

AGENDA
REGULAR MEETING
DES MOINES CITY COUNCIL
21630 11th Avenue South, Des Moines, City Council Chambers
March 14, 2013 - 7:00 p.m.

CALL TO ORDER

PLEDGE OF ALLEGIANCE

CORRESPONDENCE

COMMENTS FROM THE PUBLIC

BOARD & COMMITTEE REPORTS/COUNCILMEMBER COMMENTS

PRESIDING OFFICER'S REPORT

Page 1 Washington State Future City Regional Competition Presentation -
Pacific Middle School

ADMINISTRATION REPORTS

CONSENT CALENDAR

Page 11 Item 1: APPROVAL OF MINUTES
Motion is to approve the minutes of the February 28, 2013 City Council Meeting.

Page 17 Item 2: DRAFT RESOLUTION 13-011 SETTING A PUBLIC
HEARING; SIGN CODE AMENDMENTS – PUBLIC
READERBOARDS, CHAPTER 18.42 DMMC
Motion is to adopt Draft Resolution No. 13-011 setting a public hearing on April 11, 2013 to consider Draft Ordinance 13-011 amending the Sign Code codified as Chapter 18.42 DMMC.

Page 25 Item 3: DRAFT RESOLUTION 13-033 PLACING MUNICIPAL
COURT JUDGE POSITION ON BALLOT
Motion is to approve Draft Resolution 13-033 providing for the submission of the position of Des Moines Municipal Court Judge to the qualified voters of the City of Des Moines for the 2013 primary and general elections, and every four years thereafter.

NEW BUSINESS

Page 29 1. DRAFT ORDINANCE 12-191, FRANCHISE AGREEMENT
FOR THE ZAYO GROUP
Staff Presentation: Acting Director of Public Works
Dan Brewer

NEXT MEETING DATE

March 28, 2013 Regular City Council Meeting

ADJOURNMENT

A G E N D A I T E M

BUSINESS OF THE CITY COUNCIL

City of Des Moines, WA

SUBJECT: Washington State Future City
Regional Competition

FOR AGENDA OF: March 14, 2013

DEPT. OF ORIGIN: Administration

ATTACHMENTS:

1. Proclamation
2. Article by Pacific Middle School Design
and Engineering Teacher Sandy Gady

DATE SUBMITTED: February 24, 2013

CLEARANCES:

- ☐ Legal NA
- ☐ Finance NA
- ☐ Marina NA
- ☐ Parks, Recreation & Senior Services NA
- ☐ Planning, Building & Public Works NA
- ☐ Police NA
- ☐ Courts NA

APPROVED BY CITY MANAGER
FOR SUBMITTAL: _____

Purpose and Recommendation

The purpose of this agenda item is to recognize and congratulate Pacific Middle School students for demonstrating excellence in the Washington State Future City Regional Competition held in February, 2013.

Suggested Motion

MOTION: "I move to approve the Proclamation recognizing the achievements of the Pacific Middle School students in the Washington State Future City Regional Competition."

Background

Pacific Middle School teams competed in the Washington State Future City Regional Competition that is part of the National Engineering Week held in February of each year, placing 2nd, 3rd, 4th, 5th, 14th and 15th in the competition. Future City is a national competition where middle school students form teams of three to build cities set in the future. This is the second time in five years of competition that Instructor Sandy Gady's students have placed in the finals. The Teams' models were displayed at Pacific Middle School's Science Night on March 6, 2013.



City of Des Moines

ADMINISTRATION
21630 11TH AVENUE SOUTH, SUITE A
DES MOINES, WASHINGTON 98198-6398
(206) 878-4595 T.D.D.; (206) 824-6024 FAX: (206) 870-6540



Proclamation

WHEREAS, Future City is a national competition, held as part of National Engineering Week in February of each year, in which teams of middle school students design and build models of cities set at least 150 years in the future, and

WHEREAS, the City of Des Moines recognizes that this competition introduces students to Science, Technology, Engineering and Math (STEM) concepts, as well as the Career and Technical Education aspect of working successfully in groups, time management and communication skills, that build essential future job skills for our community and our nation, and

WHEREAS, the City of Des Moines is pleased to observe that the students must plan for and model the basic services and features of a city, such as zoning, infrastructure, and city location, thus preparing them for the duties of future citizenship, and

WHEREAS, the City of Des Moines applauds the participating teams from Pacific Middle School, and their instructor, for the awards of 2nd, 3rd, 4th, 5th, 14th and 15th place at the Washington State Future City Regional Competition; now therefore;

THE DES MOINES CITY COUNCIL HEREBY PROCLAIMS that the following Pacific Middle School students, along with their Instructor Sandy Gady, have demonstrated excellence in the Washington State Future City Regional Competition, and invites all citizens to join in congratulating them:

2nd Place:	Team "Olympic City"	Matthew Garrido, Thomas Swanson, and Elliott Plourde, <i>Students</i>
3rd Place:	Team "Utopia"	Tristan Neathery, Truman Ponder-Bader and Alex Kanemasu, <i>Students</i>
4th Place:	Team "Cloud 9"	Sam Johnson, Colin Meyers, and Nick Hanley, <i>Students</i>
5th Place:	Team "Time Cruisers"	Anders Hunt, Trey Hunt, and Jacob Sylvester, <i>Students</i>
14th Place:	Team "Expo Town"	Amber Thatcher, Austin Beardemphl and Kokoro Terukina, <i>Students</i>
15th Place:	Team "Xenon"	Emily Ding, Umi Terukina and Veronica Soran, <i>Students</i>
	Sandy Gady	<i>Instructor</i>

SIGNED this 14th day of March, 2013.

MAYOR

Saturday, January 26, 2013, six teams from Pacific Middle School participated in the Washington State Future City Regional Competition. The competition is a national competition which is part of National Engineering Week held in February each year. Winners of the regional competition receive a trip to Washington, DC, where they compete for the national title.

The team of "Olympic City", comprised of Matthew Garrido, Thomas Swanson and Elliott Plourde placed 2nd in Washington State from 22 teams. Overall, our teams placed 2nd, 3rd, 4th, 5th, 14th and 15th place.

Other teams from Pacific included:

- "Cloud 9", Sam Johnson, Colin Meyers, and Nick Hanley (4th place)
- "Time Cruisers", Anders Hunt, Trey Hunt, and Jacob Sylvester (5th place)
- "Utopia", Tristan Neathery, Truman Ponder-Bader and Alex Kanemasu (3rd place)
- "Expo Town", Amber Thatcher, Austin Beardemphl and Kokoro Terukina (14th place)
- "Xenon", Emily Ding, Umi Terukina and Veronica Soran (15th place)

The Future City Competition is a component of the Design and Engineering class at Pacific. The purpose of the project is to introduce students to Science, Technology, Engineering and Math, STEM concepts as well as the Career and Technical Education aspect of working successfully in groups, time management and communication skills. Within the project, students have an opportunity to do what engineers do, identify problems; brainstorm ideas; design solutions; test, retest and build; and share their results. Throughout the process there are extensive rubrics available online at www.futurecity.org students use to evaluate their work.

This is the fifth year Pacific has competed in the competition, and the second time we have made it to the finals. "We are very proud of Thomas, Elliot and Matthew and their accomplishments. They did an excellent job in their presentation. Sandy Gady, the Design and Engineering teacher commented, "Our teams really took a huge step forward this year. All of their models and essays were exemplary. Their presentations were well thought out and all looked like professionals. Any one of the teams could have made it to the finals and represented us well. While everyone was at lunch, I sat in the room looking down the row of our models, and realized just how hard these students had worked to be there today and it brought tears to my eyes. These are truly accomplished students that gave their all and should be recognized that they are leaders amongst their generation."

"One of the last things I told Olympic City before they presented was they were not alone. Alongside them on the stage were the members of every other team that has ever been here before them as well as their peers sitting in the audience today," said Gady. A really big thank you as well to the parents who were there supporting us throughout the day as well as the project. A thank you also to Peter Sturtevant of CH2MHill for being with us as our Engineer mentor who helped us with the engineering concepts, and Councilwoman Melissa Musser and Mayor Tony Piasecki, Mayor from Des Moines City Hall for coming into class and helping the students understand how city governments work, plan and make decisions. Models will be on display for all to see March 6th at the Science Night being hosted by the Science Department.

Future City is a national competition is where teams of middle school students form teams of three to build cities set in the future. The teams are chosen by the students. There are four distinct phases the students go through.

Students begin the competition by using SimCity™4 Deluxe software to create their futuristic city. Within the program, students have to make choices for their virtual city. They identify basic services and features, zoning and city infrastructures and the city location.

Each team member is required to write two written components; one is a 1,000 word research essay on a given topic, the second is to write a narrative essay of 500 words identifying and highlighting the features of their city. The topic for this year was, "Storm water runoff." The teams then take the best components of each individual essay and combine them to create the team essays that are submitted to the competition.

Students then work on their model as teams. These models are constructed at home, using predominantly recycled materials. The physical model should be no larger than 25" x 50" x 20", and must have at least one moving part. The

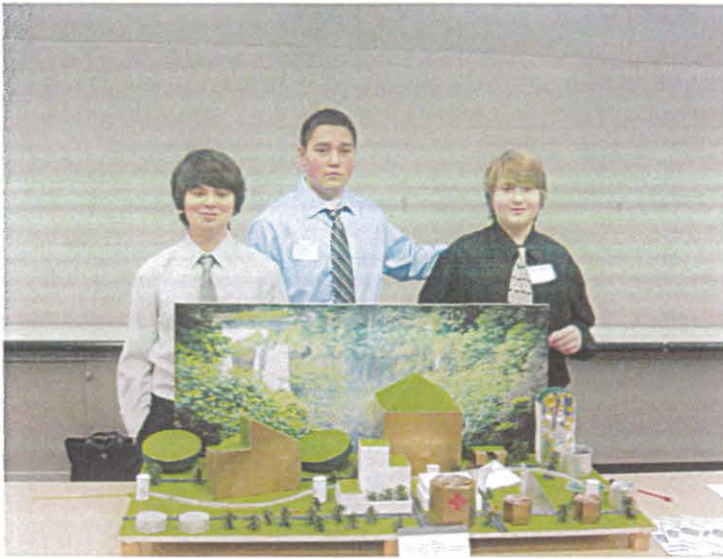
model should be representative of their virtual design they created in SimCity™4. The model is 3-dimensional and should creatively represent their city in a futuristic manner at least 150 years into the future.

The final phase is the actual team presentation. Students create scripts where they incorporate the highlights of their city, its infrastructure, and the alternative energy sources. This is where the research the students did comes into play. Students have 7 minutes to present to a panel of 3 to 5 judges, outlining their city and its energy, transportation and community aspects. Judges then ask students questions for 12 minutes. These questions range from the types of engineering used in the city, to clarifications on how their waste disposal systems work, transportation to and from the city, innovations and futuristic components, to where in the city would you most like to live and why.

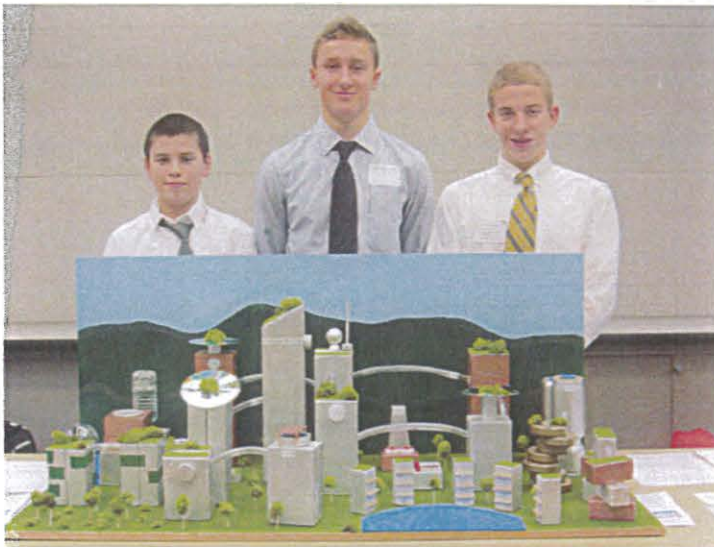
"This competition is a wonderful way for our students to showcase all they are capable of doing. There are so many cross-curricular aspects to the project. Technology for building their cities; city planning and geographical location for Social Studies; budgeting and scale for Math; model building for Technology, Art and Math; research, writing, and presentation for Language Arts; time management, public speaking, and communication for Career and Technical Education. Each year our teams get better and better. For many, this is the first time they have ever had a chance to stand in front of a group with a microphone and present," commented Gady.



Olympic City: 2nd place
(left to right)
Elliott Plourde, Matthew Garrido, Thomas Swanson



Utopia: 3rd place
(left to right)
Alex Kanemasu, Truman Ponder-Bader, Tristan Neathery



Cloud 9: 4th place
(left to right)
Colin Meyers, Sam Johnson, Nick Hanley

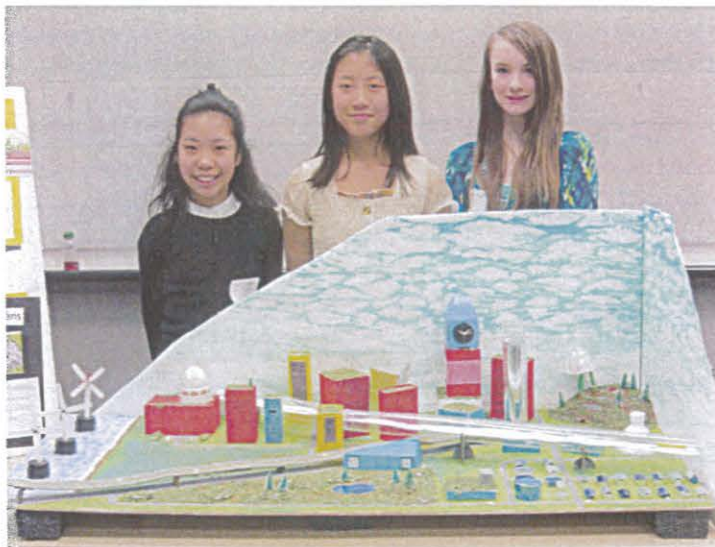


Time Cruisers: 5th place
(left to right)
Andres Hunt, Trey Hunt, Jacob Sylvester



Expo Town: 14th place
(left to right)

Kokoro Teruknia, Amber Thatcher, Austin
Beardemphl



Xenon: 15th place
(left to right)

Umi Terukina, Emily Ding, Veronica Soran



2nd place Olympic City, Pacific Middle School

(left to right)

Peter Sturtevant, (Engineer), Thomas Swanson, Matthew Garrido, Elliott Plourde, Sandy Gady

**MINUTES
REGULAR MEETING
DES MOINES CITY COUNCIL
21630 11th Avenue South, Des Moines, City Council Chambers
February 28, 2013 - 7:00 p.m.**

CALL TO ORDER

Mayor Kaplan called the meeting to order at 7:04 p.m.

PLEDGE OF ALLEGIANCE

The flag salute was led by Mayor Pro Tem Pina.

ROLL CALL

Present were Mayor Kaplan; Mayor Pro Tem Pina; Councilmembers Melissa Musser, Jeanette Burrage, Bob Sheckler, and Carmen Scott.

Councilmember Caldwell was absent.

Mayor Pro Tem Pina moved to excuse Councilmember Caldwell, seconded by Councilmember Burrage.

The motion passed 6-0.

Staffs present were City Manager Tony Piasecki; Assistant City Attorney Tim George; Harbormaster Joe Dusenbury; Acting Director of Community Development Denise Lathrop; Police Commander Barry Sellers; City Clerk Bonnie Wilkins.

CORRESPONDENCE

There was no correspondence.

COMMENTS FROM THE PUBLIC

Quinton Thompson – spoke on ADA access on City sidewalks and streetlights and how he might be of service to the City.

BOARD & COMMITTEE REPORTS/COUNCILMEMBER COMMENTS

Councilmember Scott:

- Farmers Market Board Meeting:
 - Farmers Market's first day is Saturday, June 1, 2013.
 - City has been paid for Marina space and garbage.
 - Application Fees: Farmers \$25, Crafters \$30 and Food Vendors \$30.
 - Offering a Senior Shuttle the first Saturday of every month. Volunteers needed to drive shuttle.
- Sonju Garden:
 - All garden beds booked except for 3 raised beds that can be adopted by seniors.
 - Expanding garden area for additional space.
 - Next work party is March 9, 2013 @ Sonju Garden.

Councilmember Sheckler:

- The whales were very active between Lahaina, Kauai and Molokai, Hawaii.

Councilmember Burrage:

- Public Safety & Transportation Meeting on March 7, 2013
 - Traffic circles on 208th Street, public welcome

Mayor Pro Tem Pina:

- Finance & Economic Development Committee Meeting held on February 26th & 28th in regards to Pacific Ridge Zoning. Meeting highlights:
 - Health Point Development
 - Sea Mar
 - Artemis Hotel
 - Fishing Pier @ Marina
- Poverty Bay Wine Festival.
- Read the "Sweetheart Story" from the Activity Center.
- Public Issues Committee/Sounds Cities:
 - Meetings have moved to the first Wednesday of each month

Councilmember Musser:

- *The Seattle Times* picked the Mount Rainier Lady Rams as the favorite to win the State 4A Championship.
 - Brittany & Jordan McPhee star players

PRESIDING OFFICER'S REPORT

- Earth Hour, sponsored by World Wildlife Federation, will be on March 23, 2013; demonstrate the power of conservation with lights out for 1 hour, beginning at 8:30 p.m.
- Attended Chinese New Year's Celebration in Federal Way, sponsored by South Puget Sound Chinese Language School based out of Highline Community College for the past 22 years, on February 16, 2013.
- Spoke at the Huntington Park monthly board meeting on February 20, 2013.
- Attended a Spaghetti Feed Fundraiser at St. Philomena Church: proceeds to help members of the congregation with health & financial problems.
- Met with Senator Patty Murray's King County Director to discuss some of the needs that the City has and which available programs might help facilitate City projects.
- Highline School District is conducting a series of future planning meetings. Midway Elementary School hosted the meeting held on February 28, 2013.

ADMINISTRATION REPORTS

City Manager Piasecki reported that Sound Transit is holding a series of drop-in, informational sessions regarding the Federal Way Transit Extension Project. Meetings will be:

- Monday, March 4, 2013 at the Woodmont Library.
- Wednesday, March 6, 2013 at the Des Moines Library.
- Tuesday, March 12, 2013 at the Kent Library.
- Thursday, March 14, 2013 at Highline Community College.
- Monday, March 18, 2013 at the Des Moines Activity Center, 11:00-1:00 p.m.

