

ORDINANCE O-4352

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING ELECTRIC LIGHTWAVE LLC, A DELAWARE LIMITED LIABILITY COMPANY, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS TELECOMMUNICATIONS BUSINESS.

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) "ELI" means Electric Lightwave LLC, a Delaware Limited Liability Company, and its respective successors and assigns.
- (b) "City" means the City of Kirkland, a municipal corporation of the State of Washington, and its respective successors and assigns.
- (c) "Franchise Area" means: any, every and all of the roads, streets, avenues, alleys, highways and unrestricted utility easements of the City as now laid out, platted, dedicated or improved; and any, every and all roads, streets, avenues, alleys and highways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended.
- (d) "Facilities" means wires, lines, conduits, cables, vaults, duct runs, and all necessary or convenient facilities and appurtenances thereto, whether the same be located over or under ground.
- (e) "Ordinance" means this Ordinance O-4352, which sets forth the terms and conditions of this Franchise.

Section 2. Franchise Area and Compliance.

A. Facilities within Franchise Area. Subject to Section 11 of this Franchise, the City does hereby grant to ELI 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 the Franchise Area for purposes of its telecommunications business 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 ELI to go upon any other public place other than those types of public places specifically designated as 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, ELI shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission.

Section 3. Non-interference of Facilities.

A. ELI's Facilities shall be located, relocated and maintained within the Franchise Area 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 ELI, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, ELI shall obtain prior approval from the City of Kirkland Public Works Department and obtain any necessary permits for the excavation work. Upon completion of such excavation, ELI shall restore the surface of the Franchise Area to the specifications established within the City of Kirkland Public Works Policies and Standards and in accordance with standards of general applicability imposed by the City by ordinance or administrative order. If ELI should fail to leave any portion of any Franchise Area so excavated in a condition that meets the City's specifications per the Public Works Policies and Standards, the City may after notice of not less than five days to ELI, which notice shall not be required in case of an emergency, order any and all work considered necessary to restore to a safe condition that portion of the Franchise area so excavated, and ELI shall pay to the City the reasonable cost of such work; which shall include among other things, the overhead expense of the City in obtaining completion of said work.

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

Section 4. Relocation of Facilities.

A. Whenever the City causes the grading or widening of the Franchise Area or undertakes construction of any water, sewer or storm drainage line, lighting, signalization, sidewalk improvement, pedestrian amenities, or other public street improvement (for purposes other than those described in Subsection 4(B) below) and such project requires the relocation of ELI's then existing Facilities within the Franchise Area, the City shall:

- (1) Provide ELI, at least 90 days prior to the commencement of such project, written notice that a project is expected to require relocation; and
- (2) Provide ELI with reasonable plans and specifications for such grading or widening.

After receipt of such notice and such plans and specifications, ELI shall relocate such Facilities within the Franchise Area at no charge to the City so as to accommodate such street improvement project. The City shall cooperate with ELI to designate a substitute location for its Facilities within the Franchise Area. The City will establish a date by which Facilities will be relocated, which date will be not less than 60 days after written notice to ELI as to the facility to be relocated. ELI must finish relocation of each such Facility by the date so established.

B. Whenever any person or entity, other than the City, requires the relocation of ELI's Facilities to accommodate the work of such person or entity within the Franchise Area; or, whenever the City requires the relocation of ELI's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then ELI shall have the right as a condition of such relocation to require such person or entity to:

- (1) make payment to ELI, at a time and upon terms acceptable to ELI, for any and all costs and expense incurred by ELI in the relocation of ELI's Facilities; and
- (2) indemnify and save ELI harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the relocation of ELI's Facilities, to the extent such injury or damage is caused by the negligence of the person or entity requesting the relocation of ELI's Facilities or other negligence of the agents, servants or employees of the person or entity requesting the relocation of ELI's Facilities.

ELI shall require only those costs and expenses incurred by ELI in integrating and connecting such relocated Facilities with ELI's other Facilities to be paid to ELI by such person or entity, and ELI shall otherwise relocate its Facilities within such segment of the Franchise Area in accordance with the provisions of Subsection 4(A) above.

