

1 Sponsored by: Councilmember Terry Lee
2 Requested by: Executive/Public Works and Utilities

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6 **ORDINANCE NO. 2010-105**
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9 **An Ordinance of the Pierce County Council Finding the Proposed Non-
10 Exclusive Telecommunications Franchise to AboveNet
11 Communications, for a Telecommunications Network in
12 Pierce County, to be in the Public Interest; Setting Forth
13 Terms and Conditions Accompanying the Granting of the
14 Telecommunications Franchise; Providing for the Regulation
15 of Construction, Operation, Maintenance, and Use of the
16 Network; Prescribing Remedies for the Violation of the
17 Provisions of the Franchise; and Authorizing the County
18 Executive to Enter into the Franchise Agreement.**
19

20 **Whereas**, AboveNet Communications, Inc., doing business in the State of
21 Washington, has applied for a non-exclusive telecommunications franchise to construct,
22 operate, and maintain telecommunications facilities upon, in, under, across, along, and
23 over certain County roads, highways, and other County property in Pierce County,
24 Washington as hereinafter set forth; and
25

26 **Whereas**, said application came on regularly for hearing before the Pierce
27 County Council on the date set forth below under the provisions of Chapter 36.55
28 Revised Code of Washington (RCW), and Chapter 12.34 Pierce County Code (PCC);
29 and
30

31 **Whereas**, it appears to the Council that notice of said hearing has been duly
32 given as required by law and that it is in the public interest to grant the Franchise; **Now**
33 **Therefore**,

34
35
36 **BE IT ORDAINED by the Council of Pierce County:**
37

38
39 Section 1. The Pierce County Council hereby finds that the Telecommunications
40 Franchise, a copy of which is attached hereto and incorporated herein as Exhibit A, to
41 AboveNet Communications, Inc. is in the public interest.
42
43



1 Section 2. The Pierce County Council hereby authorizes the County Executive to
2 enter into the attached franchise agreement authorizing AboveNet Communications,
3 Inc. to construct, operate, and maintain a telecommunications facilities system in,
4 across, under, upon, along, and over County roads, rights-of-way, highways, and
5 County property in Pierce County, Washington, as described below:
6

7 All county roads lying within Townships 19 North through 22 North, inclusive, of
8 Range 1 West, Willamette Meridian, and all County roads lying within Townships
9 15 North through 22 North, inclusive, of Ranges 1 East through Range 9 East,
10 Willamette Meridian, and lying within the boundaries of Pierce County,
11 Washington.
12

13
14 PASSED this 14th day of December, 2010.
15

16 ATTEST:

PIERCE COUNTY COUNCIL
Pierce County, Washington

17
18
19 Denise D. Johnson

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21 **Denise D. Johnson**
22 Clerk of the Council

Roger Bush

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24
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27 **Roger Bush**
28 Council Chair

Pat McCarthy

29
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31 **Pat McCarthy**
32 Pierce County Executive

33 Approved Vetoed , this
34 15 day of December,
35 2010.

36 Date of Publication of
37 Notice of Public Hearing: December 1 and December 8, 2010

38 Effective Date of Ordinance: December 25, 2010



TELECOMMUNICATIONS FRANCHISE AGREEMENT

ARTICLE I – DEFINITIONS

Section 1. General Interpretation.

For the purpose of this Franchise, and except as defined specifically below, the terms, phrases, words and their derivations herein shall have the meaning given in the Telecommunications Ordinance. Words not otherwise defined shall be given their common and ordinary meaning. When consistent with the context, words used in the singular number include the plural number, words in the plural number include the singular number, and words used in the present tense include the future tense.

Section 2. Specific Definitions.

- A. **"Agency"** means any governmental agency or quasi-governmental agency other than the County, including the FCC and the WUTC.
- B. **"County"** means the County of Pierce, Washington, and its lawful designees.
- C. **"County Property"** means any real property owned by the County whether in fee or other ownership, estate or interest.
- D. **"Effective Date"** means the date identified in Article XXII, Section 4 herein.
- E. **"Facilities"** means the equipment and facilities used in the provision of Services hereunder to be installed and operated by Grantee.
- F. **"FCC"** means the Federal Communications Commission.
- G. **"Fee"** means any assessment, license, charge, fee, imposition, tax (but excluding any utility users' tax or occupation tax), or levy lawfully imposed by any governmental body.
- G. **"Franchise"** means the non-exclusive authorization granted herein and pursuant to the Telecommunications Ordinance to use County rights-of-way to construct, operate, and maintain Grantee's Facilities.
- I. **"Franchised Service Area"** means the unincorporated County limits.
- J. **"Grantee"** means AboveNet Communications, Inc., and its agents, employees, lawful transferees, successors, and/or assigns.
- K. **"Laws"** means any and all judicial decisions and any and all federal, state and local statutes, constitutions, ordinances, resolutions, regulations, rules, tariffs, administrative orders, certificates, orders, or other requirements of the County or other Agency having jurisdiction over the parties to this Franchise, in effect at the time of execution of this Franchise and thereafter.
- L. **"Month"** means a calendar month.
- M. **"Person"** means an individual, a corporation, a limited liability company, a general or limited partnership, a sole proprietorship, a joint venture, a business trust, or any other form of business association.
- N. **"Network Telephone Service"** means the Provision of access to the local telephone network, local telephone switching service, toll service, or otherwise providing telephonic, data, video conferencing or similar communication or transmission services for hire via a local network, line, channel or similar communication or transmission system. Network Telephone Service includes intrastate or interstate services and specifically excludes cable television or open video system service, broadcast services, or other multi-channel video services.
- O. **"Provision"** means any clause, condition, covenant, qualification, restriction, reservation, term, or other stipulation in this Franchise that defines or otherwise controls, establishes, or



1 limits the performance required or permitted by this Franchise. All provisions, whether
2 covenants or conditions, shall be deemed to be both covenants and conditions.

3 P. **"Public Facility"** means any tower, water tower, building, pole or other structure which the
4 County owns or controls.