CONSENT AGENDA

Item 1: APPROVAL OF MINUTES

Motion is to approve the minutes of the February 7 and February 14, 2013 City Council Meetings.

Item 2: APPROVAL OF VOUCHERS

Motion is to approve for payment vouchers and payroll transfers included in the above list and further described as follows:

Claim checks \$232,749.64

Payroll fund transfers in the total amount of \$425,101.21

Total certified Wire Transfers, Voids, A/P & Payroll vouchers are \$657,850.85

Item 3: AGREEMENT FOR SERVICES FOR PLANNING, IMPLEMENTATION, AND FUNDING OF A JOINT HUMAN SERVICES APPLICATION PROGRAM

Motion is to approve the Agreement for Services between the City of Des Moines and 18 other suburban cities for the purpose of planning, implementing, and funding a joint human services application program, and authorize the City Manager to sign the Agreement for Services substantially in the form as submitted.

Item 4: INTERLOCAL AGREEMENT BETWEEN THE CITY AND HIGHLINE SCHOOL DISTRICT REGARDING THE ZENITH PARK SITE

Motion is to approve the Addendum to extend the Interlocal Agreement between the City and Highline School District for use of Highline School District property, for a term of five (5) years, wherein the District grants the City the right to use a portion of the District's Property known as Zenith Park for parks and recreational purposes, and authorize the City Manager to sign the agreement substantially in the form as submitted.

Direction/Action

Motion made by Councilmember Musser to approve the consent agenda, seconded by Mayor Pro Tem Pina.

The motion passed 6-0.

OLD BUSINESS

1. MARINA AND BEACH PARK DEVELOPMENT PLAN

Staff Presentation: Harbormaster Joe Dusenbury & Denise

Direction/Action

Motion made by Councilmember Sheckler to select a site developer using a RFQ process similar to the process the Port of Seattle is using for the Des Moines Business Park, seconded by Councilmember Musser.

The motion passed 5-1.

For: Mayor Kaplan, Mayor Pro Tem Pina, Councilmembers Musser, Burrage and Sheckler.

Against: Councilmember Scott.

2. DRAFT ORDINANCE NO. 12-117, PROHIBITION OF SKY LANTERNS
Staff Presentation: Police Commander Barry Sellers

Direction/Action

First Motion made by Councilmember Sheckler to suspend Rule 26(a) in order to enact Draft Ordinance No. 12-117 on first reading, seconded by Mayor Pro Tem Pina.

The motion passed 5-1.

For: Mayor Kaplan, Mayor Pro Tem Pina, Councilmembers Musser, Sheckler and Scott

Against: Councilmember Burrage did not vote.

Second Motion made by Councilmember Sheckler to enact Draft Ordinance No. 12-117 adding new sections to chapter 9.42 DMMC to define and prohibit the use of sky lanterns in Des Moines, seconded by Mayor Pro Tem Pina.

The motion passed 5-1.

For: Mayor Kaplan, Mayor Pro Tem Pina, Councilmembers Musser, Sheckler and Scott

Against: Councilmember Burrage.

Mayor Kaplan read Ordinance No. 12-117 into the record.

NEW BUSINESS

1. DRAFT RESOLUTION NO. 13-024, SOLE-SOURCE CONTRACT FOR PURCHASE AND INSTALLATION OF A CCTV SECURITY CAMERA SYSTEM AT THE REDONDO BOAT LAUNCH FACILITY AND MEMORANDUM OF UNDERSTANDING WITH HIGHLINE COMMUNITY COLLEGE
Staff Presentation: Harbormaster Joe Dusenbury

Direction/Action

First Motion made by Mayor Pro Tem Pina to adopt Draft Resolution No. 13-024 waiving state competitive bidding requirements for the purchase and installation of a security camera system for the Redondo Boat Launch Facility, seconded by Councilmember Musser.

The motion passed 5-1.

For: Mayor Kaplan, Mayor Pro Tem Pina, Councilmembers Musser, Sheckler and Scott

Against: Councilmember Burrage.

Second Motion made by Mayor Pro Tem Pina to move to approve the contract with Reliable Security Services, Inc. for the purchase and installation of a security camera system, in an amount not to exceed \$44,779.00 plus Washington State Sales Tax, and to authorize the City Manager to sign the contract substantially in the form as submitted, seconded by Councilmember Musser.

The motion passed 5-1.

For: Mayor Kaplan, Mayor Pro Tem Pina, Councilmembers Musser, Sheckler and Scott

Against: Councilmember Burrage.

Third Motion made by Mayor Pro Tem Pina to move to approve the Memorandum of Understanding with Highline Community College for the installation, use and operations of a CCTV camera system at the Marine Science and Technology Center and Redondo Beach, and authorize the City Manager to sign the Memorandum substantially in the form as submitted, seconded by Councilmember Musser.

The motion passed 6-0.

Mayor Kaplan read Draft Resolution No. 13-024 into the record.

ADJOURNMENT

Motion made by Councilmember Sheckler to adjourn, seconded by Mayor Pro Tem Pina
The motion passed 6-0.

The meeting was adjourned at 8:30 p.m.

NEXT MEETING DATE

March 7, 2013 Regular City Council Meeting.

Respectfully submitted,

Bonnie Wilkins
City Clerk

A G E N D A I T E M

BUSINESS OF THE CITY COUNCIL City of Des Moines, WA

SUBJECT: Sign Code Amendments –Public
Readerboards, Chapter 18.42 DMMC

ATTACHMENTS:

1. Draft Resolution 13-011
2. Draft Ordinance 13-011

FOR AGENDA OF: March 14, 2013

DEPT. OF ORIGIN: Planning, Building and
Public Works

DATE SUBMITTED: March 6, 2013

CLEARANCES:

- ☒ Legal JB
- ☐ Finance N/A
- ☐ Marina N/A
- ☐ Parks, Recreation & Senior Services N/A
- ☒ Planning, Building & Public Works DEL
- ☐ Police N/A
- ☐ Courts N/A

APPROVED BY CITY MANAGER
FOR SUBMITTAL: 

Purpose and Recommendation

The purpose of this agenda item is to establish a public hearing date for the City Council to consider Draft Ordinance 13-011 which amends the Sign Code codified as Chapter 18.42 DMMC. The City Council can establish the public hearing date by passing the following motion:

Suggested Motion

Motion: “I move to adopt Draft Resolution No. 13-011 setting a public hearing on April 11, 2013 to consider Draft Ordinance 13-011 amending the Sign Code codified as Chapter 18.42 DMMC.”

Background

The City is exploring a variety of means to communicate with the public about events or issues of city-wide importance. In addition to banners, public kiosks, and wayfinding improvements, electronic readerboard devices provide an opportunity to effectively provide information, notice, and direction to the public. The City’s Sign Code does not clearly address that these types of signs are allowed as off premise signs. Allowing the public readerboards to be off premise signs would enable the City to display content about events and activities that may be located in areas other than where the sign is

physically located. Generally, signs are allowed to advertise business or functions located on the site where the sign is located only. Staff believes that reader board devices and the ability to advertise for a broader public purpose is in the public interest. They will serve to notify the public and promote events that enhance the sense of community as well as provide a tool to help mobilize and direct efforts in a time of emergency or crisis.

Discussion

Draft Ordinance 13-011 amends a portion of Title 18 of the DMMC. Changes to Title 18 are processed as a Type VI land use action and as such requires a public hearing to provide an opportunity for the public to comment. Additionally, the date of the public hearing to consider Draft Ordinance 13-011 is required to be set by motion of the City Council pursuant to DMMC 18.60.120(3). Approval of the resolution setting the hearing date does not obligate the City Council to approve Draft Ordinance 13-011 at the public hearing.

Further, the regulations within the proposed amendments are classified as development regulations under the Growth Management Act as defined in RCW 36.70A.030(7); therefore, the Draft Ordinance was sent to the Department of Commerce for review and comment by the Department and other State agencies. This is normally a 60 day review and comment period, but staff has requested it be expedited due to the fact that it has minimal Growth Management ramifications and this request was granted.

Alternatives

The City Council may:

1. Adopt the Draft Resolution as written.
2. Adopt the Draft Resolution with amendments by the City Council establishing a different hearing date.
3. Decline to adopt the Draft Resolution setting the hearing date to consider the proposed amendments to the Sign Code – Chapter 18.42 DMMC.

Financial Impact

The allowances afforded under Draft Ordinance 13-011 for the city to pursue reader board devices in an off premise manner will result in savings of time and more efficiently advertise events that the City supports. The cost to acquire and install each device can be in the range of \$20,000-30,000 depending on the unit's capabilities. While this cost is not directly attributed to the proposed ordinance, it will be a capital cost that the City will pursue annual sponsorship and funding until the City Council determines that adequate coverage of key "traffic" areas of the city are covered.

PLANNING, BUILDING, AND PUBLIC WORKS' FIRST DRAFT 03/05/2013

DRAFT RESOLUTION NO. 13-011

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DES MOINES, WASHINGTON, fixing a time for a public hearing to consider Draft Ordinance No. 13-011 which amends DMMC 18.42.270, the Zoning Code, to clarify that public readerboard signs are allowed as off premise signs.

WHEREAS, the City Council is considering a variety of means by which wayfinding and communication to the public for civic events purposes and important public notices can be achieved, and

WHEREAS, the City is embarking on significant street improvements on the South 216th Street corridor and seeking a means to enhance communications to the public near city facilities in this area as well as throughout the Marina District and in other areas having high public visibility, and

WHEREAS, a public hearing is necessary to receive public comment regarding this proposal, and

WHEREAS, a public hearing is required for adoption of an ordinance which amends a portion of the Title 18 DMMC commonly referred to as the Sign Code; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES RESOLVES AS FOLLOWS:

The matter of amending DMMC 18.42.270 to clarify regulations that provide for public reader boards signs as off premise signs is set for a public hearing before the City Council on Thursday, April 11, 2013, at 7:00 p.m., or as soon thereafter as the matter may be heard, in the City Council Chambers, 21630 11th Avenue South, Suite B, Des Moines, Washington.

ADOPTED BY the City Council of the City of Des Moines, Washington this ____ day of _____, 2013 and signed in authentication thereof this ____ day of _____, 2013.

M A Y O R

Resolution No. 13-011
Page 2 of 2

APPROVED AS TO FORM:

City Attorney

ATTEST:

City Clerk

PLANNING, BUILDING, AND PUBLIC WORK'S FIRST DRAFT 05/06/2013**DRAFT ORDINANCE NO. 13-011**

AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON, relating to the Sign Code and the placement and regulation of reader board signs, and amending DMMC 18.42.270.

WHEREAS, the City desires to install public reader boards at strategic locations throughout the City that are capable of displaying electronic messages notifying the public of community events and activities of civic importance, and

WHEREAS, the City is relying on significant sponsorship from private corporations and entities to fund the costs associated with the purchase, installation and operation of electronic reader boards, and

WHEREAS, reader board signs can be operated in a manner that classifies them either as an on premise or off premise sign depending on the desired function and nature of a business or entity utilizing this type of sign, and

WHEREAS, off premise signs, with a few exceptions, are prohibited under the City's sign code, and

WHEREAS, use of reader board signs in an off premise capacity will enable the City and other public entities to inform the public of area-wide activities and events and assist in providing city-wide emergency information, and

WHEREAS communications for matters deemed appropriate by City leaders and administration including, but not limited to major events, are distinct and different from typical advertising mediums designed to promote a specific product, service, or corporate entity, and

WHEREAS, the City is interested in locating reader board signs that provide public services in a manner that best offers exposure to the general public for the purpose intended, and

WHEREAS, it is necessary to provide clarifying language to the City's Sign Code that enables public reader boards not to be construed as prohibited off premise signs, and

WHEREAS, revisions to the City's Sign Code as proposed will provide opportunities for other semipublic entities such as

Draft Ordinance No. 13-011
Page 2 of 3

schools, community clubs, and special purpose districts to erect reader board signs as may be needed, and

WHEREAS, pursuant to DMMC 18.56.080, amendment of the Sign Code (Title 18 DMMC) is a legislative (Type VI) decision, and

WHEREAS, the textual code amendments proposed by this Ordinance are exempt from the requirements of SEPA pursuant to WAC 197-11-800(19), and

WHEREAS, the textual code amendments proposed in this ordinance were provided to the Department of Commerce as required by RCW 36.70A.106, and

WHEREAS, the City Council conducted a public hearing on April 11, 2013 to review this matter and consider public comments, and

WHEREAS, the City Council finds that the amendments contained in this ordinance are appropriate and necessary; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:

Sec. 1. DMMC 18.42.270 and sections 4(N) of Ordinance No. 584 as amended by section 16 of Ordinance No. 1509 are each amended to read as follows:

18.42.270 Placement All signs, except real estate directional signs, political signs, signs owned and operated by a public entity, portable signs expressly allowed under DMMC 18.42.050, and off-premises signs approved under DMMC 18.42.090, must be located on the premises of the business or events or activities that they identify or advertise. All other ~~a~~Advertising signs located on premises other than the premises of the business or events or activities they identify or advertise are ~~forbidden~~ prohibited, notwithstanding single ownership of more than one premises, except where the premises are contiguous. For the purposes of

Draft Ordinance No. 13-011

Page 3 of 3

this section "contiguous" means that such buildings or properties are joined and/or interior access is provided from one to the other.

Sec. 2. Severability - Construction.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

(2) If the provisions of this ordinance are found to be inconsistent with other provisions of the Des Moines Municipal Code, this ordinance is deemed to control.

Sec. 3. Effective date. This ordinance shall take effect and be in full force five (5) days after its passage, approval, and publication in accordance with law.

PASSED BY the City Council of the City of Des Moines this ____ day of ____, 2013 and signed in authentication thereof this ____ day of ____, 2013.

M A Y O R

APPROVED AS TO FORM:

City Attorney

ATTEST:

City Clerk

Published: _____

A G E N D A I T E M

BUSINESS OF THE CITY COUNCIL City of Des Moines, WA

SUBJECT: Resolution placing Municipal Court Judge position on ballot.

ATTACHMENTS:

1. Draft Resolution 13-033

FOR AGENDA OF: March 14, 2013

DEPT. OF ORIGIN: Legal

DATE SUBMITTED: March 6, 2013

CLEARANCES:

☒ Legal PO

☐ Finance NA

☐ Marina NA

☐ Parks, Recreation & Senior Services NA

☐ Planning, Building & Public Works NA

☐ Police NA

☐ Courts NA

APPROVED BY CITY MANAGER
FOR SUBMITTAL: AS

Purpose and Recommendation

The purpose of this report is to seek City Council approval of Draft Resolution 13-033 providing for the submission of the position of Des Moines Municipal Court Judge for a term of four years to the qualified voters of the City of Des Moines.

Suggested Motion

Motion: I move to approve Draft Resolution 13-033 providing for the submission of the position of Des Moines Municipal Court Judge to the qualified voters of the City of Des Moines for the 2013 primary and general elections, and every four years thereafter.

Background

State law requires that each full-time equivalent judicial position be filled by election. On March 25, 2010, the City Council of Des Moines adopted Ordinance No. 1482 which created a full-time elected position of Des Moines Municipal Court Judge. The Ordinance states that the position "shall be filled by election for the term commencing on January 1, 2014, and every four years thereafter.

Discussion

In prior years, the position of Municipal Court Judge was a part-time position. Now that the position has been made full-time it must be filled by an election. As this will be the first election for the position of Des Moines Municipal Court Judge, the City Council must pass a Resolution placing the position on the ballot.

Pursuant to RCW 29A.52.210, a primary will be held unless no more than two candidates file for the position.

Recommendation or Conclusion

It is recommended this Draft Resolution is adopted.

CITY ATTORNEY'S FIRST DRAFT 02/26/2013

DRAFT RESOLUTION NO. 13-033

A RESOLUTION OF THE CITY OF DES MOINES, WASHINGTON providing for the submission of the position of Des Moines Municipal Court Judge for a term of four years to the qualified voters of the City of Des Moines on the primary and general election ballot of 2013, and every four years thereafter, as authorized by Des Moines Ordinance No. 1482, and directing the City Clerk to certify to the County Auditor a certified copy of this Resolution; and providing for other matters properly related thereto.

WHEREAS, RCW 3.50.055 requires that each full-time equivalent judicial position shall be filled by election, and

WHEREAS, on March 25, 2010, the City Council of Des Moines adopted Ordinance No. 1482 which created a full-time elected position of Des Moines Municipal Court Judge, set terms, and established appointment guidelines for vacancies and removals, and

WHEREAS, the City Council of Des Moines finds that the position of Des Moines Municipal Court Judge is a full-time equivalent judicial position that must be filled by election, and

WHEREAS, the City Council of Des Moines finds it is appropriate to submit to the qualified voters of the City of Des Moines the position of Des Moines Municipal Court Judge for a term of four years on the primary and general election ballots of 2013, and every four years thereafter, in accordance with Des Moines Ordinance No. 1482; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES RESOLVES AS FOLLOWS:

Sec. 1. Des Moines Municipal Court Judge. An election is hereby requested to be called, conducted and held within the City of Des Moines for the primary and general election ballot of 2013 and every four years thereafter, for the purposes of submitting to the qualified electors of the City to vote for the position of Des Moines Municipal Court Judge for a term of four years.

Resolution No. _____
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Sec. 2. Submission to the county. The City requests the King County Director of Records and Elections to submit to the qualified electors of the City a vote on the position of Des Moines Municipal Court Judge for a term of four years.

Sec. 3. Dates of election. If necessary, the primary election will be held on August 6, 2013. The general election will be held on November 5, 2013. Subsequent primary and general elections will be held every four years thereafter.

ADOPTED BY the City Council of the City of Des Moines this ____ day of _____, 2013 and signed in authentication thereof this ____ day of _____, 2013.

