by PAETEC in the City rights-of-way. At PAETEC's sole option, PAETEC may provide alternate security in the form of an assignment of funds or a letter of credit, in the same amount as the bond. All forms of security shall be in the form reasonably acceptable to the City. The bond shall be conditioned so that PAETEC shall observe all the covenants, terms and conditions and shall faithfully perform all of the obligations of this Franchise Agreement, and to repair or replace any defective PAETEC work or materials discovered in the City's roads, streets or property.

H. "One-Call" Location & Liability. PAETEC shall subscribe to and maintain membership in the regional "One-Call" utility location service and shall promptly locate all of its lines upon request. The City shall not be liable for any damages to PAETEC's system components or for interruptions in service to PAETEC customers which are a direct result of work performed for any City project for which PAETEC has failed to properly locate its lines and facilities within the prescribed time limits and guidelines established by One-Call. The City shall also not be liable for any damages to the PAETEC system components or for interruptions in service to PAETEC customers resulting from work performed under a permit issued by the City.

I. As-Built Plans Required. PAETEC shall maintain accurate engineering plans and details of all installations within the City limits and shall provide such information in both paper form and electronic form using the most current Autocad version prior to close-out of any permits issued by the City and any work undertaken by PAETEC

pursuant to this Franchise Agreement. The City shall determine the acceptability of any as-built submittals provided under this section.

J. **Recovery of Costs.** PAETEC shall be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise Agreement or under ordinances of the City. Where the City incurs costs and expenses for review or inspection of activities undertaken through the authority granted in this Franchise Agreement or any ordinances relating to the subject for which permit fees have not been established, PAETEC shall pay such reasonable costs and expenses directly to the City.

K. **Vacation.** If, at any time, the City shall vacate any City road, right-of-way or other City property which is subject to rights granted by this Franchise Agreement and said vacation shall be for the purpose of acquiring the fee or other property interest in said road, right-of-way or other City property for the use of the City, in either its proprietary or governmental capacity, then the City may, at its option and by giving 30-days written notice to PAETEC, terminate this Franchise Agreement with reference to such City road, right-of-way or other City property so vacated, and the City shall not be liable for any damages or loss to PAETEC by reason of such termination other than those provided for in RCW 35.99.

Section 6. Franchise Compliance.

A. **Franchise Violations.** The failure by PAETEC to fully comply with any of the provisions of this Franchise Agreement may result in a written notice from the City that describes the violations of the franchise and requests remedial action within 30 days of receipt of such notice. If PAETEC has not attained full compliance at the end of the 30-day period following receipt of the violation notification, the City may declare an immediate termination of all franchise rights and privileges, provided that full compliance was reasonably possible within that 30-day period.

B. Emergency Actions.

1. If any of PAETEC's actions, or any failure by PAETEC to act to correct a situation caused by PAETEC, is deemed by the City to create a threat to life or property, financial harm, or cause a delay of the construction, repair or maintenance of the public improvement, the City may order PAETEC to immediately correct said threat, financial harm, or delay or, at the City's discretion, the City may undertake measures to correct said threat, financial harm or delay itself; provided that, when possible, the City shall notify PAETEC and give PAETEC an opportunity to correct within a specified time said threat, financial harm or delay before undertaking such corrective measures. PAETEC shall be liable for all costs, expenses and damages attributed to the correction of such an emergency situation as undertaken by the City to the extent that such situation was caused by PAETEC and shall further be liable for all costs, expenses and damages resulting to the City from such situation and any reimbursement of such costs to the City shall be made within 30 days of written notice of the completion of such action or determination of damages by the City. The failure by PAETEC to take appropriate action to correct a situation caused by PAETEC and identified by the City as a threat to public or private safety or property, financial harm, or delay of the construction, repair or maintenance of the public improvement shall be considered a violation of franchise terms.

2. If during construction or maintenance of PAETEC's facilities any damage occurs to an underground facility and the damage results in the release of natural gas or other hazardous substance or potentially endangers life, health or property, PAETEC or its contractor shall immediately call 911 or other local emergency response number.

