

ORDINANCE NO. 1999-08-052

AN ORDINANCE GRANTING PACIFIC FIBER LINK, L.L.C., ITS SUCCESSORS, GRANTEES AND ASSIGNS THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN ONE OR MORE FIBER OPTIC CABLE LINES FOR THE TRANSMISSION OF TELECOMMUNICATIONS IN, THROUGH AND UNDER CERTAIN STREETS AND PUBLIC PROPERTY WITHIN THE CITY OF BELLINGHAM.

WHEREAS, PACIFIC FIBER LINK, L.L.C. has applied for a franchise to operate a cable based telecommunications line through the City of Bellingham; and,

WHEREAS, the Charter of the City of Bellingham permits franchises for the use of City right-of-way, if certain conditions are met; and,

WHEREAS, the Public Works Department has duly reviewed the application for franchise and recommends it be approved if the conditions contained herein and in Bellingham Municipal Code 13.15 are satisfied; and,

WHEREAS, the City Council finds the grant of this franchise to be in the best interests of the City,

NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN AS FOLLOWS:

1. Grant of franchise.

There is hereby granted to PACIFIC FIBER LINK, L.L.C., a Washington Limited Liability Company, its successors, grantees, and assigns (hereinafter referred to as "PFL" or "Grantee"), for the period of twenty-five (25) years from the effective date of this Ordinance, the right, privilege, authority and franchise to construct, operate, maintain, alter, remove, replace and repair one or more fiber optic cable lines, together with equipment and appurtenances as may be necessary, for the transmission of signals via fiber optic cable through and under the following streets and public property of the City of Bellingham:

See attached Exhibit A, incorporated by this reference.

The City of Bellingham acknowledges the intention of PFL to operate its fiber optic cable for a term extending beyond this grant but cannot, under current law, extend the term of this grant beyond twenty-five (25) years.

2. Construction

All surface structures shall be erected and maintained at such places and positions upon said streets and public property as to interfere as little as practicable with the free passage of traffic and the free use of adjoining property, and all lines within the City shall be buried to a minimum depth of four feet below the land surface. All lines and installations shall be located and constructed in accordance with the PFL Project Narrative, (dated __/__/__) on file with the City, and also in accordance with plans and specifications approved by the Director of Public Works and in accordance with the laws of the State of Washington and Ordinances of the City now or hereafter in force regulating such installation. Whenever it shall be necessary in the construction, maintaining, repairing or replacing of any such line or structures to any street, or public property, the Grantee shall without delay and at Grantee's expense restore the surface of the street, or public property as nearly as practicable to the same condition as it was in before the doing of the work. Such restoration shall be done under the supervision of the Director of Public Works of the City, and if required, shall be done under a bond in an amount appropriate to guarantee adequate restoration. Grantee shall continuously be a member of the State of Washington "One Call" system, or approved equivalent and shall comply with applicable rules and regulations. Grantee agrees to use a two-inch (2") conduit with pedestals or junction blocks at locations agreed to by and between the parties. The conduit shall be placed along Samish Way leading into the City, through the City and out the Mt. Baker Highway to Britton Road.

3. Relocation.

A. Whenever it becomes necessary for the City to change the grade or location of any street, or other public property, upon or under which any installation is located, the Grantee shall within ninety (90) days following receipt of written notice, change its installation to conform with the change in grade or location without cost to the city.

B. Whenever in the judgment of the City public necessity shall require the change of location of any of the Grantee's installations, the Grantee shall make such changes as and when directed by the City, at Grantee's cost and expense. The City will use all reasonable efforts to notify Grantee within thirty (30) days before requiring any change of location.

4. Indemnity and Insurance.

A. The Grantee, at its sole expense, shall indemnify, defend and hold harmless the City from and against any and all actual or alleged liability, loss, cost, damage or expense (including reasonable attorneys fees and costs) subject to the terms and conditions enunciated in BMC 13.15.170; provided, however, that in case any suit or action is instituted against the City by reason of any such damage or injury, the City shall cause written notice thereof to be given said Grantee and the said Grantee shall have the right to defend. The foregoing shall not apply to claims between the parties hereto not involving third parties.

B. Pursuant to the terms and condition of BMC 13.15.160, the Grantee shall provide the City, for its review and approval, an insurance certificate, having the City as an additional insured, as to the liabilities discussed in subparagraph A above.

5. Non-exclusive Franchise.

This Franchise is granted upon the express condition that it shall not be deemed an exclusive franchise and shall not in any manner prevent the City of Bellingham from granting other or further franchises in or under any of said streets and public property, or making reasonable use of the surface above the line.

