

ORDINANCE NO. 2000-12-085

AN ORDINANCE GRANTING ADVANCED TELCOM, INC. dba ADVANCED TELCOM GROUP (ATG), ITS SUCCESSORS, GRANTEES AND ASSIGNS THE NONEXCLUSIVE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN TELCOMMUNICATIONS FACILITIES FOR THE TRANSMISSION OF TELECOMMUNICATIONS IN, THROUGH, OVER AND UNDER CERTAIN STREETS AND PUBLIC PROPERTY WITHIN THE CITY OF BELLINGHAM.

WHEREAS, ATG has applied for a nonexclusive franchise to construct, operate and maintain a telecommunications network via duct, pole lease and underground cable lines through the City of Bellingham; and,

WHEREAS, the City of Bellingham has the legal authority to grant franchises for the use of City right-of-way and other public properties, if certain conditions are met; and,

WHEREAS, the City has duly reviewed the application for a nonexclusive franchise and is willing to grant the franchise rights requested provided the terms and conditions contained herein and in Bellingham Municipal Code 13.15 are satisfied;

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

1 Authority.

The City of Bellingham (hereinafter the "City") is authorized under federal and state law and under the City's Charter and Municipal Code (hereinafter "BMC") to grant the franchise requested by ATG. Specifically, Charter Article XI and BMC Chapters 6.70 and 13.15 provide authority. The provisions of the Charter and the BMC are expressly incorporated herein by this reference and this Franchise is to be read in a manner consistent with the applicable Charter and BMC sections.

2. Grant of franchise.

2.1 The City hereby grants to ATG, a Delaware corporation, its successors, grantees, and assigns, for the period of ten years from the effective date of this Ordinance, the nonexclusive right, privilege, authority and franchise to construct, operate, maintain, alter, remove, replace and repair its telecommunications network facilities, together with equipment and appurtenances as may be necessary, for the transmission of signals via its network through, over and under the streets and public property of the City as designated in the attached Exhibit A, which is expressly incorporated herein by this reference. The "Effective Date" of this Ordinance shall mean the date ATG accepts this Ordinance as provided for herein.

2.2 This nonexclusive franchise only provides ATG with the authority to construct, operate and maintain facilities to provide telecommunications services. "telecommunications services" shall mean the providing or offering for rent, sale or lease, or in exchange for other value received, the transmittal of voice, data, image, graphic or other electronic information between or among points. "telecommunications

services” shall not include, by implication or otherwise, and, therefore this Franchise does not provide ATG permission to provide, cable television services as defined by the Cable Acts (the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992 and the telecommunications Act of 1996, as hereafter amended), video dial-tone services, multi-channel video programming, or open video systems. If ATG wishes to provide services other than telecommunications services, ATG shall apply to the City for a separate franchise covering those other services.

3. Facilities.

3.1 All surface structures shall be constructed, installed, erected, maintained and repaired 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 so as to provide safety for persons and property. All subsurface lines within the City shall be buried to a minimum depth of four feet below the land surface. All lines and facility installations shall be located, constructed and maintained in accordance with the ATG Project Narrative and the plans and specifications, which must be approved by the Director of Public Works. Additionally, the Grantee's construction, maintenance and repairs shall be in compliance with all applicable federal, state and local laws now or hereafter in force. The Project Narrative and all plans and specifications shall be filed with the City before construction may begin.

3.2 The City may condition the granting of any permit or other approval that is required under this Franchise, at any time, on any lawful condition or regulation as may be reasonably necessary to the management of the public right-of-way, including, by way of example and not limitation, maintaining proper distance from other utilities, protecting the continuity of pedestrian and vehicular traffic and protecting any right-of-way improvements, private facilities and public safety.

3.3 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, as soon as is commercially reasonable, and at Grantee's sole expense, restore the surface of the street, or public property as nearly as practicable to as good or better condition as it was in before the work began. Such restoration shall be done under the supervision of the City's Director of Public Works or his authorized designee and to the City's satisfaction and specifications. If required, the restoration shall be done under a bond in an amount appropriate to guarantee adequate restoration.

3.4 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 shall provide reasonable notice to the City prior to commencing any work or construction under this Franchise and additionally to those owners or other persons in control of property abutting the Franchise area when such work or construction will affect access to such property or otherwise impact such property or the private or public improvements within said area.