5 Q. **"Public Way"** means and includes the surface of and space above and below any real
6 property in the County in which the County has an ownership interest or interest as trustee
7 for the public, including but not limited to, all public streets, highways, roads, alleys,
8 sidewalks, tunnels, viaducts, bridges, subways or skyways or any other public place or
9 property under control of the County, and any public or utility easements established,
10 dedicated, or devoted for public utility purposes.

11 R. **"Rights-of-Way"** means all County Property and Public Ways, located within any road
12 right-of-way, outside incorporated cities and towns and not designated as state highways,
13 which have been opened and used as public ways of travel and have been maintain by the
14 County as opened County roads.

15 S. **"Services"** means the Telecommunications Services provided through or in connection
16 with the network constructed, operated and maintained by Grantee, as authorized herein.

17 T. **"SONET"** is an acronym for Synchronous Optical Network, which provides the
18 transmission of light signals over optical fiber and allows different fiber systems or networks
19 to interconnect efficiently and accurately.

20 U. **"Telecommunications Network"** or **"Network"** means all of Grantee's Facilities used in
21 the provision of Services in County, taken together as a unified system.

22 V. **"Telecommunications Ordinance"** or **"Ordinance"** means Pierce County Code Chapter
23 12.34 which sets forth terms and conditions applicable to any and all franchised cable and
24 telecommunications providers making use of public rights-of-way in County

25 W. **"WUTC"** means the Washington Utilities and Transportation Commission.
26

27 ARTICLE II – FRANCHISE

28 Section 1. Grant of Broadband Telecommunications Franchise.

29 A. Grant of Franchise. Subject to obtaining any permits as are required under the County's
30 Charter or Code or other applicable Laws (and subject to Grantee obtaining any additional
31 necessary agreements, approvals, or authorizations from any entity which owns poles or
32 any other third party rights), the County hereby grants on a non-exclusive basis as provided
33 in Pierce County Code (PCC) 12.34.420, authorization for Grantee to attach, install,
34 operate, maintain, remove, reattach, reinstall, relocate, upgrade and replace Facilities
35 within the Rights-of-Way in unincorporated Pierce County for the purposes of providing
36 Services to Persons located within or (without) the limits of the County. Exhibit I represents
37 the initial phase of the location of the network which Grantee intends to install. Any work
38 performed pursuant to the rights granted under this Franchise may, at the County's option,
39 be subject to the prior review and approval of the Director of Public Works and Utilities.
40 During the term of this Franchise, the location of Facilities installed by Grantee or its
41 designee shall be disclosed, in writing, to the County by Grantee within ten days before its
42 installation, removal, or relocation. Such disclosures shall be incorporated in Exhibit I by
43 way of a modification to this Franchise Agreement and shall not change except upon
44 submittal of a revised Exhibit I, and a written request for a modification of the number
45 and/or location of such Facilities. Revised Exhibit I and request for modification shall be
46 subject to the review and approval of the Director of Public Works and Utilities. This
47 Franchise grants authority to construct and maintain Facilities in Public Ways. This
48 Franchise is granted pursuant to the terms and conditions contained in Chapter 12.34 PCC.
49 All provisions of Chapter 12.34 PCC except as may be explicitly set-forth in this Agreement,
50 are hereby incorporated by reference.
51



- 1 B. Compliance. The County has determined that this Franchise, taken as a whole, offers no
 2 more or less favorable terms than those required of existing similarly situated Grantee(s) in
 3 the County.
- 4 C. Costs Related to Exercise of Franchise. Any and all rights expressly granted to Grantee
 5 under this Franchise shall be exercised at Grantee's sole cost and expense, shall be
 6 subject to the prior and continuing right of the County to use any and all parts of the Rights-
 7 of-Way or Public Facilities or property, non-exclusively or concurrently, with any other
 8 Person, and further shall be subject to County's police powers and all deeds, easements,
 9 dedications, conditions, covenants, restrictions, encumbrances and claims of title which
 10 may affect the Rights-of-Way, or Public Facilities now or hereafter existing. Nothing in this
 11 Franchise shall be deemed to grant, convey, create, or vest a real property interest in land
 12 to or in Grantee, including any fee or leasehold interest or easement rights.
- 13 D. No Interference. Except as expressly permitted by applicable Laws or this Franchise, in the
 14 performance and exercise of its rights and obligations under this Franchise, Grantee shall
 15 not interfere in any manner with the existence and operation of any and all private property
 16 and Rights-of-Way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial or
 17 underground electric and telephone wires, cable television and other telecommunications,
 18 utility and municipal property without the express written approval of the owner or owners of
 19 the affected property or properties. The County shall ensure that a similar binding obligation
 20 of non-interference is imposed upon all other grantees occupying the Rights-of-Way.
 21 Further the County will assist in resolving disputes among occupiers of the Rights-of-Way.
 22 In the event Grantee experiences any prohibited interference, Grantee shall notify the
 23 County of such interference and the County and Grantee shall then work cooperatively to
 24 eliminate such interference. In resolving such disputes, the County shall give priority to the
 25 occupant who was first in time at the particular location where the interference is being
 26 experienced, unless doing so would impose undue hardship upon the newcomer.
- 27 E. Compliance with Laws. Grantee shall comply with all Laws in the exercise and
 28 performance of its rights and obligations under this Franchise. If required by Law, Grantee
 29 shall obtain all required approvals from the appropriate governing authorities.

