ORDINANCE Q-4492

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING XO COMMUNICATIONS SERVICES, LLC A NON-EXCLUSIVE FRANCHISE FOR THE TRANSMISSION OF TELECOMMUNICATIONS IN, THROUGH, OVER AND UNDER THE STREET RIGHTS OF WAY OF THE CITY OF KIRKLAND.

WHEREAS, XO COMMUNICATIONS SERVICES, LLC ("Grantee") has requested that the City grant it the right to install, operate and maintain a fiber optic-based telecommunications system within the public rights of way of the City; and

WHEREAS, the City Council finds it desirable for the welfare of the City and its residents that such a non-exclusive franchise be granted to Grantee; and

WHEREAS, the City Council has the authority under state law to grant franchises for the use of its street rights of way; and

WHEREAS, the City is willing to grant the rights requested by Grantee subject to certain terms and conditions.

NOW, THEREFORE, The City Council of the City of Kirkland does ordain as follows:

Section 1. Definitions. Where used in this franchise (the "Franchise") these terms have the following meanings:

A. "Affiliate" means XO Communications Services, LLC ("Grantee") on behalf of itself and its XO operating affiliates to the extent such operating affiliate(s) directly provides Telecommunications Service(s) hereunder.

B. "City" means the City of Kirkland, a municipal corporation of the State of Washington.

C. "Facilities" means Grantee’s fiber optic cable system constructed and operated within the City’s street rights of way, and shall include all cables, wires, conduits, ducts, pedestals and any associated converter, equipment or other facilities within the City’s street rights of way, designed and constructed for the purpose of providing telecommunications service.

D. "Franchise" shall mean the initial authorization or renewal thereof, granted by the City, through this Ordinance, or a subsequently adopted Ordinance, which authorizes construction and operation of the
Grantee's facilities for the purpose of offering telecommunications service.

E. "Franchise Area" means the present municipal boundaries of the City, and shall include any additions thereto by annexation or other legal means.

F. "Person" means an individual, partnership, association, joint stock company, trust, corporation, limited liability company or governmental entity.

G. "Right of Way" means the surface and the space above and below streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, rights of way and similar public areas, but does not include the portion of the Eastside Rail Corridor (a rail corridor that has been railbanked pursuant to 16 U.S.C. 1247(d)) within the City.

H. "Telecommunications Service" means any telecommunications service, telecommunications capacity, or dark fiber, provided by the Grantee using its Facilities, either directly or as a carrier for its Affiliates, or any other person engaged in Telecommunications Services, including, but not limited to, the transmission of voice, data or other electronic information, facsimile reproduction, burglar alarm monitoring, meter reading and home shopping, or other subsequently developed technology that carries an electronic signal over fiber optic cable. Telecommunications Service shall also include non-switched, dedicated and private line, high capacity fiber optic transmission services to firms, businesses or institutions within the City. However, Telecommunications Service shall not include the provision of cable television, open video, or similar services, as defined in the Communications Act of 1934, as amended, and the Telecommunications Act of 1996, as amended, for which a separate franchise would be required.

Section 2. Franchise Area and Authority Granted.

A. Facilities within Franchise Area. The City does hereby grant to Grantee the right, privilege, authority and franchise to construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across rights of way in the Franchise Area for purposes of telecommunications service as defined in RCW 82.04.065.

B. Permission Required to Enter Onto Other City Property. Nothing contained in this Ordinance is to be construed as granting permission to Grantee to go upon any other public place other than rights of way within the Franchise Area in this Ordinance. Permission to
go upon any other property owned or controlled by the City must be
sought on a case by case basis from the City.

C. Compliance with WUTC Regulations. At all times during the
term of this Franchise, Grantee shall fully comply with all applicable
regulations of the Washington Utilities and Transportation Commission.

Section 3. Construction and Maintenance.

A. Grantee's Facilities shall be located, relocated and
maintained within the right of way in accordance with Kirkland Municipal
Code ("KMC") Chapter 26.36 and so as not to unreasonably interfere
with the free and safe passage of pedestrian and vehicular traffic and
ingress or egress to or from the abutting property and in accordance
with the laws of the State of Washington. Whenever it is necessary for
Grantee, in the exercise of its rights under this Franchise, to make any
excavation in the right of way, Grantee shall obtain prior approval from
the City of Kirkland Public Works Department, pay the applicable permit
fees, and obtain any necessary permits for the excavation work
pursuant to KMC Title 19 and KMC Chapter 26.24. Upon completion of
such excavation, Grantee shall restore the surface of the right of way to
the specifications established within the Kirkland Municipal Code and
City of Kirkland Public Works Policies and Standards. If Grantee should
fail to leave any portion of the excavation in a condition that meets the
City's specifications per the KMC and Public Works Policies and
Standards, the City may, on five calendar day notice to Grantee, which
notice shall not be required in case of an emergency, cause all work
necessary to restore the excavation to a safe condition. Grantee shall
pay to the City the reasonable cost of such work; which shall include,
among other things, the City's overhead in obtaining completion of said
work.

