

ORIGINAL

ORDINANCE 2011 - 08

**AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF SUNNYSIDE, WASHINGTON, APPROVING
FRANCHISE AGREEMENT WITH FATBEAM, LLC**

WHEREAS, Fatbeam, LLC has been awarded a contract to install and maintain fiber optic cable for the Sunnyside School District; and

WHEREAS, the City of Sunnyside and Fatbeam, LLC have prepared a franchise agreement for the purpose of permitting Fatbeam, LLC to install and maintain such fiber optic cable; and

WHEREAS, the City Council finds that approving the Franchise Agreement is in the best interest of residents of the City of Sunnyside and will promote the general health, safety and welfare;

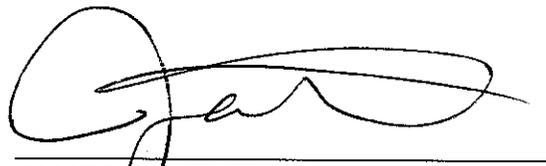
WHEREAS, the ordinance approving the Franchise Agreement was introduced to the City Council at the July 11, 2011 regular business meeting, and has been submitted to the city attorney for review, in accordance with RCW 35A.47.040;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYSIDE, WASHINGTON DO ORDAIN as follows:

SECTION 1. The Franchise Agreement, attached hereto as Exhibit "A" and incorporated herein by this reference, by and among the City of Sunnyside and Fatbeam, LLC, is hereby approved.

SECTION 2. This ordinance shall be effective five days after passage, approval and publication as required by law.

PASSED this 25th day of July, 2011.



JAMES A. RESTUCCI, MAYOR

ATTEST:


DEBORAH A. ESTRADA, CITY CLERK

APPROVED AS TO FORM:


MENKE JACKSON BEYER EHLIS & HARPER, LLP
Attorneys for the City of Sunnyside

FRANCHISE AGREEMENT

between

THE CITY OF SUNNYSIDE, WASHINGTON

&

FATBEAM, LLC

SECTION 1 - DEFINITIONS

1.1 (A) Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

1.1 (B) Definitions. For the purposes of this Franchise the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number and the use of any gender shall be applicable to all genders whenever the sense requires. The words "shall" and "will" are mandatory and the word "may" is permissive. Where a term in this Franchise is not defined in this Section and there exists a definition for the term in the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (the "Telecommunications Act"), the Telecommunications Act definition shall apply. Other terms in this Franchise that are not defined in this Section shall be given their common or ordinary meaning.

1.2 "City" shall mean City of Sunnyside, Washington, and all the incorporated territory within as of the effective date of this Franchise and any other areas later added thereto by annexation or other means.

1.3 "City Council" shall mean the City Council of the City of Sunnyside, Washington.

1.4 "Customer" means any person(s) who legally receives any one or more of the services provided by FB utilizing the Telecommunications System.

1.5 "Days" shall mean calendar days.

1.6 "Facility(ies)" means all wires, lines, cables, conduits, equipment and supporting structures, and/or any other tangible component of FB's Telecommunications System, located in the City's rights-of-way, utilized by FB in the operation of activities authorized by this Franchise. The abandonment by FB of any Facilities as defined herein shall not act to remove the same from this definition.

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1.7 "FCC" shall mean the Federal Communications Commission.

1.8 "Franchise" shall mean the right granted by the Franchise Ordinance and conditioned as set forth herein by which the City authorizes FB to erect, construct, reconstruct, operate, dismantle, test, use and maintain a Telecommunications System in the City. The franchise granted herein shall be a non-exclusive franchise.

1.9 "Franchise Service Area" shall mean that area within the incorporated City limits in which FB shall extend its services.

1.10 "Grantee" shall refer to, as incorporated or used herein, Fatbeam, LLC.

1.11 "Gross Operating Revenues" shall have a meaning consistent with any existing or future City Code. Gross Operating Revenues shall include any and all compensation in whatever form, from any source, directly earned by FB or any affiliate of FB or any other person who would constitute an operator of FB's Telecommunications System under applicable local, state and/or federal law, derived from the provision of Telecommunications Services originating or terminating in the City and/or charged to a circuit location in the City regardless of where the circuit is billed or paid.

1.12 "Network Telephone Service" means the provision of transmission services capable of providing voice and data networking, video conferencing, distance learning, and security or similar communication or transmission services for hire via a local network, channel or similar communication or transmission system. Network Telephone Service includes intrastate or interstate services and specifically excludes cable television or open video system service, broadcast services or other multi-channel video services.

1.13 "Permittee" means any person who has been granted a permit by the assigned permitting authority.