30
 31 **Section 2. Acceptance of Franchise.**

- 32 A. Franchise Acceptance Procedures. This Franchise and the rights, privileges, and authority
 33 granted hereby shall take effect provided that Grantee complies with the acceptance
 34 procedures detailed herein.
- 35 B. Grantee to Have No Recourse. Except as provided in this Franchise, the County shall not
 36 be liable, unless directly and proximately caused by the willful, intentional or malicious acts
 37 of the County, for any damage to or loss of any facility within the Right-of-Way as a result of
 38 or in connection with any public works, public improvements, construction, excavation,
 39 grading, filling, or work of any kind in the Right-of-Way by or on behalf of the County.
- 40 C. Acceptance of Power and Authority of County. Grantee expressly acknowledges by
 41 acceptance of this Franchise that:
- 42 (1) It has relied upon its own investigation and understanding of the power and authority
 43 of the County to grant and enforce the Franchise;
 - 44 (2) It has not been induced to enter into this Franchise arrangement by any
 45 understanding or promise or other statement, whether verbal or written, by or on
 46 behalf of the County concerning any term or condition of the Franchise that is not
 47 specifically included herein;
 - 48 (3) It has carefully read the terms and conditions contained herein and of the Ordinance
 49 and that Grantee is willing to and does accept all the obligations of such terms and
 50 conditions to the extent not inconsistent with state or federal law
 - 51 (4) The matters contained in Grantee's Application and all subsequent applications or
 52 proposals for extensions or renewals of the Franchise, and as stated in any and all



1 other presentations to County, except as inconsistent with law, regulations or local
2 ordinance, are incorporated into this Franchise as though set out verbatim.
3

4 **Section 3. Limitations on Authority.**

- 5 A. Subject to Other Requirements. Grantee's right to operate and maintain its
6 Telecommunications Network is subject to the terms, conditions, and requirements of
7 Chapter 12.34 PCC, this Franchise, the County Charter and Code, and all applicable Laws,
8 and Grantee's right to construct, erect, install or modify its Telecommunications Network is
9 specifically subject to the requirement that Grantee obtain Permits as set forth in Chapter
10 12.34 PCC; and obtain all required permits for, and otherwise comply with, all applicable
11 land use and zoning regulations which control development on property contiguous to the
12 right-of-way containing the proposed Facilities site.
- 13 B. After-Acquired Facilities. Grantee expressly acknowledges and agrees, by acceptance of
14 this Franchise, that Facilities and appurtenances in Public Ways which are subsequently
15 acquired by the Grantee and which (if acquired prior to this original Franchise grant) would
16 have been subject to this Franchise and the permitting authority related thereto shall be
17 subject to the Provisions of this Franchise and all Permits related thereto.
- 18 C. Privileges Must be Specific. No privilege or exemption is granted or conferred by this
19 Franchise except as may be specifically prescribed.
20

21 **Section 4. Non-Exclusive Franchises.**

22 This Franchise is non-exclusive pursuant to Section 12.34.420 PCC. County reserves the right
23 to grant additional Franchises to any Person at any time. Any Franchise granted pursuant to
24 the Telecommunications Ordinance shall confer and impose substantially similar rights and
25 obligations on functionally equivalent services.
26

27 **Section 5. Amendments.**

28 This Franchise may be amended only upon the mutual written consent of County and Grantee
29 or in the exercise of the County's police power authority or other explicit authority pursuant to
30 applicable laws.
31

32 **Section 6. Service of Notice.**

33 Except as otherwise specifically provided herein, any notices required or permitted to be given
34 under this Franchise shall be deemed to be properly served when deposited with the United
35 States Postal Service, postage paid, certified or registered mail, or via nationally recognized
36 overnight carrier, and addressed to the party to receive same, or at such other address of which
37 the party to receive the notice shall have designated in the Franchise.
38

39 NOTICES TO THE County shall be addressed to all of the following:

40 Pierce County Executive's Office
41 930 Tacoma Avenue South, Room 737
42 Tacoma, WA 98402-2100
43

44 With Copy to:

45
46 Director, Public Works and Utilities
47 Public Services Bldg
48 2401 South 35th, Rm 150
49 Tacoma, WA 98409
50
51



1 Pierce County Public Works and Utilities
2 Tacoma Mall Plaza
3 2702 South 42nd Street, Ste 201
4 Tacoma, WA 98409-7322

5
6 Clerk of Pierce County Council
7 930 Tacoma Avenue South, Room 1046
8 Tacoma, WA 98402
9

10 NOTICES TO THE COMPANY shall be addressed to all of the following:

11 Attn: General Council
12 AboveNet Communications, Inc
13 360 Hamilton Ave, 7th Fl
14 White Plains, NY 10601
15

16 **Section 7. Franchise Review.**

- 17 A. Regular Review. The County may initiate periodic reviews of Grantee's Franchise
18 performance. Such reviews shall occur no more than once every three years beginning on
19 the third anniversary of the effective date of this Franchise. However, there shall be no
20 remedies or presumptions resulting from the County's failure to conduct any such periodic
21 reviews. Either County or Grantee may submit proposals for modification of Franchise
22 obligations during such review or at any other time during the term of the Franchise;
23 B. Other Review. Nothing herein shall be construed to prohibit the County and the Grantee
24 from engaging in a continuous review of the performance of Grantee, and County may
25 initiate or Grantee request a public hearing on any issue related to compliance with the
26 Franchise or any Permit related thereto.
27

28 **ARTICLE III – TERM OF FRANCHISE**
29

30 This Franchise shall be in full force and effect, unless sooner terminated pursuant to the
31 Ordinance or the terms and conditions contained herein, for a period of five years from the
32 Effective Date. In addition, the Grantee may terminate this Franchise at any time upon at least
33 thirty (30) days written notice to the County.
34

35 **ARTICLE IV – FEES AND CONSIDERATION**
36

37 Pierce County specifically reserves the right to exercise authority it has to annually fix by
38 ordinance a fair and reasonable compensation for the use of its property. If Pierce County
39 elects to exercise such authority, Grantee will receive written notice ("Compensation Notice")
40 not less than 60 days prior to its effective date and provide an opportunity to comment.
41 Acceptance of Pierce County's definition, terms, and/or formula identified in the Compensation
42 Notice will occur if the Grantee accepts in writing within sixty days of receipt of the
43 compensation Notice; in which case the applicable ordinance that the Pierce county Council
44 passes will be determinative. Rejection by the Grantee shall be deemed grounds for
45 termination of the Franchise. Any subsequently enacted compensation terms will be applied on
46 a competitively neutral and non-discriminatory basis, and in compliance with county, state and
47 federal laws.
48

49 **Section 1.** In consideration for the use of the Right-of-Way, Grantee shall provide an annual
50 payment for each of its Facilities placed in the Right-of-Way. The amount of the annual
51 payment for the calendar year 2010 shall be as follows:



- (1) Five thousand nine hundred seventy two dollars (\$5,972) for each separate support structure (such as a monopole or lattice tower), together with any associated equipment cabinets, in the Right-of-Way;
- (2) Three thousand five hundred eighty three dollars (\$3,583) for Grantee's antennas placed on the support structure of another entity lawfully occupying the Right-of-Way, together with associated equipment cabinets, or
- (3) Two thousand three hundred eighty eight dollars (\$2,388) for Grantee's antennas alone placed on the support structure of another entity lawfully occupying the Right-of-Way.