C. **Other Remedies.** Nothing contained in this Franchise Agreement shall limit the City's available remedies in the event of PAETEC's failure to comply with the provisions of this Franchise Agreement, to include but not limited to, the City's right to a lawsuit for specific performance and/or damages.

D. **Removal of System.** In the event this Franchise Agreement is terminated as a result of violations of the terms of this Franchise Agreement, PAETEC shall, at its sole

expense, promptly remove all system components and facilities, provided that the City, at its sole option, may allow PAETEC to abandon its facilities in place.

Section 7. Insurance.

A. PAETEC shall maintain liability insurance written on a per-occurrence basis during the full term of this franchise for personal injuries and property damages. The policy shall contain coverage in the amounts and conditions stipulated in Title 11 of the Tukwila Municipal Code.

B. Such insurance shall specifically name as additional insured, the City, its officers and employees; shall apply as primary insurance; shall stipulate that no insurance affected by the City will be called on to contribute to a loss covered thereunder; and shall further provide that the policy shall not be modified or canceled during the life of the permit or Franchise Agreement without giving 30 days written notice to the City. Notice shall be by certified mail, return receipt requested to the City.

C. If the City determines that circumstances warrant an increase in insurance coverage and liability limits to adequately cover the risks of the City, the City may require additional insurance to be acquired. The City shall provide written notice should the City exercise its right to require additional insurance.

Section 8. Other Permits & Approvals. Nothing in this Agreement shall relieve PAETEC from any obligation to obtain approvals or necessary permits from applicable federal, state and City authorities for all activities in the franchise area.

Section 9. Transfer of Ownership.

A. The rights, privileges, benefits, title or interest provided by this franchise shall not be sold, transferred, assigned or otherwise encumbered, without the prior written consent of the City, with such consent not being unreasonably withheld or delayed. No such consent shall be required, however, for a transfer in trust, by other hypothecation, or by assignment or any rights, title or interest in PAETEC's telecommunications system in order to secure indebtedness. Approval shall not be required for mortgaging purposes provided that the collateral pledged for any mortgage shall not include the assets of this franchise. Approval shall not be required for any transfer from PAETEC to another person or entity controlling, controlled by, or under common control with PAETEC.

B. In any transfer of this franchise which requires the approval of the City, PAETEC shall show that the recipient of such transfer has the technical ability, financial capability, and any other legal or general qualifications as reasonably determined by the City to be necessary to ensure that the obligations and terms required under this Franchise Agreement can be met to the full satisfaction of the City. The qualifications of any transferee shall be determined by hearing before the City Council and the approval to such transfer shall be granted by resolution of the City Council. Any administrative costs associated with a transfer of this franchise which requires the approval of the City, shall be reimbursed to the City within 30 days of such transfer.

Section 10. Administrative Fees.

A. Pursuant to the RCW, the City is precluded from imposing franchise fees for "telephone businesses" defined in RCW 82.04.065, except that fees may be collected for administrative expenses related to such franchise. PAETEC does hereby warrant that its operations, as authorized under this franchise, are those of a telephone business as defined in RCW 82.04.065.

B. PAETEC shall be subject to a \$5,000 administrative fee for reimbursement of costs associated with the preparation, processing and approval of this Franchise Agreement. These costs shall include, but not be limited to, wages, benefits, overhead expenses, equipment and supplies associated with such tasks as plan review, site visits, meetings, negotiations and other functions critical to proper management and oversight of City's right-of-way. Administrative fees exclude normal permit fees as stipulated in Title 11 of the Tukwila Municipal Code. Payment of the one-time administrative fee is due 30 days after franchise approval.

C. In the event PAETEC submits a request for work beyond scope of original franchise, or submits a complex project that requires significant comprehensive plan review or inspection, PAETEC shall reimburse City for franchise amendment and expenses associated with the project. PAETEC shall pay such costs within 30 days of receipt of bill from the City.

D. Failure by PAETEC to make full payment of bills within the time specified shall be considered sufficient grounds for the termination of all rights and privileges existing under this ordinance, utilizing the procedures specified in Section 6 of this ordinance.