3.5 After construction is complete, and as a condition of this Franchise, ATG shall provide to the City, upon the City's request and at no cost to the City, a copy of all as-built plans, maps and records revealing the final location and condition of its facilities within the public rights-of-way and public places.

4 Dangerous Conditions

4.1 Whenever the construction, installation, excavation, repair or maintenance of ATG's facilities that are authorized under this Franchise have caused or contributed to a condition that appears to substantially impair the support of the adjoining street, utility or public place, or endangers the public safety, the City's Director of Public Works may direct ATG, at ATG's sole expense, to take such remedial actions within a reasonable prescribed time as are necessary to protect the public or the adjoining street, utility or public place.

4.2 In the event ATG fails or refuses to comply, in whole or in part, with the Director of Public Works' direction within the prescribed time, or if emergency conditions exist which require immediate action before the City can timely contact ATG to request ATG's immediate repair, the City may take such actions as are necessary to protect the public or the public streets, utilities or public places. ATG shall be responsible for the City's costs thereof. The provisions of this section shall survive the expiration, revocation or termination of this Franchise.

5 Abandonment or Removal of Facilities

Upon the expiration, revocation or termination of this Franchise, the Grantee shall remove all of its facilities constructed or installed hereunder within ninety (90) days of receiving notice from the City, unless the City specifically grants Grantee a longer period in writing. Any of Grantee's facilities which are not removed within said ninety (90) day period shall automatically become the City's property; provided, this remedy shall not be deemed to be exclusive and shall not prevent the City from seeking a judicial order directing that the facilities be removed. Nothing in this section shall prevent the City and Grantee from agreeing that the Grantee will transfer ownership of the facilities to the City; however, the City is under no obligation to accept the facilities or to pay any particular compensation therefor.

6. Relocation.

6.1 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 of Grantee's facilities are 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.

6.2 Whenever public health, safety or necessity, as adjudged in the sole discretion of the City, 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.

7. Indemnity and Insurance.

7.1 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.

7.2 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 and indicating coverage in the amounts delineated in BMC 13.15.

8. 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 or below the line.

9. 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.

10. Registration.

10.1 The Grantee shall register with the City Finance Director written notice of the location of its place of business, obtain a business registration certificate and pay all applicable fees and taxes.

10.2 The Grantee shall provide the City copies of all applicable Federal Communications Commission ("FCC") and Washington Utilities and Transportation Commission ("WUTC") licenses.

11 Fees.

11.1 ATG shall pay Five Thousand Dollars (\$5,000.00 USD) to the City to reimburse the City for its administrative expenses incurred in receiving, reviewing, inspecting and approving permits, licenses, plans and construction necessary to build ATG's facilities. This amount will also reimburse the City for its costs incurred in receiving and approving this Franchise and for the preparation of any detailed statements pursuant to chapter 43.21C RCW. The parties agree that said amount is a reasonable estimate of the City's actual administrative expenses and complies with RCW 35.21.860. After ATG's initial facilities have been built, ATG shall pay the City's actual administrative costs associated with activities undertaken through the authority granted in this franchise ordinance or under any applicable law, which, by way of example and not limitation, shall include inspection and permitting costs for maintenance, repair and relocation. In addition to the above, ATG will ensure City streets are properly reconstructed. Finally, ATG shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency involving ATG's telecommunications facilities.

11.2 As RCW 35.21.860 precludes the City from imposing a franchise fee on a “telephone business”, as defined in RCW 82.04.065, ATG warrants to the City by accepting this Franchise that its operations as authorized hereunder are those of a “telephone business.”

11.3 Notwithstanding the foregoing, the City hereby reserves its right to impose a franchise fee on Grantee for purposes other than those delineated in RCW 35.21.860 if Grantee’s operations as authorized hereunder change to include non-“telephone business” or if the statutory prohibitions on franchise fees for telephone businesses are removed. If Grantee’s operations do ultimately include services in addition to, or other than, “telephone business”, the City reserves its right to require Grantee to obtain an additional franchise to the extent required by law.

11.4 If Grantee has any reimbursements or payments owing to the City which remain unpaid for more than ten (10) days after the date due, said reimbursements or payments shall become delinquent and shall accrue interest at the highest legal rate during the period from when the payment was due until it is actually paid in full.