Section 2. The annual payment provided for in Section 1 shall be adjusted annually beginning January 1, 2010 by the United States Department of Labor Bureau of Labor Statistic's ("BLS") Consumer Price Index – All Urban Consumers ("CPI-U") for the Seattle-Tacoma-Bremerton, Washington Region, index base period 1982-1984=100, with 2009 as the base year. If the BLS changes the indexing region during the term of this Franchise, annual adjustments will be based on the region geographically closest to the Seattle-Tacoma-Bremerton Region.

Section 3. In the event one or more of the Grantee's Facilities are out of service due to a relocation pursuant to Article IX, the County shall give the Grantee a credit equal to the prorated value of the time the Facility or Facilities are out of service on the next year's annual payment.

Section 4. The amount of the annual payment for any partial year shall be prorated.

Section 5. Grantee's payment obligation with regard to any Facility shall terminate upon removal of that Facility from the Right-of-Way. The County shall refund to Grantee within sixty (60) days of receiving notice of removal and restoration, the prorated portion of the annual payment for each removed Facility.

Section 6. Grantee shall provide notice to the County when permitting another communications provider to collocate on Grantee's facilities.

ARTICLE V – FACILITIES OR NETWORK ABANDONMENT

In the event that any Facilities or the Network is abandoned and are no longer placed in service for a period of one hundred eighty (180) consecutive days or more, Grantee shall promptly notify the County.** Upon ninety (90) days written notice from the County, Grantee shall promptly remove such Facility or Facilities and restore the Right-of-Way to its condition prior to the placement of the Facilities, all at the Grantee's sole cost and expense.

Regardless of whether Grantee has notified the County of abandonment, in case of actual abandonment the county may remove the facilities upon 90 days written notice and grantee will be responsible for the costs of removal. If Grantee fails to remove the Facilities and restore the Right-of-Way as required by the County, the County shall be entitled to remove the Facilities and restore the Right-of-Way at Grantee's sole cost and expense or accept the transfer of ownership of the same to the County, consent for which transfer is hereby expressly given by Grantee. The County shall not exercise its option hereunder to remove or transfer ownership of Facilities, unless and until the county first gives fifteen days prior written notice to Grantee to remove the Facilities. If Grantee shall fail to remove the Facilities as required by the County, the County shall be entitled to remove the Facilities at Grantee's sole cost and expense. Grantee shall execute such documents of title as will convey all right, title and interest in the event of transfer.



1 **Section 2. Relocation Costs.**

2 Whenever the removal or relocation of Facilities is required under this Franchise or otherwise by
3 order of County, and such removal or relocation shall cause the Rights-of-Way to be damaged,
4 Grantee, at no cost and expense to the County, shall promptly repair and return the Rights-of-
5 Way, in which the Facilities is located, to the same condition as existed prior to such work in the
6 determination of County. If Grantee fails to comply with this requirement, then the County shall
7 have the option of performing or causing to be performed such reasonable and necessary work
8 and charge Grantee for the actual cost incurred by County. Upon the receipt of a demand for
9 payment by the County, Grantee shall reimburse the County for such costs within ninety (90)
10 days.

11
12 **Section 3. Relocation for Third Parties.**

13 If during the term of this Franchise any person or entity other than Pierce County (hereinafter
14 "Third Party") requests the relocation of Grantee's Facilities to accommodate work within the
15 Rights-of-Way to be undertaken by or on behalf of such Third Party, and the County determines
16 that such relocation of Grantee's Facilities is in the public interest and is necessary, then the
17 County may, in its discretion, grant such Third Party request. In such event, upon written notice
18 to the Grantee from the County, Grantee shall, at the expense of the Third Party upon terms
19 acceptable to Grantee, relocate its Facilities within the Franchise Area to accommodate the
20 work of such Third Party.

21
22 **ARTICLE X – INSURANCE**

23
24 **Section 1. Insurance Requirement.**

25 A. Insurance Certificate. Grantee shall obtain insurance of a quality and amounts as required
26 in Section 12.34.630 PCC, and as detailed below and shall file the required original
27 certificate(s) of insurance with endorsements with the County, subject to the County's prior
28 approval, which shall clearly state:

- 29 (1) Policy number; name of insurance company; name, address, and telephone number of
30 the agent or authorized representative; name, address, and telephone number of
31 insured; project name and address; policy expiration date; and specific coverage
32 amount; and
33 (2) That thirty days prior written notice of cancellation is required to the County; and
34 (3) That Grantee's insurance is primary with respect to any other valid or collectible
35 insurance that the County may possess, including any self-insured retentions the
36 County may possess, and any other insurance the County does possess shall be
37 considered excess insurance only and shall not be required to be contributory with this
38 insurance.

39 B. Coverage. Grantee shall maintain liability insurance in amounts as detailed in Subsection
40 D (below). Such liability insurance shall be kept in full force and effect by a Grantee during
41 the existence of this Franchise and all renewals and extensions thereof and thereafter until
42 of all Grantee's Facilities have been removed from the Right-of-Way should such removal
43 be required by the County or undertaken by the Grantee, whichever is later. Any
44 contractors of Grantee performing on behalf of Grantee pursuant to this Franchise shall
45 also be insured as required herein and name County as an additional insured. The limits of
46 liability can be satisfied by primary and umbrella insurance policies.