Section 11. Notices. Any notice to be served upon the City or PAETEC shall be delivered to the following addresses respectively:

City of Tukwila
Office of the City Clerk
6200 Southcenter Boulevard
Tukwila WA 98188

PAETEC
Attn: ROW Department
One Martha's Way
Hiawatha IA 52233

Section 12. Indemnification.

A. PAETEC shall use reasonable and appropriate precautions to avoid damage to persons or property in the construction, installation, repair, operation and maintenance of its structures and facilities. PAETEC shall indemnify and hold the City harmless from all claims, actions or damages, including reasonable attorney's and expert witness fees, which may accrue to or be suffered by any person or persons, corporation or property to the extent caused in part or in whole by any negligent act or omission of PAETEC, its officers, agents, servants or employees, carried on in the furtherance of the rights, benefits, and privileges granted to PAETEC by this franchise. In the event any claim or demand is presented to or filed with the City which gives rise to PAETEC's obligation pursuant to this section, the City shall within a reasonable time notify PAETEC thereof and PAETEC shall have a right, at its election, to settle or compromise such claim or demand. In the event any claim or action is commenced in which the City is named a party, and which suit or action is based on a claim or demand which gives rise to PAETEC's obligation pursuant to this section, the City shall promptly notify PAETEC thereof, and PAETEC shall, at its sole cost and expense, defend such suit or action by attorneys of its own election. In defense of such suit or action, PAETEC may, at its election and at its sole cost and expense, settle or compromise such suit or action. This section shall not be construed to require PAETEC to:

1. protect and save the City harmless from any claims, actions or damages;
2. settle or compromise any claim, demand, suit or action;
3. appear in or defend any suit or action; or,
4. pay any judgment or reimburse the City's costs and expenses (including reasonable attorney's fees), to the extent such claim arises out of the negligence or intentional acts of the City, its employees, agents or independent contractors.

B. To the extent of any concurrent negligence between PAETEC and the City, PAETEC's obligations under this paragraph shall only extend to its share of negligence or fault. The City shall have the right at all times to participate through its own attorney in any suit or action which arises out of any right, privilege, and authority granted by or exercised pursuant to this franchise when the City determines that such participation is required to protect the interests of the City or the public. Such participation by the City shall be at the City's sole cost and expense.

C. With respect to the performance of this franchise and as to claims against the City, its officers, agents and employees, PAETEC expressly waives its immunity under Title 51 of the RCW, the Industrial Insurance Act, for injuries to its officers, agents and

employees and agrees that the obligation to indemnify, defend and hold harmless provided for in this paragraph extends to any claim brought by or on behalf of PAETEC's officers, agents or employees. This waiver is mutually negotiated by the parties.

Section 13. Severability. If any section, sentence, clause or phrase of this ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, either party may deem the entire ordinance to be affected and thereby nullified. However, in the event that a determination is made that a section, sentence, clause or phrase in this ordinance is invalid or unconstitutional, the parties may agree to treat the portion declared invalid or unconstitutional as severable and maintain in force the remaining provisions of this ordinance; provided that, if the City elects, without agreement by PAETEC, to enforce the remaining provisions of the ordinance, PAETEC shall have the option to terminate the Franchise Agreement.

Section 14. Reservation of Rights. The parties agree that this agreement is intended to satisfy the requirements of all applicable laws, administrative guidelines, rules, orders and ordinances. Accordingly, any provision of this agreement or any local ordinance which may conflict with or violate the law shall be invalid and unenforceable, whether occurring before or after the execution of this agreement, it being the intention of the parties to preserve their respective rights and remedies under the law, and that the execution of this agreement does not constitute a waiver of any rights or obligations by either party under the law.

Section 15. Police Powers. Nothing contained herein shall be deemed to affect the City's authority to exercise its police powers. PAETEC shall not by this Franchise Agreement obtain any vested rights to use any portion of the City right-of-way except for the locations approved by the City and then only subject to the terms and conditions of this Franchise Agreement. This Franchise Agreement and the permits issued thereunder shall be governed by applicable City ordinances in effect at the time of application for such permits.