C. Any condition or requirement imposed by the City upon any person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development) which necessitates the relocation of ELI's Facilities within the Franchise Area shall be subject to the provisions of

Subsection 4(B). However, in the event the City reasonably determines (and promptly notifies ELI in writing of such determination) that the primary purpose of imposing such condition or requirement upon such person or entity which necessitates such relocation is to cause the construction of an improvement on the City's behalf and in a manner consistent with City-approved improvement plans (as described in Subsection 4(A) above) within a segment of the Franchise Area then:

D. This Section 4 shall govern all relocations of ELI's Facilities required in accordance with this Franchise. Any required relocation of ELI's Facilities which also involves a conversion of above-ground Facilities to underground Facilities shall, as to those Facilities being converted from above-ground Facilities to underground Facilities, be arranged and accomplished in accordance with Section 11 of this Franchise. Nothing in this Section 4 shall require ELI to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other rights not arising under this Franchise.

E. ELI recognizes the need for the City to maintain adequate width for installation and maintenance of City owned and/or Northshore Utility District owned utilities such as, but not limited to, sanitary sewer, water, and storm drainage. 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, ELI 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.

Section 5. Indemnification. ELI 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 ELI or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted ELI 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.

In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify ELI thereof, and ELI 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 it shall likewise promptly notify ELI thereof, and ELI 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. Moving Buildings Within the Franchise Area. Before granting permission to any person or entity other than the City to use the Franchise Area for the moving or the removal of any building or other object, the City shall require such person or entity to make any necessary arrangements with ELI for the temporary adjustment of ELI's Facilities to accommodate the moving or removal of such building or other object. Such necessary arrangements with ELI shall be made, to ELI's satisfaction, not less than fourteen (14) days prior to the moving of removal of said building or other object. In such event, ELI shall, at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its wires which may obstruct the moving or removal of such building or other object, provided that:

- (a) The moving or removal of such building or other object which necessitates the adjustment of wires shall be done at a reasonable time and in a reasonable manner so as not to unreasonably interfere with ELI's business;
- (b) Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route which will minimize the interruption of utility service, interference with transportation and potential detriments to the public safety, as determined by the City.
- (c) The person or entity other than the City obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and save ELI harmless from any and all claims and demands made against it on account of injury or damage to the person or property or another arising out of or in conjunction with the moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence or willful misconduct of the person or entity moving or removing such building or other object or the negligence or willful misconduct of the agents, servants or employees of the person or entity moving such building or other object.

Section 7. Default. If ELI shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon ELI a written order to so comply within thirty (30) days from the date such order is received by ELI. If ELI is not in compliance with this Franchise after expiration of said thirty (30) day period, the City may act to remedy the violation and may charge the costs and expenses of such action to ELI. The City may act without the thirty (30) day notice in case of an emergency. If any failure to comply with this Franchise by ELI cannot be corrected with due diligence within said thirty (30) day period (ELI's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which ELI may so comply shall be extended for such time as may be reasonably necessary and so long as ELI commences promptly and diligently to effect such compliance. IF ELI 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 ELI, declare an immediate forfeiture of this Franchise.

In addition to other remedies provided herein, if ELI 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 ELI right-of-way use permits until compliance is achieved.

Section 8. 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 which do not interfere with ELI's rights under this Franchise. 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 9. Franchise Term. This Franchise is and shall remain in full force and effect through June 18, 2028 unless terminated sooner, provided that ELI shall have no rights under this Franchises nor shall ELI be bound by the terms and conditions of this Franchise unless ELI 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.

Section 10. 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. 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 ELI shall be performed by ELI in accordance with applicable federal, state and city rules and regulations, including the City 0-3494 Public Works Policies and Standard Plans, and any required permits, licenses or fees, and applicable safety standards then in effect.

B. Upon written inquiry, ELI shall provide a specific reference to either the federal, state, or local law or the W.U.T.C. order or action establishing a basis for ELI's actions related to a specific franchise issue.

C. In the event that any territory served by ELI 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 11. Undergrounding. The City encourages ELI to locate or relocate its facilities underground when and where practical. ELI acknowledges that the City desires to promote a policy of undergrounding of Facilities within the Franchise Areas. ELI will cooperate with the City in the undergrounding of ELI's Facilities within the Franchise Areas. If during the term of this Franchise, the City shall direct ELI to underground Facilities within any Franchise Area, such undergrounding shall be at no cost to the City. ELI shall comply with all federal, state, and City regulations on undergrounding. This Section 11 shall govern all matters related to undergrounding of ELI's Facilities (i.e., conversion or otherwise) within the Franchise Area:

(a) Street improvements. If the City undertakes any street improvement which would otherwise require relocation of ELI's above-ground facilities in accordance with subsection 4(a) above, or if subsection 4(c) above applies, the City may, by written notice to ELI, direct that ELI convert any such Facilities to underground Facilities. Any such conversion shall be done subject to and in accordance with schedules and Tariffs on file with the W.U.T.C.