47 C. Failure to Procure. Grantee acknowledges and agrees, by acceptance of this Franchise,
48 that failure to procure or maintain the required insurance shall constitute a material breach
49 of this Franchise and that the County may immediately suspend operations under the
50 Franchise, terminate the Franchise, or, at its discretion, procure or renew such insurance to



1 protect the County's interests and be reimbursed by such Grantee for all premiums paid in
2 connection therewith.

3 D. Insurance Amounts. The Grantee shall maintain throughout the term of this Franchise, or
4 until all Grantee's Facilities are removed from the Rights-of-Way, whichever is longer,
5 Workers' Compensation coverage and liability insurance in the minimum amounts of:

6 1. Commercial General Liability insurance – public liability including premises, products,
7 and complete operations.

8 (a) Bodily injury liability – \$2,000,000 each occurrence,

9 (b) Property damage liability – \$2,000,000 each occurrence, or

10 (c) In lieu of (a) and (b) above, bodily injury and property damage combined –
11 \$2,000,000 single limit.

12 2. Commercial – Automobile Liability Insurance including owned, non-owned, and hired
13 vehicles.

14 (a) Bodily injury liability – \$1,000,000 each occurrence and \$3,000,000 for each
15 occurrence,

16 (b) Property damage liability – \$1,000,000 each occurrence,

17 (c) In lieu of (a) and (b) above, bodily injury and property damage combined –
18 \$3,000,000 single limit.

19 3. Workers' Compensation within statutory limits and employer's liability insurance with
20 limits of not less than \$1,000,000 or coverage by Worker's Compensation Act of
21 Washington Account #977,636-02.

22 E. General. Grantee agrees that with respect to the above required insurance contracts,
23 related certificates will contain the following required provisions:

24 (1) The County shall be named as additional insured as to all applicable coverage.

25 (2) Contracts shall provide for thirty day notices to the County prior to cancellation,
26 revocation, non-renewal, or material change.

27
28 **Section 2. Policy Limitations.**

29 "Cross liability," "severability of interest" or "separation of insureds" clauses shall be made a part
30 of the commercial general liability and business automobile liability policies.

31
32 **Section 3. Mailing of Insurance Certificate.**

33 The certificate(s) of insurance reflecting the above requirements and notices shall be mailed to:

34 Mark Maenhout, Risk Manager

35 Pierce County Risk Management Department

36 955 Tacoma Avenue South, Suite 303

37 Tacoma, WA 98402-2160
38

39 **Section 4. Insurance Provider.**

40 Any insurance provider of Grantee shall be admitted and authorized to do business in
41 Washington and shall be rated at least A: X in A.M. Best and Company's Insurance Guide.
42

43 **ARTICLE XI – COUNTY'S RIGHT TO ACT**
44

45 In the event Grantee fails to perform any obligation, under this Franchise the County shall have
46 the right, but no obligation or duty, to take action that Grantee has failed to take, after giving at
47 least thirty days notice, in advance of taking such action, except in the event of an emergency,
48 as determined by the County, in which case no advance notice shall be required. In the event
49 County takes such action, Grantee shall promptly pay to the County upon demand, the sum or
50 sums expended or incurred by the County to take such action. Any such action taken by the
51 County shall not by itself constitute a waiver by the County of Grantee's default or the County's
52 remedies on account of such default.



1
2
3 **ARTICLE XII – TERMINATION OF FRANCHISE**

4 **Section 1. Termination.**

5 In addition to the Provisions of PCC Section 12.34.646, this Franchise may be terminated upon
6 a default hereof as provided in this Franchise. A termination of this Franchise because of
7 Grantee's default shall not prejudice any other remedy for breach of contract, damages, non-
8 payment or otherwise, which the County has under this Franchise or under law.

9 **Section 2. Notice.**

10 This Franchise may be terminated by the County in accordance with the Provisions of Sections
11 12.34.648 and 12.34.650 PCC after notice, an opportunity to cure, and a hearing as provided
12 therein.

13
14 **Section 3. Time to Cure.**

15 Upon notice of a violation or default under this Franchise, Grantee shall have thirty days in
16 which to cure such violation or default. The time for Grantee to correct any violation, default or
17 liability, shall be extended by County if the necessary action to correct such violation, default or
18 liability is of such a nature or character as to require more than thirty days within which to
19 perform, provided Grantee provides written notice that it requires more than thirty days to
20 correct such violations or defaults liability, commences the corrective action within the thirty
21 days period, and thereafter uses reasonable diligence to correct the violation, default, or liability.

22
23 **Section 4. Removal.**

24 Upon termination of this Franchise for any reason, subject to County's lien rights, as provided by
25 Washington law or other applicable laws, Grantee shall remove all of its Network and related
26 Facilities, personal property, and any other improvements installed by Grantee and restore all
27 property to the same condition existing prior to usage by Grantee within one hundred eighty
28 (180) days following termination. In the event Grantee fails to do so, the County may remove
29 Grantee's Facilities, personal property, and improvements and charge Grantee the reasonable
30 expense of removal and restoration. Except as provided herein, Grantee shall be deemed to
31 have abandoned to the County at no cost or expense to County any of its Facilities, personal
32 property or other improvements which it has failed to remove from the Rights-of-way within the
33 one hundred eighty (180) days following termination, unless such removal is prohibited because
34 of the County's exercise of its lien rights or unless the County grants in writing a longer period
35 for removal. In the event of an abandonment, the County may remove Grantees's Facilities,
36 personal property and improvements and charge Grantee the reasonable expense of removal
37 and restoration. Grantee shall further reimburse to the County pursuant to Article VII for all
38 costs of cleanup associated with any leakage or contamination from such facilities whether such
39 leakage or contamination occurs prior to or in the course of such removal.

