

ORDINANCE NO. 2000-05-018

AN ORDINANCE GRANTING AVISTA COMMUNICATIONS OF WASHINGTON, INC., 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.

WHEREAS, AVISTA Communications of Washington, Inc. has applied for a franchise to operate a cable based telecommunications line for voice and data transmissions through the City; 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 herein and in Bellingham Municipal Code 13.15 are satisfied; and,

WHEREAS, the City Council finds the grant of 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 AVISTA Communications of Washington, Inc., a Washington Corporation, its successors, grantees, and assigns (hereinafter referred to as "AVISTA" or "Grantee"), for the period of 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, and such other maintenance as may be required, including, but not limited to, tree trimming, subject to BMC Chapter 13.40, for the transmission of voice and data 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 AVISTA 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 25 years.

This franchise does not grant the right to construct, operate or use streets and public property for a cable system, as defined by the Federal Cable Act, open video system, or other video programming system.

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 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 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.

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 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 reasonable 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 30 days before requiring any change of location.

4. Indemnity and Insurance

A. The Grantee 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) arising out of or related to Grantee's facilities and operations, and as required by and 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 conditions of BMC 13.15.160, the Grantee shall provide the City, for its review and approval, an insurance certificate, having the City as 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. Administrative Fees

AVISTA shall pay a filing fee in the amount of \$5,000 to reimburse the City for its administrative costs in drafting and processing this franchise agreement and all work related thereto. AVISTA 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, AVISTA shall pay such costs and expenses directly to the City. In addition to the above, AVISTA will ensure City streets are properly reconstructed. Finally, AVISTA shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency involving AVISTA's cable and facilities.

9. Acceptance

This ordinance shall be void if the Grantee shall not within 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 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, AVISTA 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 AVISTA:

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 AVISTA has granted an IRU.

An "Indefeasible Right of Use" is an interest in AVISTA's facilities which gives AVISTA'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, AVISTA 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 property, 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. A transfer by a Grantee to another person or entity who, at the time this ordinance is adopted, is 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 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 the 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 any 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 8th day of May, 2000.

Louise Johnson
Council President

Approved by me this 30th day of May, 2000.

Mark Asmundson
Mayor

Attest: *Theresa Holt*
Finance Director

Approved as to form:

[Signature]
Office of the City Attorney

Published Prior to Passage:

<u>April 9, 2000</u>	<u>April 16, 2000</u>
<u>April 23, 2000</u>	<u>April 30, 2000</u>

Published Subsequent to Passage:

May 12, 2000

ACCEPTANCE:

The terms and conditions of the foregoing franchise (Ordinance No. 2000-05-17) are hereby accepted this 15th day of JUNE, 2000.

AVISTA Communications of
Washington, Inc.

By: *[Signature]*

Attest:

Wanda M. Morrison

Received this 15th day of June, 2000.



EXHIBIT A

Map available in City Council Office.

Avista Communications
of Washington, Inc.
Steam Plant Square
159 South Lincoln, Suite 211
Spokane, Washington 99201-4442
Telephone 509-444-4890
Facsimile 509-444-4899



June 29, 2000

Mr. Felix Anderson
City of Bellingham
210 Lottie Street
Bellingham, WA 98225

Re: Avista Communications telecommunications franchise

Dear Mr. Anderson:

For your records, enclosed is a fully executed original of Ordinance No. 2000-05-018 in favor of Avista Communications of Washington, Inc. While I have retained a copy for my files, we typically require a duplicate original so that both parties to the agreement have original documents. However, as only one copy was forwarded to me for signature, I am returning it to you for recording by the City. To the extent you can locate a duplicate original, I would appreciate your forwarding it to this office.

It has been a pleasure working with the many people and departments within the City of Bellingham getting to this point. All have been friendly, professional, and most importantly, as eager as we in keeping the project moving forward to completion. As we move ahead with construction and implementation of our telecommunications network, I look forward to my continued work with the City of Bellingham and thank you in advance for your continued support and assistance.

Please call me at (509) 444-4891 should you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Carlson".

Kenneth G. Carlson
Real Estate Representative
Avista Communications