 M A Y O R

APPROVED AS TO FORM:

 Assistant City Attorney

ATTEST:

 City Clerk

AGENDA ITEM

BUSINESS OF THE CITY COUNCIL City of Des Moines, WA

SUBJECT: Franchise Agreement for the ZAYO Group

AGENDA OF: March 14, 2013

DEPT. OF ORIGIN: Planning, Building & Public Works

ATTACHMENTS:

DATE SUBMITTED: March 6, 2013

1. Draft Ordinance 12-191
2. RCW 35.21.860
3. RCW 82.16.010

CLEARANCES:

- [X] Legal PS
 [] Finance
 [] Marina N/A
 [] Parks, Recreation & Senior Services N/A
 [X] Planning, Building & Public Works DSB
 [] Police N/A

APPROVED BY CITY MANAGER
FOR SUBMITTAL: [Signature]

Purpose and Recommendation:

The purpose of this item is to request Council to enact Draft Ordinance 12-191 establishing a non-exclusive Franchise Agreement with the ZAYO Group to construct, install, operate, maintain, and repair telecommunication facilities within the public right-of-way of the City of Des Moines. Staff recommends approval.

Suggested Motion

Motion 1a: "I move to suspend Rule 26(a) in order to enact Draft Ordinance 12-191 on first reading."

Motion 1b: "I move to enact Draft Ordinance 12-191 granting a non-exclusive franchise with the ZAYO Group to construct, install, operate, maintain, and repair telecommunication facilities within the public right-of-way of the City of Des Moines."

OR

Motion 2: "I move to approve first reading of Draft Ordinance 12-191, granting a non-exclusive franchise with the ZAYO Group to construct, install, operate, maintain, and repair telecommunication facilities within the public right-of-way of the City of Des Moines and move it to second reading on a date to be determined by the Mayor."

Background:

In September of 2012, staff was approached by the ZAYO Group for a right-of-way permit to install a fiber optic communications system within the City of Des Moines. At that time, staff informed the ZAYO Group that they would first need to obtain a Franchise with the City, before any work in the right-of-way could be permitted. The ZAYO Group requested that staff begin the process to establish a telecommunication franchise. Since that time staff has prepared the Draft Franchise Agreement, which is included as Draft Ordinance 12-191 (refer to Attachment 1).

The ZAYO Group currently has other existing municipal franchise and row use license agreements with various metro area cities in Washington State, and they are currently working on an additional 21 requests including one with the City of Des Moines. Over the last couple of years, the ZAYO Group has acquired several large communications companies, including AboveNet (formerly known as Metromedia), and 360 Networks.

The ZAYO Group is a privately held Delaware limited liability company with its headquarters located in Louisville, Colorado. ZAYO is a provider of bandwidth infrastructure solutions, offering traditional lit telecommunications services (including private lines and wavelengths, Internet access and colocation) to wholesale and enterprise customers over a fiber-optic network in metropolitan markets from coast-to-coast. Their wholesale carrier customers include telecom, wireless, cable, and Internet service providers. Zayo's enterprise customers include web-centric and technology businesses, government entities, educational institutions, financial services companies, healthcare providers and smaller firms needing to connect multiple facilities. ZAYO does not provide any residential, voice, cable or video service.

The ZAYO Group is a registered telecommunication business with the Washington Public Utilities and Transportation Commission, and their Certificate of Public Convenience and Necessity number is UT-110349.

After further discussions with ZAYO representatives, staff learned that they have a planned project to install a metro wide fiber optic communications network, which will span as far north as Everett and as far south as Joint Base Lewis McChord (JBLM) south of Tacoma. The planned alignment through Des Moines would be along the west side of Pacific Highway South, which will be the main backbone cable. Subsequently, laterals would be expanded from the main line to serve other telecoms and enterprise customers. We know that they also have plans to install fiber along South 240th Street from Pacific Highway South to Marine View Drive, to an existing Version cellular facility.

ZAYO's expansion will provide many benefits to the City, including bringing additional advanced communications infrastructure to community businesses. The additional infrastructure will introduce more competition in the local telecom market and attract new economic development to the City, which is good for business and ultimately consumers. The proposed project will enable one of the major wireless carriers to provide enhanced 4G service to the City. The ZAYO Group is optimistic that there will be additional opportunities for further expansion in the future.

Discussion:

The primary purpose of the franchise agreement is to grant the right to use the franchise area and outline the parameters for the permission. The franchise agreement is for a 10 year term and is non-exclusive. The agreement outlines the guidelines for ZAYO to perform work in the franchise area. It stipulates that ZAYO facilities must not unreasonably interfere with normal traffic and use in the right-of-way. It

requires them to obtain all permits and inspections and follow all laws and regulations. It provides a provision for an “after the fact” permit if an emergency situation exists. It requires ZAYO to provide drawings, data layers and schematics, and to participate in One-Call locate Service.

Parameters are identified for ZAYO to relocate facilities for City right-of-way improvements. With proper notice, if the improvement is clearly identified in advance there should be no cost to the City unless the City requires ZAYO to underground an aerial facility. Currently ZAYO does not have any aerial facilities within the City of Des Moines, and the franchise agreement requires undergrounding of all new installations.

The Ad-Hoc Franchise Committee met on January 24, 2013 to discuss the Draft Ordinance. Staff met with representatives from the ZAYO Group on January 29, 2013 to discuss issues raised by the committee members. Staff learned that the ZAYO Group does not provide any direct residential, voice, cable or video service. They install fiber-optic infrastructure to support wireless communications, which they then lease out to wholesale and enterprise customers.

Staff also looked into the possibility of having the ZAYO Group lease City conduit along Pacific Highway South. Unfortunately, the City does not have a spare (empty) conduit along Pacific Highway South. While there is a 2” conduit with some space available within it, the City already occupies that conduit with its own conductor and generally speaking it is not good practice to share the same conduit with other entities. In addition, the ZAYO group is proposing to install a 288 count fiber along Pacific Highway South and it is doubtful a fiber cable of that size would even fit within the space that we have. Zayo suggested to us that a typical lease rate for something like this is around \$65/mile/month. That’s roughly \$800 per year. It is staff’s opinion that this would not be a reasonable amount. If we did have a conduit available (which we do not), the lease rate for that conduit would need to be at least equitable with the amortized construction costs. Since we don’t have a conduit available to lease to them staff did not determine what a reasonable lease rate would be.

Financial impact:

RCW 35.21.860 (Attachment 2) currently prohibits the City from imposing a franchise fee for permission to use the right-of-way for telephone business purposes. Based on the representations of the ZAYO Group, staff understands that the ZAYO Group will use the right-of-way for telephone business purposes as defined by RCW 82.16.010 (Attachment 3). If this prohibition is removed or does not apply, the ZAYO Group agrees the City will assess a reasonable franchise fee in accordance with the DMMC, so long as local, State or federal law does not otherwise prohibit such fee.

The City may charge for actual administrative expenses incurred that are directly related to this franchise agreement as well as permits and inspections related to work occurring within the right-of-way.

Fees are covered in Section 9 of the Draft Ordinance.

Alternatives:

Adopt the Draft Ordinance as Written

Council could choose to adopt Draft Ordinance 12-191 as written granting a non-exclusive franchise with the ZAYO Group to construct, install, operate, maintain, and repair telecommunication facilities within the public right-of-way of the City of Des Moines.

Adopt the Draft Ordinance as Amended

The Council could adopt suggested amendments to Draft Ordinance 12-191 to discuss with Zayo and consider the final adoption at a later date.

Move to second reading

Council could choose to move Draft Ordinance 12-191 to a second reading.

Do Nothing.

Council could decide to take no action thereby not approving the Franchise Agreement.

Recommendation:

Staff recommends that the City Council enact Draft Ordinance 12-191 on first reading as presented.

Concurrence

The Legal and Planning, Building and Public Works Departments concur.

ENGINEERING DEPARTMENT'S FIRST DRAFT 2/27/2013

DRAFT ORDINANCE NO. 12-191

AN ORDINANCE OF THE CITY OF DES MOINES granting a non-exclusive Franchise to construct, install, operate, maintain, repair, or remove fiber optic cables within the public ways of the City of Des Moines ("City") to Zayo Group, LLC ("Grantee"). The City and Grantee are sometimes hereinafter collectively referred to as the "parties."

WHEREAS, Zayo Group, LLC, a limited liability company organized and existing under the laws of the State of Delaware is a competitive telecommunications company providing telecommunication services, including voice, internet and data services, which desires to occupy the City of Des Moines rights-of-ways to install, construct, operate, and maintain its telecommunications facilities and network for the purpose of providing services to its customers at locations within the City, and

WHEREAS, the Grantee, Zayo Group, LLC, has represented to the City that it provides a telephone business as defined by RCW 82.16.010, and

WHEREAS, Grantee has applied to the City for a non-exclusive telecommunications service franchise to enter, occupy, and use public ways to construct, install, operate, maintain, and repair fiber optic facilities to offer and provide telecommunications service for hire, sale, or resale in the City, and

WHEREAS, the City is authorized by applicable law to grant one or more nonexclusive franchises within the boundaries of the City, and

WHEREAS, the 1934 Communications Act, as amended relating to telecommunications providers recognizes and provides local government authority to manage the public rights-of-way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis, and

WHEREAS, a franchise does not include, and is not a substitute for any other permit, agreement, or other authorization required by the City, including without

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1 limitation, permits required in connection with construction
2 activities in public ways which must be administratively
3 approved by the City after review of specific plans, and
4

5 **WHEREAS**, Grantee shall be responsible for its actual
6 costs in using, occupying and repairing public ways, and
7

8 **WHEREAS**, the City and Grantee desire to effectuate good
9 coordination of the use of the rights-of-way, and
10

11 **WHEREAS**, the City Council finds that the franchise terms
12 and conditions contained in this ordinance are in the public
13 interest; now therefore,
14

15
16 **THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:**
17

18 **Sec. 1. Definitions.**
19

20 (1) **Use of words and phrases.** For the purposes of this
21 Franchise, the following terms, phrases, words, and their
22 derivations will have the meanings given herein. When not
23 inconsistent with the context, words used in the present tense
24 include the future, words in the plural include the singular,
25 and words in the singular include the plural. Words not defined
26 will have the meaning ascribed to those words in the Des Moines
27 City Code (DMMC), or in the federal Communications Act of 1934
28 as amended, unless inconsistent herewith. The headings contained
29 in this Franchise are to facilitate reference only, do not form
30 a part of this Franchise, and shall not in any way affect the
31 construction or interpretation hereof. The words "shall," "will,"
32 and "must" are mandatory, and the word "may" is permissive or
33 directory.
34

35 (2) "Abandonment" means the disconnection by the
36 Grantee of specific Facilities from the telecommunications
37 system.
38

39 (3) "Affiliate" means any Person who owns or controls,
40 is owned by or controlled by, or is under common ownership or
41 control with Grantee.
42

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1 (4) "Cable Act" means the Cable Communications Policy
2 Act of 1984 as amended and as may be amended from time to time
3 during the term of this Franchise (47 U.S.C. § 521 et seq., as
4 amended).

5
6 (5) "Cable service" means the one-way transmission to
7 subscribers of video programming or other programming service
8 and subscriber interaction, if any, which is required for the
9 selection or use of such video programming or other programming
10 service.

11
12 (6) "City Council" means the governing body of the
13 City.

14
15 (7) "Communications" means the transmission, between or
16 among points specified by the user, of information of the user's
17 choosing, without change in the form or content of the
18 information as sent and received.

19
20 (8) "Communications applications fees and charges"
21 includes fees and charges connected to right-of-way management,
22 construction permit, permit design fee, building permit,
23 encroachment permit, inspections and pavement restoration.

24
25 (9) "Communications service" means the offering of
26 communications for a fee directly to the public, or to such
27 classes of users as to be effectively available directly to the
28 public, regardless of the facilities used.

29
30 (10) "Communications system" or "system" means only
31 those facilities necessary for Grantee to provide communications
32 Service.

33
34 (11) "Conduit" means optical cable housing, jackets, or
35 casing, and pipes, tubes, or tiles used for receiving and
36 protecting wires, lines, cables, and communication and signal
37 lines.

38
39 (12) "Costs" means costs, expenses, and other financial
40 obligations of any kind whatsoever.

41

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1 (13) "Dark fiber" means properly functioning optical
2 cable which is not used or available for use by Grantee or the
3 general public.
4

5 (14) "Effective date" means five days following the
6 publication of this Franchise or a summary thereof occurs in an
7 official newspaper of the City as provided by law.
8

9 (15) "Emergency" means a condition of imminent danger to
10 the health, safety, and welfare of property or persons located
11 within the City including, without limitation, damage to persons
12 or property from natural consequences, such as storms,
13 earthquakes, riots or wars.
14

15 (16) "Facilities" means, collectively, any and all
16 telecommunications transmission systems and appurtenances owned
17 by Grantee, now and in the future, in the Franchise Area,
18 including, but not limited to, wire, radio, optical cable,
19 electromagnetic or other similar types of equipment and related
20 appurtenances in any way comprising part of the System.
21

22 (17) "FCC or Federal Communications Commission" means
23 the agency as presently constituted by the United States
24 Congress or any successor agency with jurisdiction over
25 telecommunications service matters.
26

27 (18) "Fiber optic" means a transmission medium of
28 optical fiber cable, along with all associated optronics and
29 equipment, capable of carrying telecommunication service by
30 means of electric light-wave impulses.
31

32 (19) "Franchise area" means the area within the
33 jurisdictional boundaries of the City, including any annexed
34 areas, to be served by Grantee as specified in this Franchise.
35

36 (20) "Gross Revenues" means all gross revenues received
37 by Grantee or its affiliates from the provision of intrastate
38 telephone business activities in the City of Des Moines, as
39 described in Utility Tax below.
40
41

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1 (21) "Incremental costs" means the actual and necessary
2 costs incurred which exceed costs which would have otherwise
3 been incurred.

4 (22) "Optical cable" means wires, lines, cables and
5 communication and signal lines used to convey communications by
6 fiber optics.
7

8 (23) "Open Video System" means a facility consisting of a
9 set of transmission paths and associated signal generation,
10 reception and control equipment that is designed to provide Cable
11 Service which includes video programming and which is provided to
12 multiple subscribers within a community, provided that the Federal
13 Communications Commission has certified that such system complies
14 with 47 CFR 76.1500 et seq.
15

16 (24) "Person" means any individual, firm, partnership,
17 association, joint stock company, trust, corporation, company,
18 governmental entity.
19

20 (25) "Public ways or rights-of-way" includes the
21 surface, the air space above the surface, and the area below the
22 surface of any public street, highway, parkway, circle, lane,
23 alley, sidewalk, boulevard, drive, bridge, tunnel, easement or
24 similar property in which the City holds any property interest or
25 exercises any rights of management or control and which,
26 consistent with the purposes for which it was acquired or
27 dedicated, may be used for the installation, repair, and
28 maintenance of a Telecommunication System. No reference in this
29 Franchise to a public right-of-way shall be deemed to be a
30 representation or guarantee by the City that its interests or
31 other rights in such property are sufficient to permit its use
32 for the installation, repair, and maintenance of a
33 Telecommunication System, and the Grantee shall be deemed to
34 gain only those rights which the City has the undisputed right
35 and power to give. For this Franchise, public ways and rights-
36 of-way are limited to the areas above the ordinary high water
37 mark of Puget Sound.
38

39 (26) "Route map" means a geographic representation of
40 the Grantee's Telecommunication System as it exists within the
41 public right-of-way and within private easements in the
42 Franchise area.
43

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1 (27) "Subscriber" means any Person who or which
2 purchases, leases, rents, obtains or subscribes to
3 Telecommunications Service provided by Grantee by means of or in
4 connection with the Grantee's Telecommunications System.
5

6 (28) "Telecommunications" means the transmission,
7 between or among points specified by the user, of information of
8 the user's choosing, without change in the form or content of
9 the information as sent and received.
10

11 (29) "Telecommunications applications fees and charges"
12 includes fees and charges connected to right-of-way management,
13 construction permit, permit design fee, building permit,
14 encroachment permit, inspections and pavement restoration.
15

16 (30) "Telecommunications service" means the offering of
17 telecommunications for a fee directly to the public, or to such
18 classes of users as to be effectively available directly to the
19 public, regardless of the facilities used.
20

21 (31) "Telecommunications system" or "system" means only
22 those facilities necessary for Grantee to provide
23 Telecommunications Service.
24

25 (32) "Underground facilities" means facilities located
26 under the surface of the ground, other than underground
27 foundations or supports for overhead facilities.
28

29 (33) "Utility poles" means poles, and crossarms,
30 devices, and attachments directly affixed to such poles which
31 are used for the transmission and distribution of electrical
32 energy, signals, or other methods of communication.
33

34 (34) "Wireless Communications Facilities" means the
35 site, wireless communications support structures, antennas,
36 accessory equipment structures, and appurtenances used to
37 transmit, receive, distribute, provide or offer personal
38 wireless communications services. Wireless communications
39 facilities include, but are not limited to antennas, poles,
40 towers, cables, wires, conduits, ducts, pedestals, vaults,
41 buildings, and electronic switching equipment.
42

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1 **Sec. 2. Franchise - Grant of authority.**

2
3 (1) **Use of public rights-of-way.** There is hereby granted
4 to Grantee the right, privilege, to have, acquire, construct,
5 reconstruct, upgrade, repair, maintain, use, and operate in the
6 City a Telecommunication System, and to have, acquire,
7 construct, reconstruct, repair, maintain, use, and operate in,
8 over, under, and along the present and future Public Rights-of-
9 Way of the City all necessary or desirable wires, cables,
10 electronic conductors, underground conduits, vaults, and other
11 structures and appurtenances necessary for the construction,
12 maintenance, and operation of a Telecommunication System in the
13 Franchise Area. Grantee or Affiliates shall not install or
14 construct facilities within the City's Public Rights-of-Way
15 which are not authorized by this Franchise or lawfully allowed
16 by applicable local, state, or federal law.
17

18 (2) **Additional services/compensation.** By granting this
19 Franchise, the City does not waive and specifically retains any
20 right to regulate and receive compensation as allowed by law for
21 services offered over the Telecommunication System which are
22 not Telecommunication Services. Upon request, Grantee shall
23 inform City of any non-Telecommunication and/or
24 Telecommunication Services offered over the Telecommunication
25 System of which Grantee or its Affiliates are aware. By
26 accepting this Franchise, Grantee does not waive any right it
27 has under law to challenge the City's requirement for
28 authorization to provide non-Telecommunication Services.
29

30 (3) **Responsibility for costs.** Except as expressly
31 provided otherwise, any act that Grantee is required to perform
32 under this Franchise shall be performed at Grantee's cost. If
33 Grantee fails to perform work that it is required to perform
34 within the time provided for performance or a cure period, the
35 City may perform the work and bill the Grantee for documented
36 costs. The Grantee shall pay the amounts billed within thirty
37 (30) days. The parties agree that any amounts paid pursuant to
38 this Section are not Franchise fees and fall within one or more
39 of the exceptions to the definition of Franchise fee under
40 federal law. Nothing in this section is intended to affect in
41 any way (by expansion or contraction) Grantee's rights under
42 applicable law governing rates.