40
41 **Section 5. Lesser Sanctions.**

42 Additionally, the County may impose a lesser sanction pursuant to Section 12.34.652 PCC.

43
44 **ARTICLE XIII – GENERAL TERMS**

45
46 **Section 1. Reports and Records of the Grantee.**

47 **Reports Required.** Grantee shall supply, upon request and at no cost, any information,
48 including maps requested by the County Executive, County Engineer, or Director of
49 Transportation as it relates to the physical aspects of Grantee's facilities in the Rights-of-Way.
50 Said information may be requested in hard copy and/or electronic format compatible with
51 County's databases, including a GIS system if compatible with Grantee's existing system.



1 **Section 2. Enforcement and Administration by County.**

2 The County, through the office of the County Executive, shall have continuing regulatory
3 jurisdiction and supervision over the occupancy of the Rights-of-Way pursuant to this Franchise,
4 and may from time to time adopt such reasonable rules and regulations as it may deem
5 necessary; provided that, any County permits or approvals for Facilities shall be governed by
6 the applicable County ordinances, rules, and regulations in effect at the time Grantee submits a
7 complete application for such permits and other approvals.

8
9 **Section 3. Failure to Enforce.**

10 The Grantee shall not be excused from complying with any of the terms and conditions of this
11 Franchise by any failure of the County upon one or more occasions to insist upon or to seek
12 compliance with any of such terms or conditions.

13
14 **ARTICLE XIV – INSPECTION**

15
16 The County maintains the right to inspect and approve of, at Grantee's expense, all of Grantee's
17 facility installations in the Rights-of-Way for ROW management and life-safety issues, but not
18 including the visual or aesthetic impacts of any facility for which a valid zoning permit has been
19 issued. In addition, the County Engineer may require Grantee to furnish certification from
20 Grantee's engineer (so long as such engineer's certifications are accepted by the Washington
21 State Department of Transportation or the Federal Rural Utilities Service and if such
22 certifications are not so acceptable, then by an independent, qualified engineer) that the
23 facilities are constructed and operated in accordance with good engineering practice and are
24 reasonably secure against damage and injury.

25
26 **ARTICLE XV – PERMITS, INITIAL SERVICE AREA**
27 **AND CONSTRUCTION STANDARDS**

28
29 **Section 1. Initial Service Area and General Standards.**

- 30 A. Permits. Grantee shall comply with Section 12.34.600 PCC. In addition thereto, Grantee
31 shall apply for a construction Permit prior to beginning any work in a Public Way or Right-of-
32 Way generally including the opening of any street in the County, and shall comply with
33 Chapters 12.34 and 12.32, and 17B.10.100 PCC. No work, other than emergency work,
34 shall commence without such Permit pursuant to Section 12.34.710 PCC. Emergency
35 repairs shall be made immediately with notice to the County no later than five business days
36 after the repair is initiated. Grantee shall further comply with Sections 12.34.700, 12.34.705,
37 and 12.34.715 PCC, which generally apply to construction standards, construction codes,
38 utility Right-of-Way permits, and applications.
- 39 B. Network Planning. The Grantee and the County shall make reasonable good faith efforts to
40 advise each other of plans and programs, both long and short range, for the placement of
41 Facilities in Rights-of-Way, and other Public Property which might affect the other party or
42 require its coordination.
- 43 C. Limited Access. The County reserves the right to limit or exclude Grantee's access to a
44 specific route, public right-of-way, or other location when there is inadequate space, a
45 pavement cutting moratorium, unnecessary damage to public property, interference with
46 County utilities, or for any other reason determined by the County Executive or designee, or
47 the County Engineer to be necessary for management and preservation of the Rights-of-
48 Way.
- 49 D. Facilities Placement. Grantee will comply with Sections 12.34.725, 12.34.730 and
50 12.34.735 PCC and shall obtain a Permit pursuant to the Ordinance for each separate
51 Facility requiring work or construction in public Rights-of-Way or other public property, and
52 shall comply with all terms of such Permit(s). Additionally, the siting of all of Grantee's



1 facilities located within the Right-of-Way shall comply with the zoning code and development
2 regulations and construction-related permits, e.g., building, electrical, etc., in effect at the
3 time of the submittal of a complete application to the designated county department, which
4 control development on property contiguous to that portion of any right-of-way on which
5 Grantee proposes to site Facilities. Grantee's Facilities may require additional project
6 permits and approvals under County land use codes and development regulations.

7 E. Additional Accommodations. In addition, the County Executive or designee may determine,
8 in the exercise of reasonable discretion, when and where reasonable accommodations shall
9 be made by Grantee to the County for public needs or, where requested, other third party
10 needs, how such accommodation should be made, and a reasonable apportionment of any
11 expenses of the same; PROVIDED, that this Franchise creates no third party beneficial
12 interests or enforceable contractual right to require the County to order such
13 accommodation. Notwithstanding the foregoing, it remains the responsibility of the Grantee
14 to anticipate and avoid conflicts with other right-of-way occupants or users, other utilities,
15 franchises or permittees. Except as provided in Article II, Section 1(D), the County assumes
16 no responsibility for such conflicts.

17 F. Notice of Work. Grantee shall provide notice of non-emergency work as provided in
18 Sections 12.34.606, 12.32.110, 12.04.030, and 17B10.100 PCC. The Grantee shall provide
19 notice of emergency work as provided in Article XV, Section A, above.

20 G. Removal of Facilities. Removal of Grantee's Facilities shall be in accordance with Sections
21 12.34.612 and 12.34.614 PCC.

22 H. Coordination of Construction Activities. Work shall be coordinated in accordance with
23 Sections 12.34.640 and 12.32 PCC.

24 25 **Section 2. Undergrounding.**

26 In those areas of County where the transmission or distribution facilities of the local exchange
27 carrier and/or the electric utility are underground, or hereafter place underground, Grantee shall
28 likewise construct or relocate, operate and maintain that portion of its Network in the area
29 underground upon County approval. Further, consistent with any general municipal
30 undergrounding policy or program now or hereafter developed, the county may require
31 Grantee's participation in municipally imposed undergrounding or related requirement. Grantee
32 agrees to coordinate its underground installation and planning activities with the County's
33 underground plan and policies. Such undergrounding in any event shall be at Grantee's
34 expense.