(b) Location of Facilities. All Facilities to be installed within the Franchise Area shall be installed underground; provided, however, that such Facilities may be installed above ground if - 9-so authorized by the City through participation in an Undergrounding Program or otherwise, which authorization shall not be unreasonably withheld or delayed, consistent with the provisions of the City's Land Use Code and applicable development standards.

Section 12. Record of Installations and Service. With respect to excavations by ELI and the City within the Franchise Area, ELI and the City shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state law.

Upon written request of the City, ELI 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.

As built drawings of the precise location of any Facilities placed by ELI in any street, alley, avenue, highway, easement, etc., shall be made available to the City within 10 (ten) working days of request.

Section 13. City Use and Access.

A. City Use of Facilities. With respect to trenches which are facilities and which are (1) wholly owned by ELI and (2) within the Franchise Area, the City, subject to ELI's prior written consent, which may not be unreasonably withheld, may install and maintain City owned wires and underground conduits in such trenches, for police, fire and other noncommercial communications purposes, subject to the following:

- (1) Such installation and maintenance shall be done by the City and any additional costs shall be at the City's expense;
- (2) ELI shall have no obligation under the indemnification provisions of the Franchise for the installation or maintenance of such City owned wires or conduits.
- (3) ELI shall not charge the City a fee for the use of such trenches in accordance with this Section 14 as a means of deriving revenue therefrom; provided, however, nothing herein shall require ELI to bear any cost or expense in connection with such installation and maintenance by the City.

B. City Access. If the City requests telecommunication services from ELI, ELI shall allow the service at ELI's most favorable rate charged for a similar service within the state of Washington. Other terms and conditions of the provision of such services may be determined between ELI and the City in a separate agreement.

Section 14. Other Use of Facilities. With respect to trenches or other facilities developed or placed in the Franchise Area by ELI, City may approve installation or addition of devices to such places or use of such facilities by another franchisee or user, so long as such action will not unreasonably interfere with ELI's rights under this Franchise. ELI

may not charge City any fee or costs based on such City approval, but ELI may seek from others compensation as necessary to recover its costs and expenses arising from actions taken pursuant to approvals given as per this Section.

Section 15. Shared Use of Excavations. ELI 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 Areas informed of its intent to undertake such construction work. ELI 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.

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

- (a) Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;
- (b) 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.

The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. ELI 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.

The City reserves the right to require ELI to joint trench with other franchisees if both parties are anticipating trenching within the same franchise area and provided that the terms of (a) and (b) above are met.

Section 16. Insurance. ELI shall maintain in full force and effect throughout the term of this Franchise, a minimum of Three Million Dollars (\$3,000,000.00) per occurrence liability policy insurance for property damage and bodily injury.

The City shall be an additional insured on this policy of liability insurance obtained by ELI for the purpose of complying with the requirements of this section.

Section 17. Tariff Changes. If ELI shall file, pursuant to Chapter 80.28 RCW, with the Washington Utilities and Transportation Commission (or its successor) any tariff affecting the City's rights arising under this Franchise, ELI shall give the City Clerk written notice thereof within five (5) days of the date of such filing.

Section 18. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon ELI, and no right, privilege, license or authorization granted to ELI 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, ELI, without the consent of, but upon notice to the City, may assign this agreement in whole or in part, to: (a) a parent company, an affiliate or, a subsidiary; or (b) a lender for security purposes only.

Section 19. Miscellaneous. 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.

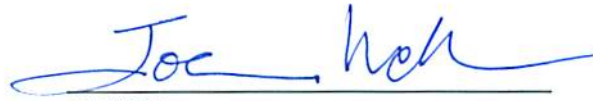
ELI shall pay for the City's reasonable administrative costs in drafting and processing this franchise agreement and all work related thereto. ELI shall further be subject to all permit fees associated with activities and the provisions of any such permit, approval, license, agreement of other document, the provisions of this Franchise shall control.

This Franchise is subject to the provisions of any applicable tariff now or hereafter on file with the Washington Utilities and Transportation Commission or its successor. In the event of any conflict of inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control.

Section 20. 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 17th day of April, 2012.

Signed in authentication thereof this 17th day of April, 2012.


A handwritten signature in blue ink, appearing to read "Joe Heck", written over a horizontal line.

MAYOR

Attest:

A handwritten signature in blue ink, appearing to read "Keturah Anderson", written over a horizontal line.
City Clerk

Approved as to Form:

A handwritten signature in blue ink, appearing to read "Robin S. Jenkins", written over a horizontal line.
City Attorney