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1
2 (4) **Publication costs.** Any and all costs of
3 publication related to this Franchise which may be required by
4 law or action of City Council shall be borne by Grantee. Any
5 payments made by the City under this provision are to be
6 reimbursed to the City within thirty (30) days of Grantee's
7 receipt of the invoice.

8
9 (5) **Franchise non-exclusive.** The rights, privileges of
10 any franchise granted pursuant to chapter 20.04 of the Des
11 Moines Municipal Code (DMMC) shall be nonexclusive. This
12 Franchise shall not be construed as any limitation upon the right
13 of the City, through its proper officers, to grant to other
14 persons or corporations, including itself, rights, privileges or
15 authority the same as, similar to or different from the rights,
16 privileges or authority herein set forth, in the same or other
17 streets and public ways by Franchise, permit or otherwise. The
18 City shall not authorize or permit any Person providing
19 Communication Services to enter into the Public Rights-of-Way in
20 any part of the City on terms or conditions that, when viewed
21 collectively, are generally more favorable or less burdensome to
22 such Person than those applied to the Grantee pursuant to this
23 Franchise.

24
25 (6) Nothing in this Franchise excuses Grantee of its
26 obligation to identify its facilities and proposed facilities
27 and their location or proposed location in the public ways and
28 to obtain use and/or development authorization and permits from
29 the City before entering, occupying, or using public ways to
30 construct, install, operate, maintain, repair, or remove such
31 facilities.

32
33 (7) Nothing in this Franchise excuses Grantee of its
34 obligation to comply with applicable codes, rules, regulations,
35 and standards subject to verification by the City of such
36 compliance.

37
38 (8) Nothing in this Franchise shall be construed to
39 limit taxing authority or other lawful authority to impose
40 charges or fees, or to excuse Grantee of any obligation to pay
41 lawfully imposed charges or fees.

42
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1 (9) Nothing in this Franchise grants authority to
2 Grantee to impair or damage any City property, public way, other
3 ways or other property, whether publicly or privately owned.
4

5 (10) Nothing in this Franchise shall be construed to
6 create a duty upon the City to be responsible for construction
7 of facilities or to modify public ways to accommodate Grantee's
8 facilities.
9

10 (11) Nothing in this Franchise shall be construed to
11 create, expand, or extend any liability of the City to any third
12 party user of Grantee's facilities or to otherwise recognize or
13 create third party beneficiaries to this Franchise.
14

15 (12) Nothing in this Franchise shall be construed to
16 permit Grantee to unlawfully enter or construct improvements
17 upon the property or premises of another.
18

19 (13) Nothing in this Franchise grants authority to
20 Grantee to enter, occupy or use City property, nor to install or
21 construct facilities within the City's Public Rights-of-Way
22 which are not authorized by this Franchise or lawfully allowed
23 by applicable local, state, or federal law.
24

25 (14) Nothing in this Franchise grants authority to
26 Grantee to provide or offer cable service as cable service is
27 defined in 47 U.S.C. § 522(6), Open Video System services, or
28 Internet Protocol Television ("IPTV") Service. This Franchise
29 does not relieve Grantee of any obligation it may have to obtain
30 from the City separate authorization to provide Cable or Open
31 Video System services, or relieve Grantee of its obligation to
32 comply with any such authorizations that may be lawfully
33 required.
34

35 (15) Grantee may use the wired facilities authorized by
36 this Franchise for the transmission of telecommunications
37 service only as expressly provided in this Franchise.
38

39 **Sec. 3. Term evaluation, and renewal.**
40

41 (1) This Franchise shall run for a period of ten (10)
42 years unless extended or terminated sooner as hereinafter

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1 provided. This Franchise shall commence after the effective
2 date of this Franchise and in accordance with the written
3 acceptance requirements herein.

4
5 (2) Should the Parties fail to formally renew this
6 Franchise prior to the expiration of the ten (10) year renewal
7 period, the Franchise shall automatically continue on a month
8 to month period until renewed or either party gives written
9 notice at least one hundred and eighty (180) days in advance of
10 intent not to renew the Franchise.

11
12 **Sec. 4. Compliance with City, State, and Federal**
13 **Laws.**

14
15 (1) **Compliance with applicable laws.** Grantee shall at
16 all times comply with all laws, rules, and regulations of the
17 City, state and federal governments and any administrative
18 agencies thereof which are applicable to all businesses in the
19 City and/or all users of the Public Rights-of-Way. The express
20 provisions of this Franchise constitute a valid and enforceable
21 contract between the parties.

22
23 (2) **Other ordinances.** This Franchise and all rights
24 and privileges granted hereunder are subject to, and the Grantee
25 must exercise all rights in accordance with, applicable law, as
26 amended over the Franchise term. However, this Franchise is a
27 contract, subject only to the City's exercise of its police
28 powers and applicable law, and in case of any conflict between
29 the express terms of this Franchise and any ordinance enacted by
30 the City, this Franchise shall govern. This Franchise does not
31 confer rights or immunities upon the Grantee other than as
32 expressly provided herein. The grantee reserves the right to
33 challenge provisions of any ordinance that conflicts with its
34 contractual rights, and does not waive its right to challenge
35 the lawfulness of a particular enactment, including on the
36 grounds that a particular action is an unconstitutional
37 impairment of contractual rights.

38
39 (3) **Police power of the City.** Construction,
40 maintenance, and operation of Grantee's Telecommunication System
41 and all property of Grantee subject to the provisions of this
42 Franchise shall be subject to all lawful police powers, rules, and

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1 regulations of the City. The Grantee shall be subject to the
2 police power of the City to adopt and enforce general ordinances
3 necessary to protect the safety and welfare of the general public
4 in relation to the rights granted in the Franchise Area. The
5 City reserves the right to use, occupy and enjoy any Public
6 rights-of-way or other public places for any purpose, including
7 without limitation, the construction of any water, sewer or
8 storm drainage system, installation of traffic signal systems,
9 intelligent transportation systems, street lights, trees,
10 landscaping, bicycle paths and lanes, equestrian trails,
11 sidewalks, other pedestrian amenities, other City services, or
12 uses not limited to the enumerated items as listed herein, and
13 other public street improvement projects. The City shall have
14 the power at any time to order and require Grantee to remove or
15 abate any pole, line, tower, wire, cable, guy, conduit,
16 electric conductor, or any other structure or facility that is
17 dangerous to life or property. In the event Grantee, after
18 written notice, fails or refuses to act within fifteen (15)
19 days of such written notice, City shall have the power to
20 remove or abate the same at the expense of Grantee, all
21 without compensation or liability for damages to Grantee
22 except in instances when the damage is caused by negligence
23 or willful misconduct of the City or its agents. Any conflict
24 between the terms or conditions of this Franchise and any other
25 present or future exercise of the City's police powers will be
26 resolved in favor of the exercise of the City's police power.

27
28 (4) **Notification in the event of preemptive law.**
29 Grantee shall use its best efforts to notify the City of any
30 change in law that materially affects Grantee's rights or
31 obligations under this Franchise.

32
33 (5) **Amending franchise to conform to subsequent law.**
34 The City reserves the right at any time to amend this Franchise
35 to conform to any hereafter enacted, amended, or adopted
36 federal or state statute or regulation relating to the public
37 health, safety, and welfare, or relating to roadway regulation, or
38 a City Ordinance enacted pursuant to such federal or state
39 statute or regulation upon providing Grantee with thirty (30)
40 days written notice of its action setting forth the full text of
41 the amendment and identifying the statute, regulation, or
42 ordinance requiring the amendment. Said amendment shall become

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1 automatically effective upon expiration of the notice period
2 unless, before expiration of that period, the Grantee makes a
3 written call for negotiations over the terms of the amendment.
4 If the parties do not reach agreement as to the terms of the
5 amendment within thirty (30) days of the call for negotiations,
6 the City may enact the proposed amendment, by incorporating the
7 Grantee's concerns to the maximum extent the City deems possible.
8

9 **Sec. 5. Conditions of public rights-of-way**
10 **occupancy.**

11
12 (1) **Use permits and/or development authorization.**
13 Grantee shall obtain use, right-of-way construction, and/or
14 development authorization and required permits from the City and
15 all other appropriate regulatory authorities prior to
16 constructing or installing facilities or performing other work
17 in the franchise area. Grantee shall provide the following
18 information for all facilities that it proposes to construct or
19 install:
20

21 (a) Engineering plans, specifications and a
22 network map of the proposed facilities and their relation to
23 existing facilities, in a format and media requested by the City
24 in sufficient detail to identify:
25

26 (i) The location and route of the
27 proposed facilities;
28

29 (ii) When requested by the City, the
30 location of all overhead and underground public utility,
31 communication, cable, water, sewer, drainage and other
32 facilities in the public way along the proposed route;
33

34 (iii) When requested by the City, the
35 location(s), if any, for interconnection with the communication
36 facilities of others;
37

38 (iv) The specific trees, structures,
39 improvements, facilities and obstructions, if any, that Grantee
40 proposes to temporarily or permanently alter, remove or
41 relocate.
42

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1 (b) If Grantee is proposing to install overhead
 2 facilities, the Grantee shall provide evidence that the proposed
 3 overhead installation is in compliance with all applicable
 4 provisions of the Des Moines Municipal Code. The Grantee shall
 5 also provide evidence of Grantee's authorization to use each
 6 utility pole along the proposed route together with any
 7 conditions of use imposed by the pole owner(s) for each pole,
 8 and written acknowledgement by the Grantee that if the overhead
 9 facilities are subsequently relocated underground, the Grantee
 10 shall relocate underground at no cost to the City.

11
 12 (c) If Grantee is proposing to install
 13 underground facilities in existing ducts or conduits within the
 14 public ways, information in sufficient detail to identify:

15
 16 (i) Evidence of ownership or
 17 authorization to use such ducts or conduits;

18
 19 (ii) Conditions of use imposed by the
 20 owner(s) of the ducts or conduits;

21
 22 (iii) If known to Grantee or reasonably
 23 ascertainable to Grantee, the total capacity of such ducts or
 24 conduits; and

25
 26 (iv) If known to Grantee or reasonably
 27 ascertainable to Grantee, the amount of the total capacity
 28 within such ducts or conduits which will be occupied by
 29 Grantee's facilities.

30
 31 (d) If Grantee is proposing to install
 32 underground facilities in new ducts or conduits within the
 33 public ways:

34
 35 (i) The location proposed for new ducts
 36 or conduits;

37
 38 (ii) The total capacity of such ducts or
 39 conduits; and

40
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1 (iii) The initial listing of co-located
2 facilities located within Grantee constructed or installed ducts
3 or conduits.

4
5 (e) A preliminary construction schedule and
6 completion date together with a traffic control plan in
7 compliance with the Manual on Uniform Traffic Control Devices
8 (MUTCD) for any construction.

9
10 (f) Information to establish that the applicant
11 has obtained all other governmental approvals and permits to
12 construct and operate the facilities.

13
14 (g) Such other documentation and information
15 regarding the facilities requested by the City.

16
17 (h) The requirements of this section do not
18 apply to installation of optical cable necessary to connect a
19 customer of Grantee to a previously approved facility; provided
20 that neither excavation nor trenching in the public right-of-way
21 is required; that the optical cable does not cross a distance of
22 more than eighty (80) feet from its point of connection to the
23 approved facility and the point where it exits the public right-
24 of-way; that the optical cable connection meets or exceeds all
25 applicable technical standards required by law; that the optical
26 cable connection is durable and installed in accordance with
27 good engineering, construction, and installation practices and
28 does not interfere with the public use of the public ways, or
29 adversely affect public health, safety or welfare; that the
30 optical cable connection is constructed and installed to conform
31 to all federal, state, local, and industry codes, rules,
32 regulations, and standards; and that the optical cable
33 connection does not damage or impair the City's public way or
34 property.

35
36 (i) The requirements of this section do not
37 apply to repair or maintenance of a previously approved overhead
38 facility; provided that the location and size of the previously
39 approved facility is not materially changed; that no additional
40 new facilities are constructed or installed; that the repair or
41 maintenance activities are conducted in accordance with good
42 engineering, repair, and maintenance practices and do not

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1 interfere with the public use of the public ways, or adversely
2 affect public health, safety, or welfare; that maintenance or
3 repair activities conform to all federal, state, local, and
4 industry codes, rules, regulations, and standards; and that the
5 repair or maintenance activities comply with the City Code.

6
7 (2) **Construction and installation requirements.**
8

9 (a) Grantee's System shall be constructed and
10 maintained in such manner as not to interfere with sewers, water
11 pipes or any other property of City, or with any other pipes,
12 wires, conduits, pedestals, structures or other facilities that
13 may have been placed in Rights-of-Way by, or under, City's
14 authority.
15

16 (b) All facilities shall be constructed and
17 installed in such manner and at such points so as not to
18 inconvenience City or public use of the public ways or to
19 adversely affect the public health, safety or welfare and in
20 conformity with plans approved by the City, except in instances
21 in which deviation may be allowed by the City.
22

23 (c) Interference with use of streets. When
24 installing, locating, constructing or maintaining Facilities,
25 the Grantee shall not interfere with the use of any street to
26 any greater extent than is necessary, and shall leave the
27 surface and subsurface of any such street in as good condition
28 as it was prior to performance by the Grantee of such work, to
29 the satisfaction of the City.
30

31 (d) The Grantee shall apply for, obtain, and
32 comply with the terms of all permits required under Des Moines
33 Municipal Code sections regulating construction and maintenance
34 within the right-of-way for any work done upon Grantee
35 Facilities. Grantee shall comply with all applicable City,
36 State, and Federal codes, rules, regulations, and orders in
37 undertaking such work, which shall be done in a thorough and
38 proficient manner. Grantee shall have the sole responsibility
39 for obtaining, at its own cost and expense, all permits,
40 licenses, or other forms of approval or authorization necessary
41 to construct, operate, maintain or repair or expand the System,
42 and to construct, maintain and repair any part thereof.

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1
2 (e) The Telecommunications System constructed,
3 maintained and operated by virtue of this Franchise, shall be so
4 constructed, maintained and operated in accordance with all
5 applicable engineering codes adopted or approved by the City,
6 State of Washington, federal government and/or engineering
7 profession and in accordance with any applicable Statutes of the
8 State of Washington, rules and regulations of the applicable
9 Washington regulatory authority, Ordinances of the City or of
10 any other governmental regulatory commission, board or agency
11 having jurisdiction over Grantee.

12
13 (f) The construction plans and Grantee's
14 operations shall conform to all federal, state, local, and
15 industry codes, rules, regulations, standards and laws. Grantee
16 must cease work immediately if the City determines that Grantee
17 is not in compliance with such codes, rules, regulations, or
18 standards, and may not begin or resume work until the City
19 determines that Grantee is in compliance. The City shall not be
20 liable for any costs arising out of delays occurring as a result
21 of such work stoppage.

22
23 (g) Neither approval of plans by the City nor
24 any action or inaction by the City shall relieve Grantee of any
25 duty, obligation, or responsibility for the competent design,
26 construction, and installation of its facilities. Grantee is
27 solely responsible for the supervision, condition, and quality
28 of the work done, whether it is performed by itself or by its
29 contractors, agents, or assigns.

30
31 (h) Except as to emergency repairs, Grantee
32 shall, prior to excavating within any street, alley or other
33 public place, and installing any conduit, overhead cable or
34 equipment therein, file with the City Manager or designee plans
35 and specifications thereof showing the work to be done, the
36 location and nature of the installation to be made, repaired or
37 maintained, and a schedule showing the times of beginning and
38 completion and shall secure a permit from the City before
39 proceeding with any such work. The Grantee shall conform to all
40 requirements of the City Code, as it currently exists or as it
41 may be amended.

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1 (i) All construction and/or maintenance work as
2 provided herein shall be performed in conformity with the plans
3 and specifications filed with the City and with the permit or
4 permits issued, except in instances in which deviation may be
5 allowed thereafter in writing pursuant to an application by the
6 Grantee.

7
8 (j) Excavation work requiring a permit from the
9 City shall only commence upon the issuance of applicable permits
10 by the City, which permits shall not be unreasonably withheld or
11 delayed. However, in the event of an emergency requiring
12 immediate action by Grantee for the protection of the
13 Facilities, City property or other persons or property, Grantee
14 may proceed without first obtaining the normally required
15 permits. In such event Grantee must (1) take all necessary and
16 prudent steps to protect, support, and keep safe from harm the
17 Facilities, or any part thereof; City property; or other persons
18 or property, and to protect the public welfare, health and
19 safety; and (2) as soon as possible thereafter, must obtain the
20 required permits and comply with any mitigation requirements or
21 other conditions in the after-the-fact permit.

22
23 (k) In the event of an emergency, the Grantee
24 may commence such repair and emergency response work as
25 required under the circumstances, provided that the Grantee
26 shall notify the City Manager or designee in writing as promptly
27 as possible, before such repair or emergency work commences,
28 or as soon thereafter as possible, if advance notice is not
29 practical. The City may act, at any time, without prior
30 written notice in the case of emergency, but shall notify the
31 Grantee in writing as promptly as possible under the
32 circumstances.

33
34 (l) Unless such condition or regulation is in
35 conflict with a federal or state requirement, the City may
36 condition the granting of any permit or other approval that is
37 required under this Franchise, in any manner reasonably
38 necessary for the safe use and management of the public right-
39 of-way or the City's property including, by way of example and
40 not limitation, maintaining proper distance from other
41 utilities, protecting the continuity of pedestrian and vehicular

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1 traffic and Rights-of-Way improvements, private facilities and
2 public safety.

3
4 (m) New facilities shall be constructed in
5 accordance with the following terms and conditions:

6
7 (i) Facilities shall be installed within
8 the Grantee's existing underground duct or conduit whenever
9 excess capacity exists.

10
11 (ii) Overhead facilities shall be
12 installed on pole attachments to existing utility poles only,
13 and then only if space is available.

14
15 (iii) Whenever all existing telephone and
16 electric utilities are located underground within public ways,
17 the Grantee must also locate its facilities underground.

18
19 (iv) Whenever all new or existing
20 telephone and electric utilities are located or relocated
21 underground within public ways, the Grantee that currently
22 occupies the same public ways shall concurrently relocate its
23 Facilities underground at its own expense.