B. Any surface or subsurface failure occurring during the term
of this Agreement caused by any excavation by Grantee shall be
repaired to the City's specifications, within 30 days, or, upon 5 days
written notice to Grantee, the City shall order all work necessary to
restore the damaged area to a safe and acceptable condition and
Grantee shall pay the reasonable costs of such work to the City,
including City overhead.

C. In the event of an emergency, Grantee may commence such
repair and emergency response work as required under the
circumstances, provided that Grantee shall notify the City Public Works
Director in writing as promptly as possible before such repair or
emergency work commences, or as soon thereafter as possible, if
advanced notice is not possible. The City may act, at any time, without
prior written notice in the case of an emergency, but shall notify Grantee
in writing as promptly as possible under the circumstances.
D. Grantee agrees that if any of its actions under this Franchise materially impair or damage any City property, survey monument, or property owned by a third-party, Grantee will restore, at its own cost and expense, the impaired or damaged property to the same condition as existed prior to such action. Such repair work shall be performed and completed to the reasonable satisfaction of the Public Works Director.

Section 4. Location and Relocation of Facilities.

A. Grantee shall place any new Facilities underground where existing telecommunications and cable facilities are located underground. Any new Facilities to be located above-ground shall be placed on existing utility poles. No new utility poles shall be installed in connection with placement of new above-ground facilities.

B. Grantee recognizes the need for the City to maintain adequate width for installation and maintenance of sanitary sewer, water and storm drainage utilities owned by the City, the Northshore Utility District and other public utility providers. Thus, the City reserves the right to maintain clear zones within the public right-of-way for installation and maintenance of said utilities. The clear zones for each right-of-way segment shall be noted and conditioned with the issuance of each right-of-way permit. If adequate clear zones are unable to be achieved on a particular right-of-way, Grantee shall locate in an alternate right-of-way, obtain easements from private property owners, or propose alternate construction methods which maintain and/or enhance the existing clear zones.

C. Except as otherwise required by law, Grantee agrees to relocate, remove or reroute its facilities as ordered by the City, at no expense or liability to the City, except as may be required by RCW Chapter 35.99. The City's decision to require the relocation of Grantee's facilities shall be made in a reasonable, uniform and non-discriminatory manner. Pursuant to the provision of Section 5, Grantee agrees to protect and save harmless the City from any customer or third-party claims for service interruption or other losses in connection with any such change or relocation.

D. If the City determines that a project necessitates the relocation of the Grantee's existing Facilities, then:

1. Within a reasonable time, which shall be no less than 90 days prior to the commencement of the project, the City shall provide the Grantee with written notice requiring relocation; provided that in the event of an emergency beyond the control of the City and which will result in severe financial consequences
to the City or its citizens or businesses, the City shall give the
Grantee written notice as soon as practicable;

2. The City shall provide the Grantee with copies of
information for such improvement project and a proposed
location for the Grantee's Facilities so that Grantee may relocate
its Facilities in other Rights of Way in order to accommodate the
project; and

3. The Grantee shall complete relocation of its Facilities at
no charge or expense to the City so as to accommodate the
project at least 10 days prior to commencement of the project.
In the event of an emergency as described in this Section, the
Grantee shall relocate its Facilities within the time period
specified by the City.

E. 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 if one or more of the alternatives are suitable to
accommodate the work, which would otherwise necessitate relocation
of the Facilities. If so requested by the City, the Grantee shall submit
additional 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.

F. 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 shall not unduly delay a City construction project.

G. The Grantee shall 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 relocate its Facilities in a
timely manner; provided, that the Grantee shall not be responsible for
damages due to delays caused by the City or circumstances beyond the
control of the Grantee.

H. In the event that the City orders the Grantee to relocate its
Facilities for a project which is primarily for private benefit, the private
party or parties causing the need for such project shall reimburse the
Grantee for the cost of relocation in the same proportion as their contribution to the total cost of the project.

I. In the event of an unforeseen emergency that creates a threat to public safety, health or welfare, the City may require the Grantee to relocate its Facilities at its own expense, any other portion of this Section notwithstanding.

Section 5. Indemnification.