6. Forfeiture.

This Franchise may be terminated or revoked pursuant to BMC 13.15.220 provided the City provides the Grantee written notice and an opportunity to cure as provided in BMC 13.15.230.

7. Registration.

The Grantee shall file with the City Finance Director written notice of the location within the City of Bellingham or elsewhere of its place of business and shall obtain a business registration certificate and be liable for and pay City utility taxes if it does business in Bellingham.

8. Fees.

PFL shall pay a filing fee for the City's administrative costs in drafting and processing this franchise agreement and all work related thereto. PFL shall further be subject to all permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City. Where the City incurs costs and expenses for review, inspection or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, PFL shall pay such costs and expenses directly to the City. In addition to the above, PFL will ensure City streets are properly reconstructed. Finally, PFL shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency involving PFL's cable and facilities.

9. Acceptance.

This ordinance shall be void if the Grantee shall not within forty (40) days from the adoption of this Ordinance file its acceptance of the same with the Finance Director of the City.

10. Bond.

The City at any time during the term of this Franchise may require the Grantee to execute and file with the City's Finance Director a good and sufficient bond in the amount of Ten Thousand Dollars (U.S. \$10,000.00) conditioned upon the faithful performance by Grantee of all the terms, undertakings and obligations of this Franchise. Grantee agrees to execute and file such Bond with the Finance Director within thirty (30) days of receipt of written notice demanding such Bond.

11. Transfer of Franchise

A. Grantee may mortgage this franchise but shall not otherwise transfer or assign it, directly or indirectly, without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. Neither shall this franchise nor any right hereunder be transferable or assignable by operation of law, other than pursuant to a mortgage foreclosure, without such consent of the City. The City shall not withhold its consent when such consent is requested in connection with a business reorganization or refinancing such that the quality of management and the capital of the successor Grantee are as good or better than the management and capital of the Grantee. This provision shall be read consistent with the requirements of BMC 13.15.200.

B. However, PFL may, without the prior written approval of the City, lease or grant an Indefeasible Right of Use ("IRU") in the facilities, or any portion thereof, to another person or party; provided that PFL:

1. Retains exclusive control over such facilities,
2. Remains responsible for locating, servicing, repairing, relocating or removing its facilities pursuant to the terms and conditions of this franchise,
3. Remains responsible for all other obligations imposed by the franchise, and,
4. Provides written notice to the City that PFL has granted an IRU.

An "Indefeasible Right of Use" is an interest in PFL's facilities which gives PFL's customers the right to use certain facilities for the purpose of providing telecommunications services. An IRU does not provide the customer with any right of physical access to the facilities, such as constructing, servicing, repairing, relocating or removing the facilities.

C. Further, PFL may, with the prior written approval of the City, which shall not be unreasonably withheld, sell, transfer, or assign the facilities, or any portion thereof, to another person or party, provided that written notice of said transaction is provided to

the City within 30 days of said transfer and the transferee or grantee is authorized to accept such an interest in the facilities, or obtains such authorization within 180 days of said transfer. Any transaction which singularly or collectively results in a change of 50% or more of the ownership or working control of the Grantee, or of the ownership or control of affiliated entities which have ownership or working control of the Grantee, or of control of the capacity or the facilities of substantial parts thereof of the Grantee shall be considered an assignment or transfer requiring City approval pursuant to the BMC 13.15.200. Transactions between affiliated entities are not exempt from City approval; however, a transfer by a Grantee to another person or entity controlling, controlled by, or under common control with Grantee shall not require City approval, provided notice thereof is timely provided to the City. Approval shall not be required for mortgaging purposes.

12. Repeal; Condemnation.

In compliance with the City's Charter, Grantee further agrees to the following conditions:

A. At any time subsequent to the effective date of this franchise, the City Council, or the people of the city acting for themselves by initiative or referendum, may repeal, amend or modify the franchise, with due regard to the rights of the Grantee and the interest of the public; provided, however, should this franchise be repealed within five (5) years of the effective date hereof, Grantee shall be entitled to a pro rata portion of the franchise fee paid.

B. At any time after the effective date of this franchise, the City may acquire Grantee's rights under it by purchase or condemnation for a fair and just value. Such an acquisition shall include all the property of the Grantee within the streets or other public property; however, no value will be given this franchise, per se, in the case of such an acquisition as it will thereupon be deemed terminated.

13. Third Party Beneficiaries

The provisions of this Franchise shall not impart rights enforceable by any person, firm or organization other than the parties hereto, or an authorized successor or assignee of a party hereto.