24
25 (n) Display of right-of-way permit. The Grantee
26 shall maintain a copy of the construction permit and approved
27 plans at the construction site, which shall be displayed and
28 made available for inspection by the City Manager or designee at
29 all times when construction work is occurring.

30
31 (o) Construction schedule. The Grantee shall
32 submit a written construction schedule to the City Manager or
33 designee prior to commencing any work in or about the public
34 ways in accordance with City regulations.

35
36 (p) Locator service compliance. The Grantee,
37 before commencing any construction in the public ways, shall
38 call for location in accordance with RCW 19.122.

39
40 (q) Placement. All optical cable, equipment,
41 and structures shall be located and placed in accordance with a
42 valid permit so as to cause minimum interference with the rights

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1 and reasonable convenience of adjacent property owners. All
2 Facilities shall be maintained in a safe condition, and in good
3 order and repair. Suitable barricades, flags, lights, flares,
4 or other devices shall be used during construction activities at
5 such times and places as are reasonably required for the safety
6 of the public. Any poles or other fixtures placed in any street
7 by the Grantee shall be placed in such manner as not to
8 interfere with the usual travel on such public way. Exact
9 placement within the right-of-way shall be coordinated with the
10 City and other utilities in order to provide for maintenance and
11 future expansion, as well as, for the safety of the public. The
12 City reserves the reasonable right as to final placement.

13
14 (r) Completion of construction. The Grantee
15 shall promptly complete all construction activities so as to
16 minimize disruption of the public ways and other public and
17 private property. All construction work authorized by a permit
18 within public ways, including restoration, must be completed
19 within 90 calendar days of the date of issuance or at such other
20 interval as the City may specify in writing upon issuance of the
21 permit.

22
23 (s) Non-complying work. Upon order of the City
24 Manager or designee, all work which does not comply with the
25 provisions of this Franchise shall be brought into compliance
26 with this Franchise.

27
28 (t) The City reserves the right to install, and
29 permit to be installed, sewer, electric, phone, gas, water and
30 other pipelines, cables, conduits and related appurtenances and
31 to do, or permit to be done, any underground or overhead work
32 in, across, along, over or under a public way or other public
33 place occupied by Grantee. The City also reserves the right to
34 construct new streets and public utilities and to alter the
35 design of existing streets and public utilities. In performing
36 such work, the City shall not be liable to Grantee for any
37 damage, but nothing herein shall relieve any other person or
38 entity from the responsibility for damages to Grantee's
39 Facilities. The City will use its best efforts to provide
40 Grantee with reasonable advance notice of plans by other persons
41 to open the public ways.

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1
2 (3) **Coordination of construction and installation**
3 **activities.**

4 (a) Grantee shall coordinate its construction
5 and installation activities and other work with the City and all
6 other users of the public ways, including utilities located
7 within the Franchise Area.
8

9 (b) All construction or installation locations,
10 activities and schedules shall be coordinated, as ordered by the
11 City, to minimize public inconvenience, disruption or damages.
12

13 (c) At least forty-eight (48) hours prior to
14 entering a public way to perform construction and installation
15 activities or other work, Grantee shall give notice, at its
16 cost, to owners and occupiers of property adjacent to such
17 public ways indicating the nature and location of the work to be
18 performed. Such notice shall be physically posted by door
19 hanger. Grantee shall make a good faith effort to comply with
20 the property owner or occupier's preferences, if any, on
21 location or placement of underground facilities, consistent with
22 sound engineering practices.
23

24 (d) The City shall give reasonable advance
25 notice to Grantee of plans to open public ways for construction
26 or installation of facilities; provided, however, the City shall
27 not be liable for damages for failure to provide such notice.
28 When such notice has been given, Grantee shall provide
29 information requested by the City regarding Grantee's future
30 plans for use of the public way to be opened. When notice has
31 been given, Grantee may only construct or install facilities
32 during such period that the City has opened the public way for
33 construction or installation.
34

35 (4) **Relocation.** Grantee shall relocate its facilities
36 as ordered by the City Manager or designee at no expense or
37 liability to the City when there is construction, alteration,
38 repair or improvement of a public way. Grantee shall complete
39 the relocation by the date specified by the City. Grantee
40 agrees to protect and save harmless the City from any customer
41 or third-party claims for service interruption or other losses
42 in connection with any such change or relocation. Grantee shall

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1 relocate its facilities at its own expense except where the
2 Grantee had paid for the relocation costs of the same facilities
3 at the request of the City within the past five (5) years, the
4 Grantee's share of the cost of relocation will be paid by the
5 City if it requested the subsequent relocation.

6
7 (5) **Temporary removal, adjustment or alteration of**
8 **facilities.**
9

10 (a) Grantee shall temporarily remove, adjust or
11 alter the position of its facilities at its cost at the request
12 of the City for public projects, events, or other public
13 operations or purposes.

14
15 (b) Grantee shall locate the precise horizontal
16 and vertical location of its underground facilities by
17 excavating upon request of the City. If the City's request is
18 in support of a City project, the Grantee shall complete this
19 service within 14 days at no cost to the City. If the City's
20 request is in support of a third party's project, the Grantee
21 shall be entitled to recover its cost from the project sponsor.

22
23 (c) If any person requests permission from the
24 City to use a public way for the moving or removal of any
25 building or other object, the City shall, prior to granting such
26 permission, require such person or entity to make any necessary
27 arrangements with Grantee for the temporary removal, adjustment
28 or alteration of Grantee's facilities to accommodate the moving
29 or removal of said building or other object. In such event,
30 Grantee shall, at the cost of the person desiring to move or
31 remove such building or other object, remove, adjust or alter
32 the position of its facilities which may obstruct the moving or
33 removal of such building or other object, provided that:

34
35 (i) The moving or removal of such
36 building or other object which necessitates the temporary
37 removal, adjustment or alteration of facilities shall be done at
38 a reasonable time and in a reasonable manner so as to not
39 unreasonably interfere with Grantee's business, consistent with
40 the maintenance of proper service to Grantee's customers;
41

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1 (ii) Where more than one route is
2 available for the moving or removal of such building or other
3 object, such building or other object shall be moved or removed
4 along the route which causes the least interference with the
5 operations of Grantee, in the sole discretion of the City;
6

7 (iii) The person obtaining such permission
8 from the City to move or remove such building or other object
9 may be required to indemnify and save Grantee harmless from any
10 and all claims and demands made against it on account of injury
11 or damage to the person or property of another arising out of or
12 in conjunction with the moving or removal of such building or
13 other object, to the extent such injury or damage is caused by
14 the negligence of the person moving or removing such building or
15 other object or the negligence of the agents or employees of the
16 person moving or removing such building or other object; and
17

18 (iv) Completion of notification
19 requirements by a person who has obtained permission from the
20 City to use a public way for the moving or removal of any
21 building or other object shall be deemed to be notification by
22 the City.
23

24 (d) The City may require Grantee to temporarily
25 remove, adjust or alter the position of Grantee's facilities as
26 the City may reasonably determine to be necessary at no cost to
27 the City for work deemed needed by the City in the Rights-of-
28 Way. The City shall not be liable to Grantee or any other party
29 for any direct, indirect, consequential, punitive, special or
30 other damages suffered as a direct or indirect result of the
31 City's actions.
32

33 (e) The temporary removal, adjustment or
34 alteration of the position of Grantee's facilities shall not be
35 considered relocation for any purpose whatsoever.
36

37 (6) **Tree trimming.** The Grantee shall have the authority
38 to trim trees or other natural growth on public property or which
39 overhang streets, alleys, sidewalks and public ways of the City
40 so as to prevent the branches of such trees from coming in
41 contact with the Grantee's wires, cables or other equipment
42 that may be damaged due to continued contact. Grantee takes

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1 full responsibility for removing debris when the work is
2 complete. All trimming is to be done at the sole expense and
3 responsibility of Grantee.

4
5 Trimming of trees and shrubbery within or overhanging the public
6 ways to prevent contact with Grantee's Facilities shall be done
7 in such a manner to cause the minimum amount of damage to trees
8 and shrubs. If in the City's determination, trees are
9 excessively damaged as a result of the work undertaken by or on
10 behalf of Grantee, Grantee shall pay the City, within 30 days of
11 submission of a statement by the City, the reasonable cost of
12 any treatment required to preserve a tree or shrub or the cost
13 for removal and replacement of the tree or shrub with
14 landscaping of equal value or the value of the tree or shrub
15 prior to the damage or removal, as determined by the City
16 Manager or designee.

17
18 Any trimming or removal of trees or shrubs shall be done in full
19 compliance with the City's Ordinances and all other laws or
20 regulations of the City.

21
22 (7) **Underground installation.**

23
24 (a) The parties agree that this Franchise does
25 not limit the City's authority under federal law, state law, or
26 local ordinance, to require the undergrounding of utilities.

27
28 (b) Whenever the City requires the
29 undergrounding of aerial utilities in the Franchise Area, the
30 Grantee shall underground the Grantee Facilities in the manner
31 specified by the City Manager or designee at no expense or
32 liability to the City. Where other utilities are present and
33 involved in the undergrounding project, Grantee shall only be
34 required to pay its fair share of common costs borne by all
35 utilities, in addition to the costs specifically attributable to
36 the undergrounding of Grantee Facilities. Common costs shall
37 include necessary costs for common trench excavation, backfill,
38 and restoration, and utility vaults. Fair share shall be
39 determined in comparison to the total number and size of all
40 other utility facilities being undergrounded.

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1 (c) Grantee will maintain membership in good
2 standing with the Utility Coordinating Council One Call Center,
3 or other similar or successor organization designated to
4 coordinate underground equipment locations and installations.
5 Grantee shall abide by chapter 19.122 RCW (Washington State's
6 "Underground Utilities" statutes) and will further comply with
7 and adhere to local procedures, customs and practices relating
8 to the one call locator service program.
9

10 (8) **Ducts and conduits.**
11

12 (a) If the Grantee is constructing underground
13 conduit for its own use, the City may require the Grantee to
14 construct excess conduit capacity in the public ways, provided
15 that the City enters into a contract with the Grantee consistent
16 with RCW 80.36.150. The contract rates to be charged should
17 recover the incremental costs of the Grantee, (calculated as the
18 difference between what the Grantee would have paid for the
19 construction of its conduit and the additional cost only of
20 construction of the excess conduit). If the City makes the
21 additional conduit available to any other entity for the
22 purposes of providing telecommunications service or cable
23 service for hire, sale, or resale to the general public, the
24 rates to be charged, as set forth in the contract with the
25 Grantee shall recover at least the fully allocated costs of the
26 Grantee. The Grantee shall state both contract rates in the
27 contract. The City shall inform the Grantee of the use, and any
28 change in use, of the requested conduit and related access
29 structures, if any, to determine the applicable rate to be paid
30 by the City.
31

32 (b) The City shall not require that the
33 additional conduit space be connected to the access structure
34 and vaults of the Grantee.
35

36 (c) Except as expressly provided in this
37 section, Grantee shall not charge the City for any costs, of any
38 kind whatsoever, for facilities provided by Grantee in
39 accordance with this section.
40

41 (9) **Location of Grantee Facilities.**
42

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1 (a) From time to time, the City, or its
2 representatives, may request identification of the specific
3 location of Grantee System facilities. The Grantee agrees to
4 respond to such request within forty-eight (48) hours of the
5 receipt of the request. In the event that Grantee cannot locate
6 such information within forty-eight (48) hours, Grantee shall
7 notify the City. If Grantee fails to notify the City of its
8 facilities locations within forty eight (48) hours, and damage
9 is caused to Grantee's facilities as a direct result, the
10 Grantee shall hold the City harmless from all liability, damage,
11 cost or expense resulting from the City's actions in this regard
12 unless such damage was caused by the willful misconduct of the
13 City or its agents.

14
15 (b) Report of underground facilities. From time
16 to time the City may require to design or construct right-of-way
17 improvements in a specific area, the City or its designee may
18 require the Grantee to submit a report of existing underground
19 system facilities for a specific area of the City that will be
20 impacted as a result of a planned right-of-way improvement.
21 Within thirty (30) days after receipt by the Grantee of a
22 request from the City or its designee, the Grantee shall submit
23 a report of underground system facilities that shall comply with
24 the following provisions:

25
26 (i) Certification by an engineer licensed
27 in the State of Washington employed by the Grantee that the
28 report accurately depicts the location of all system facilities,
29 including drop service lines to individual subscribers, if any.
30 The accuracy of this report shall be noted based upon the
31 capability of the locating equipment used.

32
33 (ii) The accurate depth of the underground
34 facility, as may be available based upon the capability of the
35 locating device used. The accuracy of this information shall be
36 noted.

37
38 (iii) Submittals shall be provided in
39 hardcopy, and if available, electronically as an AutoCAD or
40 ArcView file.

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1 (iv) The City and Grantee recognize the
2 importance of making best efforts to communicate during the
3 planning and construction phases of right-of-way improvement
4 projects. To that end, the City and Grantee agree to work
5 cooperatively and to be reasonable and timely in requesting and
6 providing necessary information. In the event the City
7 reasonably determines that more precise information is needed
8 for a specific aspect of a right-of-way project, the Grantee
9 agrees to take the necessary steps to provide such precise
10 information within thirty (30) days of receipt of request. If
11 it is necessary for the Grantee to pot-hole or excavate and
12 restore portions of the right-of-way to respond to the City's
13 information request, the Grantee agrees to take such steps at
14 its expense, and the City agrees to waive all permitting and
15 inspection fees therefore.

16
17 (c) Within sixty (60) days of the effective date
18 of this Franchise, Grantee shall provide the City with a current
19 route map of the Telecommunication System located within the
20 City. Upon City request, but no more often than once each year
21 during the term of this Franchise, the Grantee shall provide the
22 City with an updated route map showing the changes that have
23 occurred in the Telecommunication System.

24
25 (d) Grantee agrees to obtain facilities location
26 information from other users of the Public Rights-of-Way prior
27 to Grantee's construction, reconstruction, maintenance,
28 operations and repair of the Grantee's System facilities.

29
30 (10) **Removal and abandonment of facilities.** In the
31 event that the use of any part of the Grantee's system is
32 discontinued for any reason for a continuous period of twelve
33 (12) months, or in the event such system equipment or facilities
34 have been installed in any public ways or rights-of-way without
35 complying with the requirements of this Franchise or other City
36 ordinances, or the Franchise has been terminated or has expired,
37 upon receiving ten (10) business days prior written demand from
38 the City, the Grantee shall promptly remove, at its expense,
39 such affected equipment or Facilities, other than any which the
40 City may permit to be abandoned in place, from the public ways
41 of rights-of-way. Said removal shall be completed within one-
42 hundred eighty (180) days from receipt of the City's written

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1 demand. In the event of such removal, the Grantee shall
2 promptly restore the public ways or rights-of-way from which
3 such property has been removed to a condition satisfactory to
4 the City. Any affected equipment or facilities of the Grantee
5 remaining in place one-hundred eighty-one (181) days after the
6 termination or expiration of the Franchise, and upon written
7 notice from the City, shall be considered permanently abandoned.
8 The City may extend such time not to exceed an additional ninety
9 (90) days with prior written request from the Grantee, and such
10 request shall not be unreasonably withheld. Any equipment or
11 facilities of the Grantee that the City allows to be abandoned
12 in place shall be abandoned in such manner as the City shall
13 prescribe. Upon permanent abandonment of the equipment or
14 facilities of the Grantee in place, the equipment or Facilities
15 shall become that of the City, and the Grantee shall submit to
16 the City Clerk an instrument in writing, to be approved by the
17 City Attorney, transferring to the City the ownership of such
18 equipment or facilities. None of the foregoing affects or
19 limits the Grantee's rights to compensation for an involuntary
20 abandonment of its equipment or facilities under state or
21 federal law.

22
23 (11) **Safety and maintenance requirements.**
24

25 (a) All work authorized and required under this
26 Franchise will be performed in a safe, thorough, and workmanlike
27 manner.
28

29 (b) Grantee, in accordance with applicable
30 federal, state, and local safety requirements shall, at all
31 times, employ ordinary care and shall use commonly accepted
32 methods and devices for preventing failures and accidents which
33 are likely to cause damage, injury, or nuisance to occur. All
34 facilities, wherever situated or located, shall at all times be
35 kept in a good, safe, and suitable condition. If a violation of
36 a safety code or other applicable regulation is found to exist
37 by the City, the City may, after discussions with Grantee,
38 establish a reasonable time for Grantee to make necessary
39 repairs. If the repairs are not made within the established time
40 frame, the City may make the repairs itself at the cost of the
41 Grantee or have them made at the cost of Grantee.
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1 (c) If Grantee fails to commence, pursue or
2 complete any work required by law, this Franchise or any
3 applicable permit to be done in any public way within the time
4 prescribed and to the satisfaction of the City, the City may at
5 its discretion cause the work to be done. Grantee shall pay to
6 the City the reasonable costs of the work in an itemized report
7 provided by the City to Grantee within 30 days after receipt of
8 such report.

9
10 (d) Grantee, and any person acting on its
11 behalf, shall provide a traffic control plan that conforms to
12 the latest edition of the Manual of Uniform Traffic Control
13 Devices (MUTCD). Said plan shall use suitable barricades,
14 flags, flagmen, lights, flares, and other measures as required
15 for the safety of all members of the general public during the
16 performance of work, of any kind whatsoever, in public ways to
17 prevent injury or damage to any person, vehicle, or property.
18 Grantee shall implement and comply with its approved traffic
19 control plan during execution of its work. The traffic control
20 plan shall be developed and kept on site in Grantee's possession
21 for all work impacting vehicular and pedestrian traffic. Traffic
22 control plans may be modified as necessary by the Grantee to
23 achieve effective and safe traffic control. All road closures
24 requested by Grantee require a detour plan submitted at least 48
25 hours in advance and prior City approval unless there is an
26 emergency.

27
28 (e) Grantee shall maintain its facilities in
29 proper working order. Grantee shall restore its facilities to
30 proper working order upon receipt of notice from the City that
31 facilities are not in proper working order. The City may, after
32 discussions with Grantee, establish a reasonable time for
33 Grantee to restore its facilities to proper working order. If
34 the facilities are not restored to proper working order within
35 the established time frame, the City may restore the facilities
36 to proper working order or have them restored at the cost of
37 Grantee.

38
39 (f) The City shall have the right to inspect all
40 construction and installation work performed by Grantee pursuant
41 to this Franchise to the extent necessary to ensure compliance
42 by Grantee. On an ongoing basis, Grantee shall certify to the

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1 City that Grantee's work is being performed and completed in a
2 satisfactory manner.