A. Grantee shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of Grantee or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted Grantee in this Franchise; provided, however, such indemnification shall not extend to injury or damage caused by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

B. In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify Grantee thereof, and Grantee shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand, provided further, that in the event any suit or action be begun against the City based upon any such claim or demand, the City shall likewise promptly notify Grantee thereof, and Grantee shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

Section 6. Default.

A. If Grantee shall fail to comply with any of the provisions of this Franchise, unless otherwise provided in this Franchise, the City may serve upon Grantee a written order to comply within thirty (30) days from the date such order is received by Grantee. If Grantee is not in compliance with this Franchise after expiration of the thirty (30) day period, the City may act to remedy the violation and may charge the reasonable costs and expenses of such action to Grantee. The City may act without the thirty (30) day notice in case of an emergency. If any failure to comply with this Franchise by Grantee cannot be corrected with due diligence within said thirty (30) day period, then the time within which Grantee may so comply shall be extended for such time as may
be reasonably necessary and so long as Grantee works promptly and
diligently to effect such compliance. If Grantee is not in compliance with
this Franchise, and is not proceeding with due diligence in accordance
with this section to correct such failure to comply, then the City may in
addition, by ordinance and following written notice to Grantee, declare
an immediate forfeiture of this Franchise.

B. In addition to other remedies provided in this Franchise or
otherwise available at law, if Grantee is not in compliance with
requirements of the Franchise, and if a good faith dispute does not exist
concerning such compliance, the City may place a moratorium on
issuance of pending Grantee right-of-way use permits until compliance
is achieved.

Section 7. Nonexclusive Franchise. This franchise is not and
shall not be deemed to be an exclusive Franchise. This Franchise shall
not in any manner prohibit the City from granting other and further
franchises over, upon, and along the Franchise Area. This Franchise
shall not prohibit or prevent the City from using the Franchise Area or
affect the jurisdiction of the City over the same or any part thereof.

Section 8. Franchise Term.

A. This Franchise is and shall remain in full force and effect for
a period of ten (10) years from and after the effective date of the
Ordinance, provided that the term may be extended for an additional
five (5) years upon the agreement of Grantee and the City; and provided
further, however, Grantee shall have no rights under this Franchise nor
shall Grantee be bound by the terms and conditions of this Franchise
unless Grantee shall, within thirty (30) days after the effective date of
the Ordinance, file with the City its written acceptance of this Franchise,
in a form acceptable to the City Attorney.

B. If the City and Grantee fail to formally renew this Franchise
prior to the expiration of its term or any extension thereof, this Franchise
shall automatically continue in full force and effect until renewed or until
either party gives written notice at least one hundred eighty (180) days
in advance of intent not to renew this Franchise.

Section 9. Compliance with Codes and Regulations.

A. The rights, privileges and authority herein granted are
subject to and governed by this ordinance and all other applicable
ordinances and codes of the City of Kirkland, as they now exist or may
hereafter be amended, including but not limited to the provisions of
Kirkland Municipal Code Title 26 and Kirkland Municipal Code Chapter
5.08. Nothing in this ordinance limits the City's lawful power to exercise
its police power to protect the safety and welfare of the general public.
Any location, relocation, erection or excavation by Grantee shall be performed by Grantee in accordance with applicable federal, state and city rules and regulations, including the City’s Public Works Policies and Standard Plans, and any required permits, licenses or fees, and applicable safety standards then in effect.

B. In the event that any territory served by Grantee is annexed to the City after the effective date of this Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

Section 10. Undergrounding. New Facilities shall be installed underground pursuant to Section 4 of this Franchise. Grantee acknowledges the City’s policy of undergrounding of Facilities within the Franchise Area. Grantee will cooperate with the City in the undergrounding of Grantee’s existing Facilities with the Franchise Area. If during the term of this Franchise, the City shall direct Grantee to underground Facilities within any Franchise Area, such undergrounding shall be at no cost to the City except as may be provided in RCW Chapter 35.99. Grantee shall comply with all federal, state, and City regulations on undergrounding. If the City undertakes any street improvement which would otherwise require relocation of Grantee’s above-ground facilities, the City may, by written notice to Grantee, direct that Grantee convert any such Facilities to underground Facilities.

Section 11. Record of Installations and Service.

A. With respect to excavations by Grantee and the City within the Franchise Area, Grantee and the City shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state law.

B. Upon written request of the City, Grantee shall provide the City with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

C. As-built drawings and maps of the precise location of any Facilities placed by Grantee in any Right of Way shall be made available by Grantee to the City within 10 (ten) working days of the City’s request. These plans and maps shall be provided at no cost to the City and shall include hard copies and/or digital copies in a format specified by the City.
Section 12. Shared Use of Excavations.