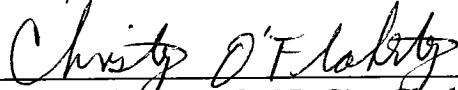
Section 16. Future Rules, Regulations and Specifications. PAETEC acknowledges that the City may develop rules, regulations and specifications, including a general ordinance or other regulations governing telecommunications operations in the City. Such regulations, upon written notice to PAETEC, shall thereafter govern PAETEC's activities hereunder; provided, however, that in no event shall regulations:

1. materially interfere with or adversely affect PAETEC's rights pursuant to and in accordance with this Franchise Agreement; or
2. be applied in a discriminatory manner as it pertains to PAETEC and other similar user of such facilities.

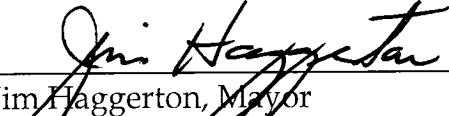
Section 17. Effective Date. This ordinance or a summary thereof shall be published in the official newspaper of the City, and shall take effect and be in full force five days after passage and publication as provided by law.

PASSED BY THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, at a Regular Meeting thereof this 19TH day of April, 2010.

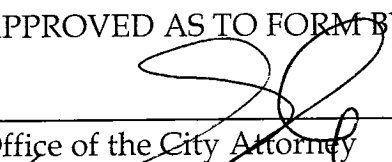
ATTEST/AUTHENTICATED:



Christy O'Flaherty, CMC, City Clerk



Jim Haggerton, Mayor

APPROVED AS TO FORM BY:


Office of the City Attorney

Filed with the City Clerk: 4-14-10
Passed by the City Council: 4-19-10
Published: 4-22-10
Effective Date: 4-27-10
Ordinance Number: 2283

Attachments: Exhibit A - Description
Exhibit A-1 -- Map
Exhibit B - Acceptance Form

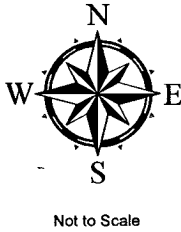
EXHIBIT A

PAETEC HOLDING CORPORATION Fiber Optic System

PAETEC's primary Fiber Optic System in Tukwila begins at the northern City limit on Airport Way and continues south to Boeing Access Road. On Boeing Access Road, the System heads west to East Marginal Way South then south on East Marginal Way to Interurban Avenue South where it continues south on West Valley Highway to the southernmost limit of the City.

PAETEC also has a Fiber Optic System that begins 300 feet north of the intersection of Interurban Avenue South and East Marginal Way South. On Interurban Avenue South, the System travels south on Interurban Avenue South to the intersection of Interurban and East Marginal Way then continues south on East Marginal Way to South 133rd Street to the intersection of South 133rd Street and Interurban Avenue South tying into the primary Fiber Optic System described above.