35 36 **ARTICLE XVI – INDEMNIFICATION**

37 38 **Section 1. Indemnification.**

39 The Grantee agrees to defend, indemnify, and hold harmless Pierce County, its appointed and
40 elected officers and employees, from and against all damages, losses and expenses, including
41 reasonable attorneys' fees and costs of suit or defense, arising out of, resulting from, or alleged
42 to arise out of or result from the acts, omissions, failure to act, or misconduct of the Grantee or
43 its affiliates, officers, employees, agents, contractors, or subcontractors in the construction,
44 operation, maintenance, repair, or removal of its facilities and in providing or offering services
45 over the Facilities, or from physical contact with facilities or supporting structures, whether such
46 acts or omissions are authorized, allowed, or prohibited under this Franchise or the Ordinance.

47
48 If the claim, suit, or action for injuries, death, or damages as provided for in the preceding
49 paragraphs of this contract is caused by or results from the concurrent negligence of

50 (a) The indemnitee or the indemnitee's agents or employees and



1 (b) The indemnitor or the indemnitor's agents or employees, the indemnity provisions
2 provided for in the preceding paragraphs of this contract shall be valid and enforceable
3 only to the extent of the indemnitor's negligence.
4

5 Grantee specifically and expressly waives any immunity under Industrial Insurance Title 51
6 RCW, and acknowledges that this waiver was mutually negotiated by the parties herein.
7

8 **Section 2. No Responsibility for Loss.**

9 The County shall not be responsible for any damages, losses, or liability of any kind arising from
10 the issuance or approval by the County of a permit, license, or franchise to any third party.
11

12 **Section 3. Breach.**

13 The waiver of any breach or violation of any Provision of this Franchise shall not be deemed to
14 be a waiver or a continuing waiver of any subsequent breach or violation of the same or any
15 other Provision of this Franchise.
16

17 **Section 4. Intervention.**

18 If the County otherwise has the right to intervene, Grantee expressly acknowledges and agrees,
19 by acceptance of this Franchise, not to oppose such intervention by the County in any suit or
20 proceeding to which the Grantee is a party related to the Franchise.
21

22 **ARTICLE XVII – BONDS**

23
24 **Section 1. Bond Requirement.**

25 Pursuant to Section 12.34.638 PCC, during construction of new or additional facilities in the
26 rights-of-way, Grantee, or its contractor, shall furnish a Bond equal to at least 100% of the
27 estimated cost of restoring the rights of way to substantially the same condition as existed prior
28 to Grantee's construction, or such other amount as may be determined to be appropriate by the
29 County Engineer under Chapter 12.32 PCC for the particular class of work being permitted.
30

31 **Section 2. Rights Cumulative.**

32 The rights reserved by County with respect to the Performance Bond are in addition to all other
33 rights County may have under the Ordinance or a Franchise or any other law. County may,
34 form year to year, in its sole discretion, reduce the amount of the bond.
35

36 **Section 3. Time to Cure.**

37 Upon notice of a violation under this Franchise, grantee shall have thirty days in which to cure
38 such violation. The time for Grantee to correct any violation, default or liability, shall be
39 extended by County if the necessary action to correct such violation, default or liability is of such
40 a nature or character as to require more than thirty days within which to perform, provided
41 Grantee provides written notice that it requires more than thirty days to correct such violations or
42 liability, commences the corrective action within the thirty days period and thereafter uses
43 reasonable diligence to correct the violation, default or liability.
44

45 **Section 4. Franchise Termination Costs or Damages.**

46 In the event this Franchise is canceled or terminated by reason of default of the Grantee or
47 otherwise revoked, County shall be entitle to collect form the Bond that amount which is
48 attributable to any damages sustained by County. The Grantee, however, shall be entitled to
49 the return of such Bond, or portion thereof, as remains nine Months after the expiration of the
50 term of the Franchise.
51
52



1 **Section 5. Performance Required.**

2 Neither the Provisions of this Section nor any bond accepted by the County pursuant thereto,
3 nor any damages recovered by the County thereunder shall be construed to excuse faithful
4 performance by a Grantee or limit the liability of a Grantee for damages, to the full amount of the
5 bond. The rights reserved by the County with respect to the bonds herein are in addition to all
6 other rights and remedies the County may have under this Franchise or any other law.

7
8 **Section 6. Change in Surety.**

9 If, at any time during the term of this Franchise, the condition of the corporate surety shall
10 change in such a manner as to render the bond unsatisfactory to the Pierce County Risk
11 Manager, the Grantee shall replace such bond by a bond of like amount, similarly conditioned,
12 issued by a corporate surety satisfactory to the Risk Manager.

13
14 **ARTICLE XVIII – PROOF OF INSURANCE**

15
16 Grantee shall furnish proof to the County Executive that a satisfactory insurance policy and
17 bonds have has been obtained. A certificate of insurance and the Bond, along with written
18 evidence of payment of the required premiums, shall be filed and maintained with the County
19 Risk Manager.

20
21 **ARTICLE XIX – ASSIGNMENT OR TRANSFER OF GRANT**
22 **AND FRANCHISE RENEWAL**

23
24 **Section 1. Transferee Must Be Signatory.**

25 In no event shall a transfer, assignment, or disposal of ownership or control be effective without
26 the transferee acknowledging the obligations under the Ordinance, becoming a signatory to this
27 Franchise and assuming all rights and obligations hereunder, and assuming all other rights and
28 obligations of the transferor to the County.

29
30 **Section 2. Franchise Renewal.**

31 The Grantee may seek renewal of this Franchise, and County shall review such request for
32 renewal in accordance with Sections 12.34.460, 12.34.465, and 12.34.470 of the Pierce County
33 Code and applicable laws.