A. Grantee and the City shall exercise best efforts to coordinate construction work either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities within the Franchise Area informed of its intent to undertake such construction work. Grantee and the City shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

B. If at any time, or from time to time, either Grantee, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the others, upon receipt of a written request to do so, an opportunity to use such excavation, provided that:

1. Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;

2. Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. The parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

C. In addition, pursuant to RCW 35.99.070, the City may request that Grantee install additional conduit, ducts and related access structures for the City pursuant to contract, under which Grantee shall recover its incremental costs of providing such facilities to the City.

D. The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. Grantee shall be given written notice at least 90 days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five year street trenching moratoriums.

E. The City reserves the right to require Grantee to joint trench with other franchisees if both entities are anticipating trenching within the same franchise area and provided that the terms of this Section are met.

Section 13. Insurance.

A. Grantee shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of work under this Franchise by Grantee, its agents, representatives or
employees in the amounts and types set forth below pursuant to KMC 26.40.020:

1. Commercial General Liability insurance with limits no less than $5,000,000 combined single limit for bodily injury (including death) and property damage, including premises operation, products and completed operations and explosion, collapse and underground coverage extensions;

2. Automobile liability for owned, non-owned and hired vehicles with a combined single limit of three million dollars for each accident for bodily injury and property damage; and

3. Worker’s compensation within statutory limits and employer’s liability insurance with limits of not less than one million dollars for each accident/disease/policy limit.

B. Grantee’s insurance coverage shall be primary insurance as respects the City. Any insurance, self-insurance or insurance pool coverage maintained by the City shall be in excess of Grantee’s insurance and shall not contribute with it.

C. Grantee shall furnish the City with certificates of the foregoing insurance coverage or a copy of amendatory endorsements, including but not necessarily limited to the additional insured endorsement.

D. Grantee shall have the right to self-insure any or all of the above-required insurance. Any such self-insurance is subject to approval by the City.

E. Grantee’s maintenance of insurance as required by this Franchise shall not be construed to limit the liability of Grantee to the coverage provided by such insurance, or otherwise limit City’s recourse to any remedy to which the City is otherwise entitled at law or in equity.

Section 14. Assignment.

A. All of the provisions, conditions, and requirements herein contained shall be binding upon Grantee, and no right, privilege, license or authorization granted to Grantee hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold. Notwithstanding the foregoing, Grantee, without the consent of, but upon notice to the City, may assign this agreement in whole or in part to: (a) an Affiliate (as defined in this Franchise); (b) a lender for security purposes only; or (c) the surviving entity in the event of a merger or acquisition of substantially all of Grantee’s assets.
B. Grantee may lease the Facilities or any portion thereof to another or provide capacity or bandwidth in its Facilities to another, provided that: Grantee at all times retains exclusive control over such Facilities and remains responsible for locating, servicing, repairing, relocating or removing its Facilities pursuant to the terms and conditions of this Franchise.

Section 15. Abandonment and Removal of Facilities. Upon the expiration, termination, or revocation of the rights granted under this Franchise, the Franchisee shall remove all of its Facilities from the Rights of Way of the City within ninety (90) days of receiving notice from the City's Public Works Director; provided however, that the City may permit the Grantee's improvements to be abandoned in place in such a manner as the City may prescribe. Upon permanent abandonment, and Franchisee's agreement to transfer ownership of the Facilities to the City, the Franchisee 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 ninety (90) 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 Franchisee to abandon said Facilities in place.

Section 16. Miscellaneous.

A. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections of paragraphs.

B. Grantee shall pay for the City's reasonable administrative costs in drafting and processing this Ordinance and all work related thereto, which payment shall not exceed $2,000. Grantee shall further be subject to all permit fees associated with activities and the provisions of any such permit, approval, license, agreement of other document, the provisions of this Franchise shall control.

C. Failure of either party to declare any breach or default under this Franchise or any delay in taking action shall not waive such breach or default, but that party shall have the right to declare any such breach or default at any time. Failure of either party to declare one breach or default does not act as a waiver of that party's right to declare another breach or default.
Section 17. 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 Kirkland  
Public Works Director  
123 Fifth Avenue  
Kirkland, WA 98033

Grantee:  
XO Communications Services, LLC.  
Attn: Regulatory Contract Administrator  
1000 Denny Way, Suite 200  
Seattle, WA 98109

With a copy to:  
XO Communications Services, LLC.  
Attn: Director, Regulatory Contracts  
13865 Sunrise Valley Drive  
Herndon, VA 20171

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 18. Effective date. This Ordinance, being in compliance with RCW 35A.47.040, shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017 Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in open meeting this 6th day of October, 2015.

Signed in authentication thereof this 6th day of October, 2015.

Attest:

City Clerk

Approved as to Form:

City Attorney

MAYOR