12. Acceptance.

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

13. Bond.

In accordance with BMC 13.15.180, the Grantee shall execute and file with the City’s Finance Director a good and sufficient bond or other form of assurance of financial responsibility reasonably acceptable to the City, in the amount of Twenty Five Thousand Dollars (\$25,000.00USD) within thirty (30) days of Grantee’s acceptance hereof. As set forth in BMC 13.15.180, said bond shall be conditioned upon the faithful performance by Grantee of all the terms, conditions, undertakings and obligations of this Franchise.

14. Transfer of Franchise

14.1 Subject to the provisions of the City’s Charter Article 11.06 and BMC 13.15.200, the Grantee shall not, directly or indirectly, transfer, assign, or dispose of this Franchise by sale, lease, merger, consolidation or other act of such person, by operation of law or otherwise without the City’s prior express consent, which shall be done by ordinance. The City’s consent shall not be unreasonably withheld or delayed. If this Franchise is transferred with the City’s consent, all the terms and conditions contained herein shall be binding upon the Grantee’s successors, assigns, administrators and legal representatives as if they were specifically mentioned wherever Grantee is mentioned herein.

14.2 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 in the public rights of way of the City 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 within thirty (30) calendar days after the transaction has closed. Approval shall not be required for mortgaging purposes.

15. Repeal; Condemnation. Subject to all applicable constitutional, federal, state and/or local laws, regulations and rules, this franchise shall be governed by Bellingham City Charter Article XI.

16. Survival of Provisions.

All the provisions, conditions and requirements of this Franchise shall be in addition to any and all other obligations and liabilities the Grantee may have to the City at law or in equity or by statute or contract. The provisions, conditions and requirements contained in Sections 3 (Facilities); 4 (Dangerous Conditions); 5 (Abandonment or Removal of Facilities); 6 (Relocation); and 7 (Indemnity and Insurance) shall survive the expiration or termination of this Franchise and any renewals or extensions thereof, and remain effective until such time as the Grantee removes its facilities from the public rights-of-way or public property, transfers ownership of the facilities to a third party or abandons the facilities as provided herein:

17. Notices. All notices, demands, requests, consents and approvals which may, or are required to be given by any party to any other party hereunder, shall be in writing and shall be deemed to have been duly given if delivered personally, sent by facsimile, sent by a nationally recognized overnight delivery service, or if mailed or deposited in the United States mail and sent by registered or certified mail, return receipt requested, postage prepaid to:

City of Bellingham: City of Bellingham
Director of Public Works
210 Lottie Street
Bellingham, Washington 98225

With copy to: Les Reardanz
Senior Assistant City Attorney
210 Lottie Street
Bellingham, Washington 98225

Advanced TelCom
Group, Inc.:

or to such other address as the foregoing parties hereto may from time-to-time designate in writing and deliver in a like manner. All notices shall be deemed complete upon actual receipt or refusal to accept delivery. Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission shall be the same as delivery of an original document.

18. Miscellaneous Provisions.

18.1 *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.

18.2 *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.

18.3 *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 or the United States District Court for the Western District of Washington. Provided that nothing in this franchise shall be deemed to prevent either party from pursuing any and all administrative remedies which it may have before any state or federal administrative agency, including specifically the Washington Utilities and Transportation Commission and the Federal Communications Commission. This Agreement shall be governed by Washington State law and applicable federal law and regulation exclusively without recourse to any conflict of laws principles.

18.4 *Attorneys' Fees.* If any suit or other action is instituted in connection with any controversy arising hereunder, the prevailing party shall be entitled to recover all of its costs and expenses including such a sum as the Court may adjudge as reasonable attorneys' fees.

18.5 *Police Powers.* Grantee's exercise of any right pursuant to this Franchise is subject to the exercise of the City's police powers, as it may now have or obtain in the future.

18.6 *Similar Facilities.* To the extent that Grantee makes its facilities and/or services available to other governmental entities within the State of Washington, Grantee shall also make its facilities available to the City at similar rates and on similar terms unless otherwise prohibited or restricted by federal or state laws, regulations or tariffs.