3
4 (g) On notice from the City that any work is
5 being performed contrary to the provisions herein, or in an
6 unsafe or dangerous manner or in violation of the terms of any
7 applicable permit, laws, regulations, ordinances or standards,
8 the City may issue a stop work order and Grantee shall stop the
9 work immediately. The City shall issue a stop work order in
10 writing, unless given verbally in the case of an emergency, and
11 provide the order to the individual doing work or post it on the
12 work site. A copy of the order shall be sent to Grantee, and
13 the order must indicate the nature of the alleged violation or
14 unsafe condition and the conditions under which Grantee may
15 resume work.

16
17 (12) **Removal of unauthorized facilities.** Within thirty
18 (30) days following written notice from the City, Grantee shall,
19 at its expense, remove unauthorized facilities and restore
20 public Rights-of-Way and other property to as good a condition
21 as existed prior to construction or installation of its
22 facilities. Any plan for removal of said facilities must be
23 approved by the City prior to such work. Facilities are
24 unauthorized and subject to removal in the following
25 circumstances:

26
27 (a) Upon expiration, termination, or
28 cancellation of this Franchise;

29
30 (b) Upon abandonment of the facilities.
31 Facilities shall be deemed abandoned if they are unused by
32 Grantee as described in Section 5(10);

33
34 (c) If the facilities were constructed or
35 installed prior to the effective date of this Franchise; unless
36 such facilities were constructed or installed upon the condition
37 of subsequent approval of this Franchise with the consent of the
38 City;

39
40 (d) If the facilities were constructed,
41 installed, operated, maintained, or repaired without the prior

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1 issuance of required use and/or development authorization and
2 permits;

3
4 (e) If the facilities were constructed or
5 installed or are operated, maintained or repaired in violation
6 of the terms or conditions of this Franchise; or

7
8 (f) If the facilities are unauthorized for any
9 reason whatsoever.

10
11 (13) **Restoration of public ways and other property.**

12
13 (a) Whenever necessary, after construction or
14 maintaining any of Grantee's Facilities within the Rights-of-
15 Way, the Grantee shall, without delay, and at Grantee's sole
16 expense, remove all debris and restore the surface and
17 subsurface disturbed by Grantee as nearly as possible to as good
18 or better condition as it was in before the work began. Grantee
19 shall replace any property corner monuments, survey reference or
20 equipment that were disturbed or destroyed during Grantee's work
21 in the Rights-of-Way. Such restoration shall be done in a
22 manner consistent with applicable codes and laws and to the
23 City's satisfaction and specifications where applicable.
24 Grantee agrees to pay all costs and expenditures required on
25 Rights-of-Way as a result of settling, subsidence, or any other
26 need for repairs or maintenance resulting from excavations made
27 by Grantee for necessary trench patch maintenance, indefinitely.
28 Favorable weather conditions permitting, Grantee agrees to
29 repair Rights-of-Way as a result of settling, subsidence, or
30 other needed repairs or maintenance resulting from excavations
31 made by the Grantee upon forty-eight (48) hours notice excluding
32 weekends and holidays. If Grantee fails to undertake such
33 repairs as herein provided, the City may perform the repairs at
34 Grantee's expense.

35
36 (b) Landscape restoration. All trees,
37 landscaping and grounds removed, damaged or disturbed as a
38 result of the construction, installation, maintenance,
39 operation, repair or replacement of the Grantee's facilities,
40 shall be replaced or restored, at the Grantee's expense to the
41 condition existing prior to performance of the work.

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1 (14) **Poles, structures, and property owned by others.**

2 If and when the Grantee is authorized to install communication
3 facilities aerially in accordance with chapter 12.48 of the Des
4 Moines Municipal Code (DMMC), Grantee must obtain written
5 approval from the owners of utility poles, structures and
6 property not owned by Grantee prior to attaching to or otherwise
7 using such poles, structures or property, and provide proof of
8 such approval to the City. The City makes no representation and
9 assumes no responsibility for the availability of utility poles,
10 structures, and property owned by third parties for the
11 installation of Grantee's facilities. The City shall not be
12 liable for the unavailability of utility poles, structures, and
13 property owned by the City or third parties for any reason
14 whatsoever. The installation of facilities by Grantee on or in
15 the poles, structures, or property owned by others shall be
16 subject to and limited by the owner's authority to enter,
17 occupy, and use public ways. In the event that the authority of
18 the owner of poles, structures, or property to enter, occupy,
19 and use the public ways either expires, terminates, or is
20 cancelled, the authority of Grantee to construct, install,
21 operate, maintain, and repair Grantee's facilities at such
22 locations may be immediately cancelled at the sole option of the
23 City. The City shall not be liable for the costs for removal of
24 facilities arising from expiration, termination, or cancellation
25 of any pole owner's authority to enter, occupy, or use public
26 ways for any reason whatsoever.

27
28 **Sec. 6. Indemnification and liability and assumption**
29 **of risk.**

30
31 (1) Indemnification / Hold Harmless. The Grantee shall
32 defend, indemnify and hold the City, its officers, officials,
33 employees and volunteers harmless from any and all claims,
34 injuries, damages, losses or suits including attorney fees,
35 arising out of or in connection with activities or operations
36 performed by the Grantee or on the Grantee's behalf under this
37 Franchise agreement, except for injuries and damages caused by
38 the sole negligence of the City.

39
40 (2) The City shall give the Grantee written notice of any
41 claim or of the commencement of any action, suit or other
42 proceeding covered by this section. If a claim or action arises,

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1 the City or any other indemnified party shall then tender the
2 defense of the claim to Grantee, which defense shall be at
3 Grantee's expense. However, the failure of the City to provide
4 such notice in writing to Grantee shall not relieve Grantee of
5 its duties and obligations under this Section, provided that
6 Grantee is given sufficient advance notice to perform its duties
7 under this Section. It is further specifically and expressly
8 understood that the indemnification provided herein constitutes
9 the Grantee's waiver of immunity under Industrial Insurance,
10 Title 51 RCW, solely for the purposes of this indemnification.
11 This waiver has been mutually negotiated by the parties.
12

13 (3) Should a court of competent jurisdiction determine
14 that this Agreement is subject to RCW 4.24.115, then, in the
15 event of liability for damages arising out of bodily injury to
16 persons or damages to property caused by or resulting from the
17 concurrent negligence of the Contractor and the City, its
18 officers, officials, employees, and volunteers, the Contractor's
19 liability hereunder shall be only to the extent of the
20 Contractor's negligence. The provisions of this section shall
21 survive the expiration or termination of this Agreement.
22

23 (4) **Damages and penalties.** By acceptance of this
24 Franchise, Grantee specifically agrees that it will pay, all
25 damages or penalties which the City, its officers, agents,
26 employees, or contractors may legally be required to pay as a
27 result of damages arising out of copyright infringements and all
28 other damages arising out of Grantee's or Grantee's agents'
29 installation, maintenance, or operation of the
30 Telecommunication System, except as specifically referenced
31 elsewhere in this Franchise, whether or not any act or omission
32 complained of is authorized, allowed, or prohibited by this
33 Franchise, subject to Section 635A of the Cable Act and
34 applicable law.
35

36 (5) **Expenses.** If any action or proceeding is brought
37 against the City or any of its officers, agents, or employees
38 for claims for damages or penalties described in this Section,
39 the Grantee, upon written notice from the City, shall assume the
40 investigation of defense and fully control any resolution or
41 compromise thereof, including the employment of counsel and the
42 payment of all expenses including the reasonable value of any

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1 services rendered by any officers, agents, employees or
2 contractors of the City which are not unreasonably duplicative
3 of services provided by Grantee and its representatives. The
4 City shall fully cooperate with the Grantee.
5

6 (6) **Separate counsel.** The City shall have the right
7 to employ separate counsel in any action or proceeding and to
8 participate in the investigation and defense thereof, and the
9 Grantee shall pay the reasonable fees and expenses of such
10 separate counsel if representation of both the Grantee and the
11 City by the same attorney would be inconsistent with accepted
12 canons of professional ethics and if separate counsel is
13 employed with the approval and consent of the Grantee, which
14 shall not be unreasonably withheld.
15

16 (7) **Assumption of risk.** Grantee assumes the risk of
17 damage to its facilities located in the City's public ways from
18 activities conducted by third parties or the City, its elected
19 officials, officers, employees, agents, or representatives.
20 Grantee releases and waives any and all claims against the City,
21 its elected officials, officers, employees, agents, and
22 representatives for damage to or destruction of the Grantee's
23 facilities except to the extent any such damage or destruction
24 is caused by or arises from active sole negligence of the City.
25 Grantee bears sole responsibility to insure its property.
26 Grantee shall ensure that its insurance contracts waive
27 subrogation claims against the City, its elected officials,
28 officers, employees, agents, and representatives, and Grantee
29 shall indemnify, defend and hold harmless the City, its elected
30 officials, officers, employees, agents, and representatives
31 against any and all subrogation claims if it fails to do so.
32

33 **Sec. 7. Insurance.**

34

35 (1) Grantee shall procure and maintain for the duration
36 of the Franchise, insurance against claims for injuries to
37 Persons or damage to property which may arise from or in
38 connection with this Franchise by the Grantee, their agents,
39 representatives, employees or subcontractors.
40

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1 (a) Minimum Amounts of Insurance. In accordance
2 with applicable law, the Grantee shall maintain throughout the
3 term of this Franchise the following insurance limits:
4

5 (i) Automobile Liability. An automobile
6 liability insurance policy and, if necessary, a commercial
7 umbrella liability insurance policy with a limit of not less than
8 Three Million Dollars (\$3,000,000) per accident. Such insurance
9 shall cover liability arising out of any Grantee motor vehicle
10 (including owned, hired, and non-owned vehicles).
11

12 (ii) Commercial General Liability. A
13 commercial general liability insurance policy issued by a
14 company duly authorized to do business in the State of
15 Washington insuring the Grantee with respect to the
16 installation, maintenance, and operation of Grantee's
17 Telecommunication System in the minimum amount of One Million
18 Dollars (\$1,000,000) per occurrence and Five Million Dollars
19 (\$5,000,000) aggregate. The City shall be named as an additional
20 insured under Grantee's Commercial General Liability insurance
21 policy.
22

23 (iii) Excess General Liability. Excess or
24 Umbrella Liability coverage at limits of Five Million Dollars
25 (\$5,000,000) per occurrence and annual aggregate. This excess
26 or umbrella liability coverage shall apply, at a minimum, to
27 both the Commercial General and Auto insurance policy coverage.
28

29 (iv) Workers' Compensation coverage as
30 required by the Industrial Insurance laws of the State of
31 Washington. This requirement may be satisfied instead through
32 the Grantee's primary Commercial General and Automobile
33 Liability coverage, or any combination thereof.
34

35 (b) Other Insurance Provisions. The insurance
36 policies are to contain, or be endorsed to contain, the
37 following provisions for Automobile Liability and Commercial
38 General Liability insurance:
39

40 (i) The Grantee's insurance coverage
41 shall be primary insurance as respect the City. Any Insurance,
42 self-insurance, or insurance pool coverage maintained by the

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1 City shall be excess of the Grantee's insurance and shall not
2 contribute with it.

3
4 (ii) The Grantee's insurance shall be
5 endorsed to state that coverage shall not be cancelled by either
6 party, except after thirty (30) days prior written notice by
7 certified mail, return receipt requested, has been given to the
8 City.

9
10 (c) Acceptability of Insurers. Insurance is to
11 be placed with insurers with a current A.M. Best rating of not
12 less than A:VII.

13
14 (d) Verification of Coverage. Upon acceptance of
15 the Franchise, Grantee shall furnish the City with original
16 certificates and a copy of the amendatory endorsements,
17 including but not necessarily limited to the additional insured
18 endorsement, evidencing the insurance requirements of the
19 Grantee.

20
21 (e) Subcontractors. Grantee shall have sole
22 responsibility for determining the insurance coverage and limits
23 required, if any, to be obtained by any contractors or
24 subcontractors, which determination shall be made in accordance
25 with reasonable and prudent business practices.

26
27 (2) Endorsements. Grantee agrees that with respect to
28 the insurance requirements contained above, all insurance
29 certificates will contain the following required provisions:

30
31 (a) Name the City and its officers, employees,
32 and elected representatives as an additional insured.

33
34 (b) Provide for thirty (30) days' notice to the
35 City for cancellation, non-renewal or material change, or ten
36 (10) days notice to the City in the event of nonpayment of the
37 premium.

38
39 (c) Shall be on an occurrence basis and shall be
40 primary coverage of all losses resulting from Grantee's
41 operations covered by the policies.

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1 (3) **Insurance term.** The insurance required above
2 shall be kept in full force and effect by Grantee during this
3 Franchise and thereafter until after the removal of all poles,
4 wires, cables, underground conduits, manholes, and other
5 conductors and fixtures incident to the maintenance and
6 operation of Grantee's Telecommunication System, should such
7 removal be required by City Council or undertaken by Grantee.

8
9 (4) **Issuing companies.** Companies issuing the insurance
10 policies shall have no recourse against the City for payment of
11 any premiums or assessments which all are set at the sole risk
12 of the Grantee.

13
14 (5) **No limit on liability.** Grantee's maintenance of
15 insurance as required by this Franchise shall not be construed
16 to limit the liability of Grantee to the coverage provided by
17 such insurance, or otherwise limit the City's recourse to any
18 remedy to which the City is otherwise entitled at law or in
19 equity.

20
21 **Sec. 8. Performance bond and security fund.**

22
23 (1) **Amount.** The Grantee shall provide the City with a
24 financial guarantee in the amount of One Hundred Thousand
25 Dollars (\$100,000) running for, or renewable for, the term of
26 this Franchise, in a form and substance acceptable to the City.
27 This Franchise performance bond shall be separate and distinct
28 from any other bond or deposit required.

29
30 (2) **Damages.** In the event Grantee shall fail to
31 substantially comply with any one or more of the provisions of
32 this Franchise, then there shall be recovered jointly and
33 severally from the principal and any surety of such financial
34 guarantee any damages suffered by City as a result thereof,
35 including but not limited to staff time, material and equipment
36 costs, compensation or indemnification of third parties, and the
37 cost of removal or abandonment of facilities hereinabove
38 described.

39
40 (a) Before any draws are made on the Franchise
41 performance bond, the City Manager or designee shall give
42 written notice to the Grantee:

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1
2 (i) Describing the act, default or
3 failure to be remedied, or the damages, cost or expenses which
4 the City has incurred by reason of the Grantee's act or default;
5

6 (ii) Providing a reasonable opportunity
7 for the Grantee to first remedy the existing or ongoing default
8 or failure, if applicable;
9

10 (iii) Providing a reasonable opportunity
11 for the Grantee to pay any moneys due the City before the City
12 draws on the Franchise performance bond, if applicable;
13

14 (iv) That the Grantee will be given an
15 opportunity to review the act, default or failure described in
16 the notice with the City Manager or designee.
17

18 (b) The Grantee shall replace the Franchise
19 performance bond within fourteen (14) days after written notice
20 from the City Manager or designee that there is a deficiency in
21 the amount of the Franchise performance bond.
22

23 (3) **Security fund.** In addition to the performance bond,
24 Grantee shall establish and maintain a security fund in the
25 amount of eight thousand dollars (\$8,000), at its cost, with the
26 City by depositing such monies, letters of credit, or other
27 instruments in such form and amount acceptable to the City
28 within 30 calendar days of the effective date of this Franchise.
29 No sums may be withdrawn from the fund by Grantee without
30 consent of the City. The security fund shall be maintained at
31 the sole expense of Grantee so long as any of the Grantee's
32 facilities occupy a public way.
33

34 (a) The fund shall serve as security for the
35 performance of this Franchise, including any claims, costs,
36 damages, judgments, awards, attorneys' fees or liability, of any
37 kind whatsoever, the City pays or incurs, including civil
38 penalties, because of any failure attributable to Grantee to
39 comply with the provisions of this Franchise or the codes,
40 ordinances, rules, regulations, standards, or permits of the
41 City.
42

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1 (b) Before any sums are withdrawn from the
2 security fund, the City shall give written notice to Grantee:

3
4 (i) Describing the act, default or
5 failure to be remedied, or the claims, costs, damages,
6 judgments, awards, attorneys' fees or liability which the City
7 has incurred or may pay by reason of Grantee's act or default;

8
9 (ii) Providing a reasonable opportunity
10 for Grantee to first remedy the existing or ongoing default or
11 failure, if applicable;

12
13 (iii) Providing a reasonable opportunity
14 for Grantee to pay any monies due the City before the City
15 withdraws the amount thereof from the security fund, if
16 applicable; and

17
18 (iv) Grantee will be given an opportunity
19 to review the act, default or failure described in the notice
20 with the City or his or her designee.

21
22 (c) Grantee shall replenish the security fund
23 within fourteen (14) days after written notice from the City
24 that there is a deficiency in the amount of the fund.

25
26 (d) Insufficiency of the security fund shall not
27 release or relieve Grantee of any obligation or financial
28 responsibility.

29
30 **Sec. 9. Taxes, charges, and fees.**

31
32 (1) Franchise Fee. RCW 35.21.860 currently prohibits a
33 municipal franchise fee for permission to use the right of way
34 for telephone business purposes. Based on the representations
35 of Grantee, it is the City's understanding that Grantee will use
36 the right of way for telephone business purposes as defined by
37 RCW 82.16.010. If this prohibition is removed or does not
38 apply, Grantee agrees the City will assess a reasonable
39 franchise fee in accordance with the City Code, so long as
40 local, State or federal law does not otherwise prohibit such
41 fee.
42

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1 (2) Utility Tax. The parties further understand that RCW
2 35.21.870 currently limits the rate of City tax upon telephone
3 business activities to six percent (6%) of Gross Receipts,
4 unless a higher rate is approved by vote of the people. The
5 parties agree, however, that nothing in this Franchise shall
6 limit the City's power of taxation, as now or may hereafter
7 exist. Grantee stipulates that all of its business activities in
8 the City of Des Moines as identified herein are taxable
9 activities subject to the six percent (6%) gross receipts tax
10 rate, as imposed under the City's telephone business tax,
11 adopted in Des Moines Municipal Code Chapter 6.68. This
12 provision does not limit the City's power to amend Des Moines
13 Municipal Code Chapter 6.68 as may be permitted by law,
14 including increases to the tax rate.