34
35 **ARTICLE XXI – CHARTER LANGUAGE ADDED**

36
37 Grantee acknowledges that Pierce County Charter Section 9.20 Franchises provides in part:
38 "All franchises shall be subject to the right of the County), or the people acting for themselves
39 through the referendum, to repeal for cause, amend, or modify the franchise in the interest of
40 the public".

41
42 **ARTICLE XXII – MISCELLANEOUS**

43
44 **Section 1. Previous Rights Abandoned.**

45 This Franchise supersedes any and all other rights, privileges, powers, immunities, and
46 authorities owned, possessed, controlled, or exercisable pursuant to any previous Franchise
47 granted to Grantee in the County.

48
49 **Section 2. Severability.**

50 If any section, subsection, sentence, clause, phrase, or portion of this Franchise is for any
51 reason held to be invalid or unconstitutional by any court or administrative agency of competent
52 jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and



1 such holding shall not affect the validity of the remaining portions thereof. In such event, the
2 parties mutually agree to make any amendments to this Franchise or other applicable
3 agreements necessary to effectuate the intention of this Franchise. In the event that such
4 amendments are barred by any legal requirements governing any party, the parties shall use
5 their best efforts to otherwise avoid prejudice to the respective parties' interests, and to
6 implement changes to effectuate the intent in entering into this Franchise. Should the County,
7 in its sole discretion, determine that the severed portions substantially alter the Franchise so
8 that the original intent and purpose of this Franchise no longer exists, the County may, in its
9 discretion, terminate this Franchise without cost or penalty.

10
11 **Section 3. Applicable Law.**

12 The Franchise is governed by the Laws of the State of Washington, and venue for any
13 enforcement litigation shall be in Pierce County Superior Court. In case of conflict or ambiguity
14 between this Franchise and Grantee's Request or Application, this Franchise shall be
15 controlling.

16
17 **Section 4. Effective Date.**

18 The Provisions of this Franchise shall be effective upon the written acceptance of this Franchise
19 by the Grantee, signed by its proper officers, and filed with the Clerk of the Pierce County
20 Council within thirty days of execution of the Franchise by the County Executive, and recorded
21 with the Pierce County Auditor in accordance with RCW 36.55.080.

22
23 **Section 5. Limitation.**

24 Unless explicitly stated in the Franchise, nothing in this Franchise shall be construed or
25 interpreted in any manner as limiting, relinquishing, or waiving any rights of ownership enjoyed
26 by the County in any Rights-of-Way or any Public Facilities, or in any manner limiting,
27 relinquishing, or waiving the County's control over the operation and maintenance of the Rights-
28 of-Way or any Public Facilities or in any manner limiting, relinquishing, or waiving lawful
29 governmental rights that the County possesses.

30
31 **Section 6. Non-Waiver.**

32 Excuse by County of strict performance of any Provision of this Franchise shall not be a waiver
33 or prejudice the County's right to require strict performance of the same or any other Provision
34 in the future.

35
36 **Section 7. Integration.**

37 This Franchise contains the entire understanding between the parties with respect to the subject
38 matter herein. There are no representations, agreements, or understandings (whether written
39 or oral) between or among the parties relating to the subject matter of this Franchise which are
40 not fully expressed herein. The Telecommunications Ordinance, all Exhibits referred to in this
41 Franchise, and any addenda, attachments, and schedules which may, from time to time, be
42 referred to in any duly executed amendment to this Franchise, are by such reference
43 incorporated in this Franchise and shall be deemed to be a part of this Franchise.

44
45 **Section 8. Franchise Subject to Future Ordinance(s).**

46 Grantee acknowledges that the County may develop additional rules, regulations, and
47 specifications for the use of the Rights-of-Way and/or Public Facilities, and Grantee agrees that
48 such rules, regulations, and specifications, when finalized and to the extent not preempted by
49 federal or state law, shall govern Grantee's activities hereunder as if they were in effect at the
50 time this Franchise was executed by the County; provided that, no subsequently enacted rule,
51 regulation, or specification, may retroactively place Grantee in violation thereof.



1. **Section 9. No Warranties.**

2 Grantee shall be responsible for obtaining all necessary approvals, authorizations, and
3 agreements from any party or entity and it is acknowledged and agreed that the County is
4 making no representation, warranty, or covenant whether any of such approvals, authorizations,
5 or agreements are required or have been obtained by Grantee from any Person or entity.

7. **Section 10. Recording.**

8 This Franchise shall be recorded with the Pierce County Auditor as provided in RCW 36.55.080.
9 The Provisions and terms of this Franchise are agreed to and hereby accepted. County and
10 Grantee each respectively represent that their signatory is duly authorized and has full right,
11 power and authority to execute this Franchise.

13. **Section 11. Acceptance.**

14 The Grantee shall provide full acceptance of this Franchise and all its terms and conditions, by
15 filing a signed copy of the Franchise with the designated County official. This requirement shall
16 be a condition precedent to the Franchise taking effect. If Grantee does not provide a signed
17 copy of the Franchise as set forth in this Section, this Franchise shall be null and void.

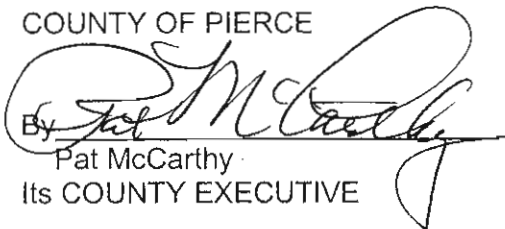
19. **Section 12. Authorization.**

20 The undersigned respectively represent and warrant that its signatory is a duly authorized and
21 empowered to sign this Franchise Agreement.


23 IN WITNESS WHEREOF, the parties hereto have caused this Franchise

24 Agreement to be executed as of the 15th day of Dec, 2010.

COUNTY OF PIERCE

By 
Pat McCarthy
Its COUNTY EXECUTIVE

33 Attest:

34 
35 _____
36 Douglas M. Jendras
37 Senior Vice President

40 AboveNet Communications, Inc
41 Grantee

48 Witness:

49 
50 _____
51 Contract Administrator
52