18.7 *Modifications.* Pursuant to the City's Charter, this Franchise can not be renewed, extended or amended except by ordinance.

18.8 *Severability.* If any provision, clause or phrase of this Franchise should be held invalid for any reason, such invalidity shall not affect the validity of any other provision, clause or phrase.

18.9 *Captions.* The captions of this Agreement are for convenience and reference only and in no way define, limit, or describe the scope or intent of this Agreement.

18.10 *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.

PASSED BY THE COUNCIL this 4TH day of DECEMBER, 2000.

Lois Bjornson
Council President

APPROVED BY ME this 13th day of December, 2000.

Mark Ash
Mayor

Attest: Theresa Ash
Finance Director

Approved as to form:

Jean Wisington
Office of the City Attorney

Published Prior to Passage:

10/22/2000
10/29/2000

11/12/2000
11/19/2000

Published Subsequent to Passage: 12/07/2000

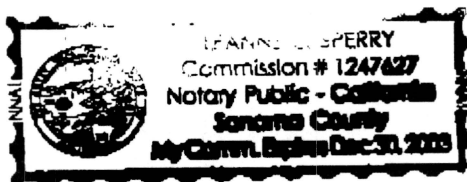
ACCEPTANCE:

I, the undersigned agent of the ATG, am authorized to bind ATG and to accept the terms and conditions of the foregoing franchise (Ordinance No. ~~2000-2-08~~), which are hereby accepted this 23 day of January, 2001. The foregoing date shall constitute the "Effective Date" of the Ordinance.

Advanced TelCom Group, Inc.

By: Kathryn L. Thomas
Name: Kathryn L. Thomas
Title: VP-Regulatory & Public Policy

Subscribed and sworn to before me this 23 day of January, 2001.



Leanne E. Sperry
Notary Public in and for the
State of ~~Washington~~ California
My commission expires 12-30-03

Received on behalf of the City this 23rd day of January, 2001.

Les E. Remond
Name: LES E. REMOND
Title: ASSISTANT CITY ATTORNEY



OFFICE OF THE CITY ATTORNEY
210 Lottie Street, Bellingham, WA 98225
Telephone: (360) 676-6903
Fax: (360) 671-1262

Date: July 23, 2003

Travelers Casualty and Surety Company of America
Attention: Bond Department
225 Lennon Lane, Suite 200
Walnut Creek, CA 94598

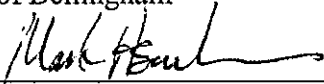
Subject: Bond # 103384654

Surety: Travelers Casualty and Surety Company of America
Principal: Advanced TelCom, Inc.
Obligee: City of Bellingham, a first-class municipal corporation of the State of Washington

Ladies/Gentlemen:

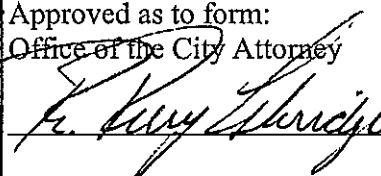
This is to advise you that Bond No. 103384654 issued on behalf of Advanced TelCom, Inc. effective September 8, 2000, is deemed released as of May 15, 2003. Travelers Casualty and Surety Company of America and Advanced TelCom, Inc. are hereby relieved of all past, present, and future liability associated with the subject bond.

City of Bellingham

By 
Mark Asmundson, Mayor

Date SEPTEMBER 12, 2003

Approved as to form:

Office of the City Attorney


Departmental Approval


Bellingham ITSD Director

Attest 
Therese Holm, City Finance Director

Bond Release (1)

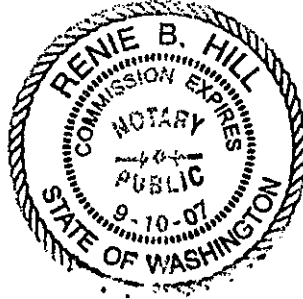
City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 676-6903

STATE OF WASHINGTON)

: SS

County of Whatcom)

On this 17th day of ~~July~~^{Sept}, 2003, before me personally appeared MARK ASMUNDSON, to me known to be the Mayor of the City of Bellingham, and who executed the above instrument and who acknowledged to me the act of signing and sealing thereof.



Renee B Hill

Notary Public in and for the State of Washington residing at Bellingham

My commission expires 10 Sept 2007