14. Entire Agreement

This Franchise and the Bellingham Municipal Code 13.15 constitute the entire agreement and understanding between the parties as to this Franchise and the Franchise merges and supersedes all prior oral or written agreements, understandings, commitments, representations and discussions between the parties. The Franchise is meant to be read in conjunction with BMC 13.15. If there is any conflict between the Franchise and the BMC, the BMC shall control.

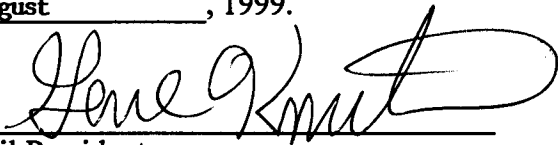
15. Waiver

Waiver of any breach of condition of this Agreement shall not be deemed a waiver of any prior or subsequent breach. No terms or conditions of this Agreement shall be held to be waived, modified or deleted except by an instrument, in writing, signed by the parties hereto.

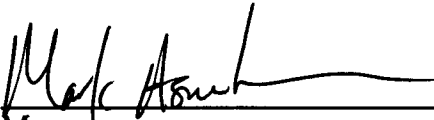
16. Venue/Governing Law

In the event that any suit, action or litigation should arise concerning the construction or interpretation of any of the terms of this Agreement, the venue of such suit, action or litigation shall be in the Superior Court of the State of Washington in and for the County of Whatcom. This Agreement shall be governed by Washington State law exclusively without recourse to any principle of conflicts of laws.

Passed by the Council this 23rd day of August, 1999.



Council President

Approved by me this 1st day of September, 1999.


Mayor

Attest: 
Finance Director

Approved as to form:


Office of the City Attorney

Published Prior to Passage:

07/18/1999

07/25/1999

08/01/1999

08/08/1999

Published Subsequent to Passage: 08/27/99

ACCEPTANCE:

The terms and conditions of the foregoing franchise (Ordinance No. 1999-08-052) are hereby accepted this _____ day of _____, 1999.

Pacific Fiber Link, L.L.C.

By: _____
Name: _____
Title: _____

Attest:

Received this _____ day of _____, 1999.

***PACIFIC FIBER LINK FRANCHISE
ORDINANCE NO. 1999-08-052***

EXHIBIT A

The Pacific Fiber Link proposed alignment through the City of Bellingham is as follows:

YEW STREET TO WOBURN STREET TO MOUNT BAKER HIGHWAY

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YY)
04/28/1999

PRODUCER Aon Risk Services, Inc. 1400 E. Mississippi Ave; Suite 1500 Denver, Colorado 80222 Phone: 877-226-4051		Serial # A1078	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.
INSURED Worldwide Fiber Inc., Pacific Fiber Link, L L C, Pacific Fiber Link, Inc. 1333 W. 120th Ave.; Suite 216 Westminster, Colorado 80234			
INSURERS AFFORDING COVERAGE			
INSURER A: Insurance Company State Of Pennsylvania			
INSURER B: American Home Assurance Company			
INSURER C: AMERICAN INTERNATIONAL SPECIALTY LINES INS. CO			
INSURER D:			
INSURER E:			

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
C	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY CLAIMS MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC	GL 267 69 87 RA ** Policy Limits Shared By All Insureds **	11/30/98	11/30/99	EACH OCCURRENCE \$ 4,000,000 FIRE DAMAGE (Any one fire) \$ 4,000,000 MED EXP (Any one person) \$ 4,000,000 PERSONAL & ADV INJURY \$ 2,000,000 GENERAL AGGREGATE \$ PRODUCTS - COMP/OP AGG \$	
	B	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS	CA 382-9806	12/01/98	12/1/99	COMBINED SINGLE LIMIT (Ea accident) \$ 5,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
		GARAGE LIABILITY ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN EA ACC \$ AUTO ONLY: AGG \$
		A	EXCESS LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE DEDUCTIBLE RETENTION \$	BE 358 51 47 ** Policy Limits Shared By All Insureds **	11/30/98	11/30/99
WORKERS COMPENSATION AND EMPLOYERS' LIABILITY						WC STATUTORY LIMITS OTH-ER E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
B	OTHER PROPERTY		7722-620	10/9/98	10/9/99	\$25,000,000 Per Occurrence

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS

Certificate Holder Has Been Added As An Additional Insured With Respects To The General Liability Policy.

Contract #94004; Seattle, Washington To Vancouver, B C, Canada. As Respects For The Installation Of Fiber-optics Telecommunication System Along Or Access County Roads And Right-of-way.

CERTIFICATE HOLDER CITY OF BELLINGHAM 210 LOTTIE STREET BELLINGHAM, WA 98225	ADDITIONAL INSURED; INSURER LETTER:	CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE <i>Pat Rath</i>
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