PAETEC Fiber Optic System Exhibit A-1



 PAETEC Fiber
 City Limits

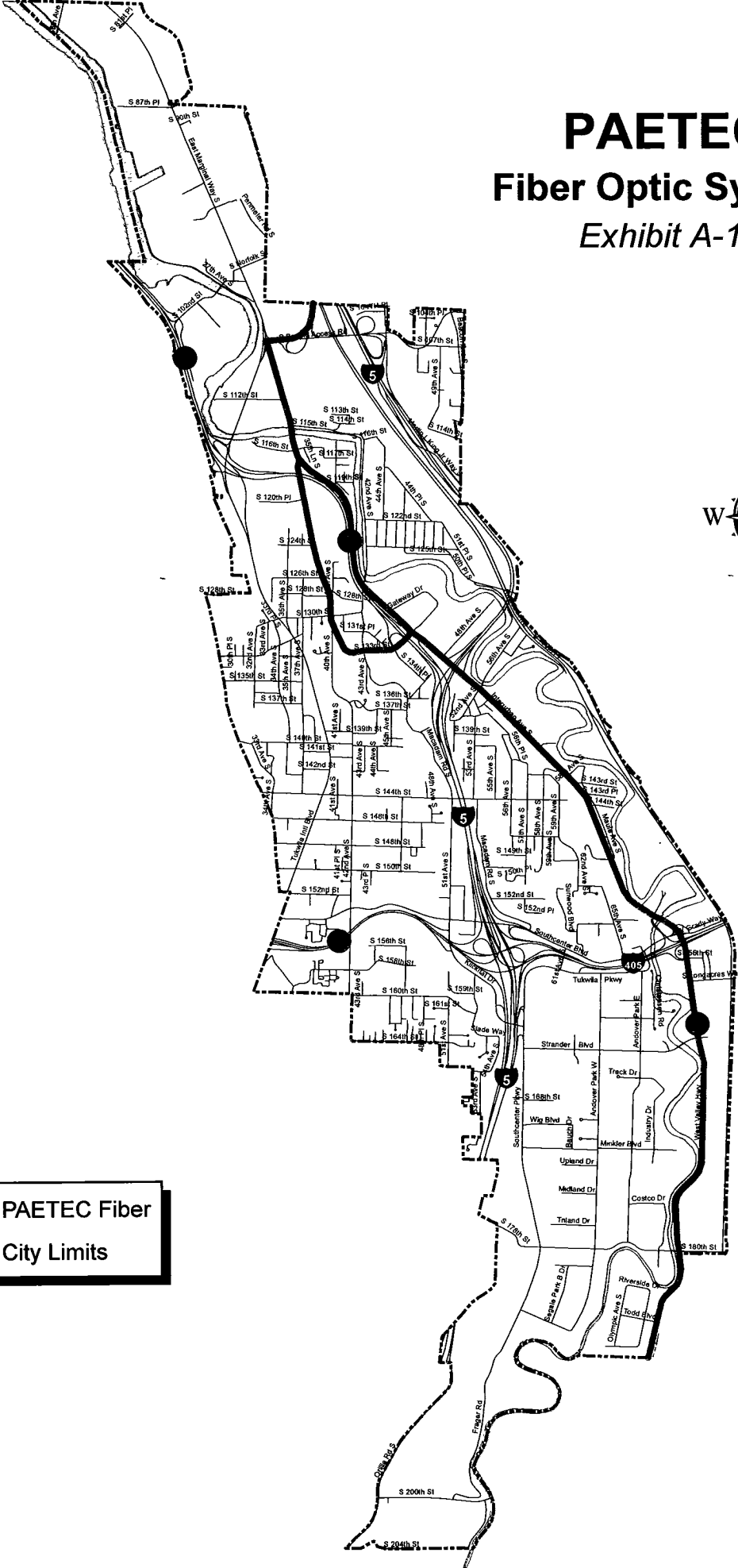


EXHIBIT B
FRANCHISE AGREEMENT ACCEPTANCE FORM
PAETEC HOLDING CORPORATION

Date: _____

City of Tukwila
City Clerk's Office
6200 Southcenter Blvd
Tukwila WA 98188

Re: Ordinance _____ Adopted _____

Dear Ms. O'Flaherty,

In accordance with and as required by Section 4 of City of Tukwila Ordinance No. _____ (the "Ordinance"), passed by the City Council and approved by the Mayor on _____, PAETEC Holding Corporation hereby accepts the terms, conditions and obligations to be complied with or performed by it under the ordinance.

Sincerely,

Signature

Printed Name

Title

**SUMMARY OF
Ordinance No. 2283**

City of Tukwila, Washington

On April 19, 2010 the City Council of the City of Tukwila, Washington, adopted Ordinance No. 2283, the main points of which are summarized by its title as follows:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, GRANTING A NON-EXCLUSIVE FRANCHISE TO PAETEC HOLDING CORPORATION, AN IOWA CORPORATION LEGALLY AUTHORIZED TO CONDUCT BUSINESS IN THE STATE OF WASHINGTON, FOR THE PURPOSE OF CONSTRUCTING, OPERATING AND MAINTAINING A TELECOMMUNICATIONS SYSTEM IN CERTAIN PUBLIC RIGHTS-OF-WAY IN THE CITY; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

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

Approved by the City Council at a Regular Meeting thereof on April 19, 2010.



Christy O'Flaherty, CMC, City Clerk

Published Seattle Times: April 22, 2010.