15
16
17 (3) Permit and Administrative Fees. Grantee shall also
18 pay and be responsible for all charges and fees imposed to
19 recover actual administrative expenses incurred by the City that
20 are directly related to receiving and approving this Franchise,
21 any use and/or development authorizations which may be required,
22 or any permit which may be required, to inspecting plans and
23 construction, or to the preparation of a detailed statement.
24 Regular application and processing charges and fees imposed by
25 the City shall be deemed to be attributable to actual
26 administrative expenses incurred by the City but shall not
27 excuse Grantee from paying and being responsible for other
28 actual administrative expenses incurred by the City.

29
30 (a) Grantee shall pay a franchise processing fee
31 of \$3,000 within 30 calendar days of the effective date of this
32 Franchise.

33
34 (b) Grantee shall pay fees according to
35 applicable sections of the City Code.

36
37 (4) Grantee shall pay and be responsible for taxes
38 permitted by law.

39
40 (5) In addition to penalties and other remedies for
41 which Grantee may be subjected, the City reserves the right to
42 impose site-specific charges for placement of structures used to

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1 provide telecommunications services. Unless otherwise agreed by
2 the parties, such charges shall be an amount equal to at least
3 fifty percent (50%) of the costs of construction or installation
4 of such structures.

5
6 **Sec. 10. Access to Facilities and Universal Service.**
7

8 (1) Grantee shall provide access to its facilities by
9 hire, sale, or resale on a nondiscriminatory basis. Grantee
10 shall make its telecommunications services available to any
11 customer within its franchise area who shall request such
12 service whenever feasible, without discrimination as to the
13 terms, conditions, rates or charges for the Grantee's services;
14 provided, however, that nothing in this section shall prohibit
15 Grantee from making any reasonable classifications among
16 differently situated customers.

17
18 (2) Grantee shall provide Internet access to users of
19 City property, at locations requested by the City, if it is
20 practicable, upon Grantee's then-current market rates for such
21 service and pursuant to a separate services agreement. Grantee
22 and the City may enter into a separate agreement or agreements
23 regarding the allocation of costs to construct, install,
24 operate, maintain, repair, and remove facilities needed to
25 provide such access; provided, however, that nothing herein
26 shall require the City to accept construction or installation of
27 facilities on City property.

28
29 **Sec. 11. Acquisition of facilities.** Upon Grantee's
30 acquisition of any facilities in the public way, or upon any
31 addition or annexation to the City of any area in which Grantee
32 has facilities, such facilities shall immediately be subject to
33 the terms of this Franchise without further action of the City
34 or Grantee.

35
36 **Sec. 12. Vacation of public ways.** The City reserves the
37 right to vacate any public way which is subject to rights,
38 privileges, and authority granted by this Franchise. If Grantee
39 has facilities in such public way, the City shall reserve an
40 easement for Grantee, if requested by the Grantee.
41

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1 **Sec. 13. Duty to provide information.** Grantee's
2 obligations under this section are in addition to those provided
3 elsewhere in this Franchise. Within fifteen (15) days of a
4 written request from the City, Grantee shall furnish the City
5 with all requested information sufficient to demonstrate:

6
7 (1) That Grantee has complied with all requirements of
8 this Franchise;

9
10 (2) That taxes, fees, charges, or other costs owed or
11 payable by Grantee have been properly collected and paid; and

12
13 (3) The names of the users of Grantee's facilities and
14 the services and products those users are providing to the
15 public.
16

17
18 **Sec. 14. Records.**
19

20 (1) Grantee will manage all of its operations in
21 accordance with a policy of keeping its documents and records
22 open and accessible to the City. The City will have access to,
23 and the right to inspect, any documents and records of Grantee
24 and its affiliates that are reasonably necessary for the
25 enforcement of this Franchise or to verify Grantee's compliance
26 with terms or conditions of this Franchise. Grantee will not
27 deny the City access to any of Grantee's records on the basis
28 that Grantee's documents or records are under the control of any
29 affiliate or a third party.
30

31 (2) All documents and records maintained by Grantee
32 shall be made available for inspection by the City at reasonable
33 times and intervals; provided, however, that nothing in this
34 section shall be construed to require Grantee to violate state
35 or federal law regarding subscriber privacy, nor shall this
36 section be construed to require Grantee to disclose proprietary
37 or confidential information without adequate safeguards for its
38 confidential or proprietary nature.
39

40 (3) One copy of documents and records requested by the
41 City will be furnished to the City at the cost of Grantee. If
42 the requested documents and records are too voluminous or for

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1 security reasons cannot be copied or removed, then Grantee may
2 request, in writing within ten (10) days of the City's request,
3 that the City inspect them at Grantee's local office. If any
4 documents or records of Grantee are not kept in a local office
5 and/or are not made available in copies to the City, and if the
6 City determines that an examination of such documents or records
7 is necessary or appropriate for the enforcement of this
8 Franchise, or to verify Grantee's compliance with terms or
9 conditions of this Franchise, then all reasonable travel and
10 related costs incurred in making such examination shall be paid
11 by Grantee.

12
13 **Sec. 15. Assignment or transfer.** Grantee's rights,
14 privileges, and authority under this Franchise, and ownership or
15 working control of facilities constructed or installed pursuant
16 to this Franchise, may not, directly or indirectly, be
17 transferred, assigned or disposed of by sale, lease, merger,
18 consolidation or other act of Grantee, by operation of law or
19 otherwise, except as provided herein, or without the prior
20 written consent of the City, which consent shall not be
21 unreasonably withheld or delayed. Any transfer, assignment or
22 disposal of Grantee's rights, privileges, and authority under
23 this Franchise, or ownership or working control of facilities
24 constructed or installed pursuant to this Franchise, may be
25 subject to reasonable conditions as may be prescribed by the
26 City.

27
28 (1) No rights, privileges, or authority under this
29 Franchise shall be assigned, transferred, or disposed of in any
30 manner within twelve (12) months after the effective date of
31 this Franchise.

32
33 (2) Absent extraordinary and unforeseeable
34 circumstances, no facility shall be assigned, transferred, or
35 disposed of before construction of the facility has been
36 completed and restoration has been performed to the satisfaction
37 of the City.

38
39 (3) Grantee and the proposed assignee or transferee
40 shall provide and certify the following information to the City
41 not less than one hundred and fifty (150) days prior to the
42 proposed date of assignment, transfer, or disposal:

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1
2 (a) Complete information setting forth the
3 nature, terms and conditions of the proposed assignment,
4 transfer, or disposal;

5
6 (b) Any other information reasonably required by
7 the City; and
8

9 (c) A transfer application fee in an amount to
10 be determined by the City to recover actual administrative costs
11 directly related to receiving and approving the proposed
12 assignment, transfer, or disposal.
13

14 (3) No assignment, transfer, or disposal may be made or
15 shall be approved unless the assignee or transferee has the
16 legal, technical, financial, and other requisite qualifications
17 to operate, maintain, repair, and remove facilities constructed
18 or installed pursuant to this Franchise and to comply with the
19 terms and conditions of this Franchise.
20

21 (4) Any transfer, assignment, or disposal of rights,
22 privileges, and authority under this Franchise or ownership or
23 working control of facilities constructed or installed pursuant
24 to this Franchise, without prior written approval of the City
25 pursuant to this section, shall be void and is cause for
26 termination of this Franchise.
27

28 (5) Any transactions which singularly or collectively
29 result in a change of fifty percent (50%) or more of the
30 ownership or working control (regardless of the percentage) of
31 the Grantee or affiliated entities having fifty percent (50%) or
32 more of the ownership or actual working control (regardless of
33 the percentage) of Grantee, or of control of the
34 telecommunications capacity or bandwidth of Grantee, shall be
35 considered an assignment or transfer requiring City approval.
36 Transactions between affiliated entities are exempt from City
37 approval; provided that, Grantee shall promptly notify the City
38 prior to any proposed change in, or transfer of, or acquisition
39 by any other party of control of Grantee. Every change,
40 transfer, or acquisition of control of Grantee shall cause a
41 review of the proposed transfer. City approval shall not be

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1 required for mortgaging purposes or if said transfer is from
 2 Grantee to another person controlled by Grantee.

3
 4 (6) All terms and conditions of this Franchise shall be
 5 binding upon all permitted successors and assigns of Grantee and
 6 all persons who obtain ownership or working control of any
 7 facility constructed or installed pursuant to this Franchise.

8
 9 **Sec. 16. Violations, noncompliance, and other grounds**
 10 **for termination or cancellation.**

11
 12 (1) This Franchise, and any right, privilege or
 13 authority of Grantee to enter, occupy or use public ways may be
 14 terminated or cancelled by the City for the following reasons:

15
 16 (a) Violation of or noncompliance with any term
 17 or condition of this Franchise by Grantee;

18
 19 (b) Violation of or noncompliance with the
 20 material terms of any use and/or development authorization or
 21 required permit by Grantee;

22
 23 (c) Construction, installation, operation,
 24 maintenance, or repair of facilities on, in, under, over,
 25 across, or within any public way without Grantee first obtaining
 26 use and/or development authorization and required permits from
 27 the City and all other appropriate regulatory authorities;

28
 29 (d) Unauthorized construction, installation,
 30 operation, maintenance, or repair of facilities on City
 31 property;

32
 33 (e) Misrepresentation or lack of candor by or on
 34 behalf of Grantee in any application or written or oral
 35 statement upon which the City relies in making the decision to
 36 grant, review or amend any right, privilege or authority to
 37 Grantee;

38
 39 (f) Abandonment of facilities;

40
 41 (g) Failure of Grantee to pay taxes, fees,
 42 charges or costs when and as due; or

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1
2 (h) Insolvency or bankruptcy of Grantee.
3

4 (2) In the event that the City believes that grounds
5 exist for termination or cancellation of this Franchise or any
6 right, privilege or authority of Grantee to enter, occupy or use
7 public ways, Grantee shall be given written notice and a
8 reasonable period of time not exceeding thirty (30) days to
9 furnish evidence:
10

11 (a) That corrective action has been, or is being
12 actively and expeditiously pursued, to remedy the violation,
13 noncompliance, or other grounds for termination or cancellation;
14

15 (b) That rebuts the alleged violation,
16 noncompliance, or other grounds for termination or cancellation;
17 or
18

19 (c) That it would be in the public interest to
20 impose some penalty or sanction less than termination or
21 cancellation.
22

23 (3) In the event that Grantee fails to provide evidence
24 reasonably satisfactory to the City as provided in
25 subsection (2) of this section, the City shall refer the
26 apparent violation, noncompliance, or other grounds for
27 termination or cancellation to the City Council. The City
28 Council shall provide the Grantee with notice and a reasonable
29 opportunity to be heard concerning the matter.
30

31 (4) If the City Council determines that the violation,
32 noncompliance, or other grounds above for termination or
33 cancellation exist, then, Grantee shall, at the election of the
34 City Council, forfeit all rights, privileges and authority
35 conferred under this Franchise or any use and/or development
36 authorization or permit granted by the City, and this Franchise
37 and any such use and/or development authorization or permit may
38 be terminated or cancelled by the City Council. The City Council
39 may elect, in lieu of the foregoing and without any prejudice to
40 any of its other legal rights and remedies, to pursue other
41 remedies, including obtaining an order compelling Grantee into
42 compliance or to take corrective action, or to recover damages

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1 and costs incurred by the City by reason of Grantee's actions or
 2 omissions. The City Council shall utilize the following factors
 3 in analyzing the nature, circumstances, extent, and gravity of
 4 the actions or omissions of Grantee:

- 5 (a) Whether the misconduct was egregious;
- 6 (b) Whether substantial harm resulted;
- 7 (c) Whether the violation was intentional;
- 8 (d) Whether there is a history of prior
- 9 violations of the same or other requirements;
- 10 (e) Whether there is a history of overall
- 11 compliance; and
- 12 (f) Whether the violation was voluntarily
- 13 disclosed, admitted or cured.
- 14
- 15
- 16
- 17
- 18
- 19
- 20

21 (5) The City Council's choice of remedy shall not
 22 excuse Grantee from compliance with any term or condition of
 23 this Franchise or the material terms of any use and/or
 24 development authorization or required permit. Grantee shall have
 25 a continuing duty to remedy any violation, noncompliance, or
 26 other grounds for termination or cancellation. Further, nothing
 27 herein shall be construed as limiting any remedies that the City
 28 may have, at law or in equity, for enforcement of this Franchise
 29 and any use and/or development authorization or permit granted
 30 to Grantee.

31 **Sec. 17. Notices.**

32 (1) Any regular notice or information required or
 33 permitted to be given to the parties under this Franchise may be
 34 sent to the following addresses unless otherwise specified:

35 GRANTEE:
 36 Zayo Group, LLC
 37 400 Centennial Pkwy, Ste. 200
 38 Louisville, CO 80027
 39 Attn: General Counsel, ZFTI

CITY:
 City Manager
 City of Des Moines
 21630 11th Ave. S.
 Des Moines, WA 98198

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1
2 (2) Grantee shall additionally provide a phone number
3 and designated responsible officials to respond to emergencies.
4 After being notified of an emergency, Grantee shall cooperate
5 with the City and make its best efforts to immediately respond
6 to minimize damage, protect the welfare, health and safety of
7 the public and repair facilities to restore them to proper
8 working order. Annually, on request of the City, Grantee will
9 meet with City emergency response personnel to coordinate
10 emergency management operations and, at least once a year, at
11 the request of the City, actively participate in emergency
12 preparations.

13
14 **Sec. 18. Non-Waiver.** The failure of the City to
15 exercise any rights or remedies under this Franchise or to
16 insist upon compliance with any terms or conditions of this
17 Franchise shall not be a waiver of any such rights, remedies,
18 terms or conditions of this Franchise by the City and shall not
19 prevent the City from demanding compliance with such terms or
20 conditions at any future time or pursuing its rights or
21 remedies.

22
23 **Sec. 19. Eminent domain.** This Franchise is subject to
24 the power of eminent domain and the right of the City Council to
25 repeal, amend or modify the Franchise in the interest of the
26 public. In any proceeding under eminent domain, the Franchise
27 itself shall have no value.

28
29 **Sec. 20. Limitation of liability.** Administration of
30 this Franchise may not be construed to create the basis for any
31 liability on the part of the City, its elected officials,
32 officers, employees, agents, and representatives for any injury
33 or damage; or by reason of any schedule or specification review,
34 inspection, notice and order, permission, or other approval or
35 consent by the City; for any action or inaction thereof
36 authorized or done in connection with the implementation or
37 enforcement of this Franchise by the City; or for the accuracy
38 of plans submitted to the City.

39
40 **Sec. 21. Damage to facilities.** Unless directly and
41 proximately caused by the active sole negligence of the City,
42 the City shall not be liable for any damage to or loss of any

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1 facilities as a result of or in connection with any public
2 works, public improvements, construction, excavation, grading,
3 filling, or work of any kind on, in, under, over, across, or
4 within a public way done by or on behalf of the City.

5
6 **Sec. 22. Competitive neutrality.** In order to maintain a
7 level playing field among all similarly situated Grantees of the
8 City, upon the grant or renewal of another franchise in the
9 Rights-of-Way where material terms or conditions of this
10 Franchise conflict with a change in the City Code, or the
11 provisions of this Franchise provide a material competitive
12 advantage over another similarly situated provider (such that it
13 negatively impacts the City's ability to effectively manage the
14 Rights-of-Way), then the City may elect to renegotiate with the
15 Grantee in good faith to modify the terms and provisions of this
16 Franchise to obtain material terms and conditions that, as a
17 whole, are competitively neutral between Grantees.

18
19 **Sec. 23. Resolution of disputes and governing law.**

20
21 (1) **Alternative dispute resolution.** If a dispute
22 arises from or relates to this Contract or the breach thereof
23 and if the dispute cannot be resolved through direct
24 discussions, the parties agree to endeavor first to settle the
25 dispute in an amicable manner by mediation administered by a
26 mediator under JAMS Alternative Dispute Resolution service rules
27 or policies before resorting to arbitration. The mediator may
28 be selected by agreement of the parties or through JAMS.
29 Following mediation, or upon written Contract of the parties to
30 waive mediation, any unresolved controversy or claim arising
31 from or relating to this Contract or breach thereof shall be
32 settled through arbitration which shall be conducted under JAMS
33 rules or policies. The arbitrator may be selected by agreement
34 of the parties or through JAMS. All fees and expenses for
35 mediation or arbitration shall be borne by the parties equally.
36 However, each party shall bear the expense of its own counsel,
37 experts, witnesses, and preparation and presentation of
38 evidence.

39
40 (2) **Applicable law and jurisdiction.** This Contract
41 shall be governed by the laws of the State of Washington.
42 Although the agreed to and designated primary dispute resolution

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1 method as set forth above, in the event any claim, dispute or
2 action arising from or relating to this Contract cannot be
3 submitted to arbitration, then it shall be commenced exclusively
4 in the King County Superior Court or the United States District
5 Court, Western District of Washington as appropriate. In any
6 claim or lawsuit for damages arising from the parties'
7 performance of this Agreement, each party shall pay all its
8 legal costs and attorney's fees incurred in defending or
9 bringing such claim or lawsuit, in addition to any other
10 recovery or award provided by law; provided, however, nothing in
11 this paragraph shall be construed to limit the City's right to
12 indemnification under Section XVII of this Contract.

13
14 (3) **Amending franchise to conform to subsequent law.**

15 The City reserves the right at any time to amend this Franchise
16 to conform to any hereafter enacted, amended, or adopted
17 federal or state statute or regulation relating to the public
18 health, safety, and welfare, or relating to roadway regulation, or
19 a City Ordinance enacted pursuant to such federal or state
20 statute or regulation upon providing Grantee with thirty (30)
21 days written notice of its action setting forth the full text of
22 the amendment and identifying the statute, regulation, or
23 ordinance requiring the amendment. Said amendment shall become
24 automatically effective upon expiration of the notice period
25 unless, before expiration of that period, the Grantee makes a
26 written call for negotiations over the terms of the amendment.
27 If the parties do not reach agreement as to the terms of the
28 amendment within thirty (30) days of the call for negotiations,
29 the City may enact the proposed amendment, by incorporating the
30 Grantee's concerns to the maximum extent the City deems possible.

31
32 (4) **Notification in the event of preemptive law.**

33 Grantee shall use its best efforts to notify the City of any
34 change in law that materially affects Grantee's rights or
35 obligations under this Franchise.

36
37 **Sec. 24. Severability.** If any section, sentence, clause
38 or phrase of this Franchise or its application to any person or
39 entity should be held to be invalid or unconstitutional by a
40 court of competent jurisdiction, such invalidity or
41 unconstitutionality will not affect the validity or
42 constitutionality of any other section, sentence, clause or

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1 phrase of this Franchise or its application to any other person
2 or entity.

3
4 **Sec. 25. Miscellaneous.**

5
6 (1) **Equal employment and nondiscrimination.** Throughout
7 the term of this Franchise, Grantee will fully comply with all
8 equal employment and nondiscrimination provisions and
9 requirements of federal, state, and local laws, and in
10 particular, FCC rules and regulations relating thereto.

11
12 (2) **Local employment efforts.** Grantee will use
13 reasonable efforts to utilize qualified local contractors,
14 including minority business enterprises and woman business
15 enterprises, whenever the Grantee employs contractors to perform
16 work under this Franchise.

17
18 (3) **Descriptive headings.** The headings and titles of
19 the sections and subsections of this Franchise are for reference
20 purposes only and do not affect the meaning or interpretation of
21 the text herein.

22
23 (4) **Force majeure.** Grantee shall not be required to
24 perform any covenant or obligation in this Franchise, or be
25 liable in damages to the City, so long as the performance or
26 non-performance of the covenant or obligation is delayed, caused
27 or prevented by an act of God or force majeure. An "act of God"
28 or "force majeure" is defined for purposes of this Franchise as
29 strikes, lockouts, sit-downs, material or labor restrictions by
30 any governmental authority, unusual transportation delays,
31 riots, floods, washouts, explosions, earthquakes, fire, storms,
32 weather (including inclement weather which prevents
33 construction), acts of the public enemy, wars, terrorism,
34 insurrections, and/or any other cause not reasonably within the
35 control of Grantee.

36
37 (5) **No joint venture.** Nothing herein will be deemed to
38 create a joint venture or principal-agent relationship between
39 the parties, and neither party is authorized to, nor shall
40 either party act toward third persons or the public in any
41 manner that would indicate any such relationship with the other.
42

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1 (6) **Actions of the City or Grantee.** In performing their
2 respective obligations under this Franchise, the City and
3 Grantee will act in a reasonable, expeditious, and timely
4 manner. Whenever this Franchise sets forth a time for any act to
5 be performed by Grantee, such time shall be deemed to be of the
6 essence, and any failure of Grantee to perform within the
7 allotted time may be considered a material breach of this
8 Franchise, and sufficient grounds for the City to invoke any
9 relevant remedy.

10
11 (7) **Counterparts.** This Franchise may be executed in
12 one or more counterparts, and each originally executed duplicate
13 counterpart of this Franchise shall be deemed to possess the
14 full force and effect of the original.

15
16 (8) **Entire agreement.** This Franchise represents the
17 entire understanding and agreement between the parties with
18 respect to the subject matter and supersedes all prior oral and
19 written negotiations between the parties.

20
21 (9) **Modification.** The parties may alter, amend or
22 modify the terms and conditions of this Franchise upon written
23 agreement of both parties to such alteration, amendment or
24 modification.

25
26 (10) **Non-exclusivity.** This Franchise shall be
27 nonexclusive, and subject to all prior rights, interests,
28 easements, permits or licenses granted by the City to any person
29 to use any property for any purpose whatsoever, including the
30 right of the City to use the same for any purpose it deems fit,
31 including the same or similar purposes allowed Grantee hereunder.
32 The City may at any time grant authorization to use the right-of-
33 ways for any purpose not incompatible with Grantee's authority
34 under this Franchise and for such additional franchises for
35 telecommunications services and or cable systems as the City
36 deems appropriate.

37
38 (11) **Rights granted.** This Franchise does not convey any
39 right, title or interest in public ways, but shall be deemed
40 only as authorization to enter, occupy, or use public ways for
41 the limited purposes and terms stated in this Franchise.

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Further, this Franchise shall not be construed as any warranty of title.

(12) **Contractors and subcontractors.** Grantee's contractors and subcontractors must be licensed and bonded in accordance with the City's ordinances, rules, and regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Grantee.

Sec. 26. Publication. The City Clerk is authorized and directed to publish a summary hereof.

Sec. 27. Effective date. This Ordinance shall be in full force and effect five days from and after its passage, approval and publication as required by law, but if, and only if, the Grantee has endorsed this Ordinance and accepted the terms and conditions thereof.

PASSED BY the City Council of the City of Des Moines this ____ day of _____, 2013 and signed in authentication thereof this ____ day of _____, 2013.

 M A Y O R

APPROVED AS TO FORM:

 City Attorney

ATTEST:

 City Clerk

Published: _____

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ACCEPTANCE:

By accepting the Franchise, the Grantee: (1) acknowledges and accepts the City's legal right to issue and enforce the Franchise; (2) agrees that it will not oppose the City's intervening, to the extent that the City is legally entitled to do so, in any legal or regulatory proceeding affecting the Telecommunication System; (3) accepts and agrees to comply with each and every provision of this Franchise; and (4) agrees that the Franchise was granted pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

ZAYO GROUP, LLC

By: _____

Printed Name: _____

Date: _____

Title: General Counsel, ZFTI

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[35.21.855](#) << [35.21.860](#) >> [35.21.865](#)

RCW 35.21.860

Electricity, telephone, or natural gas business, service provider — Franchise fees prohibited — Exceptions.

(1) No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, as defined in RCW [82.16.010](#), or telephone business, as defined in RCW [82.16.010](#), or service provider for use of the right-of-way, except:

(a) A tax authorized by RCW [35.21.865](#) may be imposed;

(b) A fee may be charged to such businesses or service providers that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter [43.21C](#) RCW;

(c) Taxes permitted by state law on service providers;

(d) Franchise requirements and fees for cable television services as allowed by federal law; and

(e) A site-specific charge pursuant to an agreement between the city or town and a service provider of personal wireless services acceptable to the parties for:

(i) The placement of new structures in the right-of-way regardless of height, unless the new structure is the result of a mandated relocation in which case no charge will be imposed if the previous location was not charged;

(ii) The placement of replacement structures when the replacement is necessary for the installation or attachment of wireless facilities, and the overall height of the replacement structure and the wireless facility is more than sixty feet; or

(iii) The placement of personal wireless facilities on structures owned by the city or town located in the right-of-way. However, a site-specific charge shall not apply to the placement of personal wireless facilities on existing structures, unless the structure is owned by the city or town.

A city or town is not required to approve the use permit for the placement of a facility for personal wireless services that meets one of the criteria in this subsection absent such an agreement. If the parties are unable to agree on the amount of the charge, the service provider may submit the amount of the charge to binding arbitration by serving notice on the city or town. Within thirty days of receipt of the initial notice, each party shall furnish a list of acceptable arbitrators. The parties shall select an arbitrator; failing to agree on an arbitrator, each party shall select one arbitrator and the two arbitrators shall select a third arbitrator for an arbitration panel. The arbitrator or arbitrators shall determine the charge based on comparable siting agreements involving public land and rights-of-way. The arbitrator or arbitrators shall not decide any other disputed issues, including but not limited to size, location, and zoning requirements. Costs of the arbitration, including compensation for the arbitrator's services, must be borne equally by the parties participating in the arbitration and each party shall bear its own costs and expenses, including legal fees and witness expenses, in connection with the arbitration proceeding.

(2) Subsection (1) of this section does not prohibit franchise fees imposed on an electrical energy, natural gas, or telephone business, by contract existing on April 20, 1982, with a city or town, for the duration of the contract, but the franchise fees shall be considered taxes for the purposes of the limitations established in RCW 35.21.865 and 35.21.870 to the extent the fees exceed the costs allowable under subsection (1) of this section.

[2007 c 6 § 1020; 2000 c 83 § 8; 1983 2nd ex.s. c 3 § 39; 1982 1st ex.s. c 49 § 2.]

Notes:

Part headings not law -- Savings -- Effective date -- Severability -- 2007 c 6: See notes following RCW 82.32.020.

Findings -- Intent -- 2007 c 6: See note following RCW 82.14.495.

Construction -- Severability -- Effective dates -- 1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

Intent -- Construction -- Effective date -- Fire district funding -- 1982 1st ex.s. c 49: See notes following RCW 35.21.710.

"Service provider" defined: RCW 35.99.010.



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[Beginning of Chapter](#) << [82.16.010](#) >> [82.16.020](#)

RCW 82.16.010

Definitions. (*Effective until June 30, 2013.*)

For the purposes of this chapter, unless otherwise required by the context:

(1) "Express business" means the business of carrying property for public hire on the line of any common carrier operated in this state, when such common carrier is not owned or leased by the person engaging in such business.

(2) "Gas distribution business" means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural.

(3) "Gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(4) "Light and power business" means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others.

(5) "Log transportation business" means the business of transporting logs by truck, except when such transportation meets the definition of urban transportation business or occurs exclusively upon private roads.

(6) "Motor transportation business" means the business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier, or contract carrier as defined by RCW [81.68.010](#) and [81.80.010](#). However, "motor transportation business" does not mean or include: (a) A log transportation business; or (b) the transportation of logs or other forest products exclusively upon private roads or private highways.

(7)(a) "Public service business" means any of the businesses defined in subsections (1), (2), (4), (6), (8), (9), (10), (12), and (13) of this section or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature, except telephone business and low-level radioactive waste site operating companies as redefined in RCW [81.04.010](#). It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, pipe line, toll bridge, toll logging road, water transportation and wharf businesses.

(b) The definitions in this subsection (7)(b) apply throughout this subsection (7).

(i) "Competitive telephone service" has the same meaning as in RCW [82.04.065](#).

(ii) "Network telephone service" means the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a telephone network, toll line or

channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet access as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(iii) "Telephone business" means the business of providing network telephone service. It includes cooperative or farmer line telephone companies or associations operating an exchange.

(iv) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in (b)(i) and (ii) of this subsection.

(8) "Railroad business" means the business of operating any railroad, by whatever power operated, for public use in the conveyance of persons or property for hire. It shall not, however, include any business herein defined as an urban transportation business.

(9) "Railroad car business" means the business of operating stock cars, furniture cars, refrigerator cars, fruit cars, poultry cars, tank cars, sleeping cars, parlor cars, buffet cars, tourist cars, or any other kinds of cars used for transportation of property or persons upon the line of any railroad operated in this state when such railroad is not owned or leased by the person engaging in such business.

(10) "Telegraph business" means the business of affording telegraphic communication for hire.

(11) "Tugboat business" means the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire.

(12) "Urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, insofar as (a) operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. Included herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type and also the business of operating cartage, pickup, or delivery services, including in such services the collection and distribution of property arriving from or destined to a point within or without the state, whether or not such collection or distribution be made by the person performing a local or interstate line-haul of such property.

(13) "Water distribution business" means the business of operating a plant or system for the distribution of water for hire or sale.

(14) The meaning attributed, in chapter 82.04 RCW, to the term "tax year," "person," "value proceeding or accruing," "business," "engaging in business," "in this state," "within this state," "cash discount" and "successor" applies equally in the provisions of this chapter.

[2010 c 106 § 224. Prior: 2009 c 535 § 1110; 2009 c 469 § 701; 2007 c 6 § 1023; 1996 c 150 § 1; 1994 c 163 § 4; 1991 c 272 § 14; 1989 c 302 § 203; prior: 1989 c 302 § 102; 1986 c 226 § 1; 1983 2nd ex.s. c 3 § 32; 1982 2nd ex.s. c 9 § 1; 1981 c 144 § 2; 1965 ex.s. c 173 § 20; 1961 c 293 § 12; 1961 c 15 § 82.16.010; prior: 1959 ex.s. c 3 § 15; 1955 c 389 § 28; 1949 c 228 § 10; 1943 c 156 § 10; 1941 c 178 § 12; 1939 c 225 § 20; 1937 c 227 § 11; 1935 c 180 § 37; Rem. Supp. 1949 § 8370-37.]

Notes:

Expiration date -- 2010 c 106 § 224: "Section 224 of this act expires June 30, 2013." [2010 c 106 § 410.]

Effective date -- 2010 c 106: See note following RCW 35.102.145.

Intent -- Construction -- 2009 c 535: See notes following RCW 82.04.192.

Expiration date -- 2009 c 469 §§ 701 and 702: "Sections 701 and 702 of this act expire June 30, 2013." [2009 c 469 § 905.]

Effective date -- 2009 c 469: See note following RCW 82.08.962.

Part headings not law -- Savings -- Effective date -- Severability -- 2007 c 6: See notes following RCW 82.32.020.

Findings -- Intent -- 2007 c 6: See note following RCW 82.14.495.

Effective date -- 1996 c 150: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 25, 1996]." [1996 c 150 § 3.]

Effective dates -- 1991 c 272: See RCW 81.108.901.

Finding, purpose -- 1989 c 302: See note following RCW 82.04.120.

Effective date -- 1986 c 226: "This act shall take effect July 1, 1986." [1986 c 226 § 3.]

Construction -- Severability -- Effective dates -- 1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

Effective date -- 1982 2nd ex.s. c 9: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect August 1, 1982." [1982 2nd ex.s. c 9 § 4.]

Intent -- 1981 c 144: "The legislature recognizes that there have been significant changes in the nature of the telephone business in recent years. Once solely the domain of regulated monopolies, the telephone business has now been opened up to competition with respect to most of its services and equipment. As a result of this competition, the state and local excise tax structure in the state of Washington has become discriminatory when applied to regulated telephone company transactions that are similar in nature to those consummated by nonregulated competitors. Telephone companies are forced to operate at a significant state and local tax disadvantage when compared to these nonregulated competitors.

To remedy this situation, it is the intent of the legislature to place telephone companies and nonregulated competitors of telephone companies on an equal excise tax basis with regard to the providing of similar goods and services. Therefore competitive telephone services shall for excise tax purposes only, unless otherwise provided, be treated as retail sales under the applicable state and local business and occupation and sales and use taxes. This shall not affect any requirement that regulated telephone companies have under Title 80 RCW, unless otherwise provided.

Nothing in this act affects the authority and responsibility of the Washington utilities and transportation commission to set fair, just, reasonable, and sufficient rates for telephone service." [1981 c 144 § 1.]

Severability -- 1981 c 144: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 144 § 12.]

Effective date -- 1981 c 144: "This act shall take effect on January 1, 1982." [1981 c 144 § 13.]

Effective date -- 1965 ex.s. c 173: See note following RCW 82.04.050.

RCW 82.16.010**Definitions. (Effective June 30, 2013.)**

For the purposes of this chapter, unless otherwise required by the context:

(1) "Express business" means the business of carrying property for public hire on the line of any common carrier operated in this state, when such common carrier is not owned or leased by the person engaging in such business.

(2) "Gas distribution business" means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural.

(3) "Gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(4) "Light and power business" means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others.

(5) "Motor transportation business" means the business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier, or contract carrier as defined by RCW 81.68.010 and 81.80.010. However, "motor transportation business" does not mean or include the transportation of logs or other forest products exclusively upon private roads or private highways.

(6)(a) "Public service business" means any of the businesses defined in subsections (1), (2), (4), (5), (7), (8), (9), (11), and (12) of this section or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature, except telephone business and low-level radioactive waste site operating companies as redefined in RCW 81.04.010. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, pipe line, toll bridge, toll logging road, water transportation and wharf businesses.

(b) The definitions in this subsection (6)(b) apply throughout this subsection (6).

(i) "Competitive telephone service" has the same meaning as in RCW 82.04.065.

(ii) "Network telephone service" means the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet access as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(iii) "Telephone business" means the business of providing network telephone service. It includes cooperative or farmer line telephone companies or associations operating an exchange.

(iv) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in (b)(i) and (ii) of this subsection.

(7) "Railroad business" means the business of operating any railroad, by whatever power operated, for public use in the conveyance of persons or property for hire. It shall not, however, include any business herein defined as an urban transportation business.

(8) "Railroad car business" means the business of operating stock cars, furniture cars, refrigerator cars, fruit cars, poultry cars, tank cars, sleeping cars, parlor cars, buffet cars, tourist cars, or any other kinds of cars used for transportation of property or persons upon the line of any railroad operated in this state when such railroad is not owned or leased by the person engaging in such business.

(9) "Telegraph business" means the business of affording telegraphic communication for hire.

(10) "Tugboat business" means the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire.

(11) "Urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, insofar as (a) operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. Included herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type and also the business of operating cartage, pickup, or delivery services, including in such services the collection and distribution of property arriving from or destined to a point within or without the state, whether or not such collection or distribution be made by the person performing a local or interstate line-haul of such property.

(12) "Water distribution business" means the business of operating a plant or system for the distribution of water for hire or sale.

(13) The meaning attributed, in chapter 82.04 RCW, to the term "tax year," "person," "value proceeding or accruing," "business," "engaging in business," "in this state," "within this state," "cash discount" and "successor" shall apply equally in the provisions of this chapter.

[2009 c 535 § 1110; 2007 c 6 § 1023; 1996 c 150 § 1; 1994 c 163 § 4; 1991 c 272 § 14; 1989 c 302 § 203. Prior: 1989 c 302 § 102; 1986 c 226 § 1; 1983 2nd ex.s. c 3 § 32; 1982 2nd ex.s. c 9 § 1; 1981 c 144 § 2; 1965 ex.s. c 173 § 20; 1961 c 293 § 12; 1961 c 15 § 82.16.010; prior: 1959 ex.s. c 3 § 15; 1955 c 389 § 28; 1949 c 228 § 10; 1943 c 156 § 10; 1941 c 178 § 12; 1939 c 225 § 20; 1937 c 227 § 11; 1935 c 180 § 37; Rem. Supp. 1949 § 8370-37.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Intent -- Construction -- 2009 c 535: See notes following RCW 82.04.192.

Part headings not law -- Savings -- Effective date -- Severability -- 2007 c 6: See notes following RCW 82.32.020.

Findings -- Intent -- 2007 c 6: See note following RCW 82.14.495.

Effective date -- 1996 c 150: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 25, 1996]." [1996 c 150 § 3.]

Effective dates -- 1991 c 272: See RCW 81.108.901.

Finding, purpose -- 1989 c 302: See note following RCW 82.04.120.

Effective date -- 1986 c 226: "This act shall take effect July 1, 1986." [1986 c 226 § 3.]

Construction -- Severability -- Effective dates -- 1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

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Effective date -- 1981 c 144: "This act shall take effect on January 1, 1982." [1981 c 144 § 13.]

Effective date -- 1965 ex.s. c 173: See note following RCW 82.04.050.