1.14 "Permitting Authority" means the head of the City division or department authorized to process and grant permits required to perform work in the City's rights-of-way, or the head of any agency authorized to perform this function on the City's behalf. Unless otherwise indicated, all references to the Permitting Authority shall include the designee of the department, division or agency head.

1.15 "Person" means any individual, sole proprietorship, corporation, partnership, association, joint venture or other form of organization of any kind and the lawful trustee, successor, assignee, transferee or personal representative thereof.

1.16 "Penalties" means any and all monetary penalties provided for in this Franchise.

1.17 "Right-of-Way" or "Rights-of-Way" shall mean the surface of and the space above and below any public street, road, highway, freeway, easement, lane, path, alley, court, sidewalk, parkway or driveway now or hereafter existing as such within all incorporated areas of the City.

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1.18 "Street" or "Streets" shall mean the surface of and the space above and below the right-of-way of any public street, road, highway, freeway, easement, lane, path, alley, court, sidewalk, parkway or driveway now or hereafter existing as such within all incorporated areas of the City.

1.19 "Telecommunications Services" shall mean:

A. Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the services described in Section 1.12;

B. Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the services described in Section 1.12;

C. Services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carriers, or telephone company providing local exchange services for the services described in Section 1.12;

D. Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services for the services described in Section 1.12;

E. Other telecommunications services as authorized by the Federal Communications Commission or the Washington Utilities and Transportation Commission; and

F. Telecommunications Services include intrastate and interstate services and specifically exclude cable television or open video system services, broadcast services or other multi-channel video services.

1.20 "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles, towers, antenna, and other necessary Facilities owned or used by FB for the purpose of providing Telecommunications Services and located in, under and above the City streets and/or rights-of-way, excluding ducts, conduits and vaults leased from another City franchisee, licensee or permittee.

1.21 "WUTC" shall mean the Washington Utilities and Transportation Commission.

1.22 "Year", "Annual" or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided for in this Franchise.

SECTION 2 - FRANCHISE

EXHIBIT "A"

2.1 Grant of Franchise. The City hereby grants to Fatbeam, LLC, a non-exclusive franchise which authorizes FB, subject to the terms of the Franchise Ordinance, to construct a Telecommunications System and offer Telecommunications Services in, along, among, upon, across, above, over, under or in any matter connected with the rights-of-way located in the City and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain or retain in, on, over, under, upon, across or along any rights-of-way or extensions thereof and additions thereto, such poles, towers, antenna, wires, cables, conductors, ducts, conduits, vaults, utility access covers, pedestals, amplifiers, appliances, attachments and other related property or equipment as may be necessary or appurtenant to the Telecommunications System. Said franchise shall constitute both a right and an obligation to provide the services of a Telecommunications System as required by the provisions of this Ordinance.

2.2 Franchise Term. The term of this Franchise shall be twenty (20) years from the effective date unless extended in accordance with the provisions in Sections 2.7 and 2.12 of this Franchise or terminated sooner in accordance with this Franchise. This provision does not affect the City's right to revoke this Franchise for cause, because of a breach of any promise, condition or stipulation stated herein.

2.3 Franchise Non-Exclusive. The franchise granted herein shall be non-exclusive. The City specifically reserves the right to grant, at any time, such additional franchises for a Telecommunications System as it deems appropriate provided, however, such additional grants shall not operate to materially modify, revoke or terminate any rights previously granted to FB. The grant of any additional franchise shall not of itself be deemed to constitute a modification, revocation or termination of rights previously granted to FB. Any franchise granted pursuant to this Franchise shall confer and impose substantially similar rights and obligations. In establishing the rights and obligations pursuant to a franchise, consideration shall be given to the services to be provided, the area to be served, the commitments made by the applicant to the City, the regulatory authority of the City and the investment proposed by such applicant. In no event will the City impose discriminatory rights or obligations on any franchise applicant.

2.4 Authority Granted.

A. Subject to local, state and federal law, this Franchise grants the authority, right and privilege to FB to operate and maintain a Telecommunications System including the lines, equipment, conduits, towers, antenna, and other facilities necessary for the provision of Network Telephone Service, as defined in Section 1.12 of this Franchise and/or in Section 5.04.020(6) of the Sunnyside Municipal Code, and other Telecommunications Services as defined herein, in, upon, along, above, over and under the streets and rights-of-way in the City.

B. FB's right to operate and maintain its Telecommunications System is subject to the terms, conditions and requirements of the Franchise Ordinance, this Franchise and the City Code and FB's right to construct, erect, install or modify its Telecommunications System is specifically subject to the requirement that FB obtain permits as set forth in this Franchise.

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C. FB expressly acknowledges and agrees, by acceptance of this Franchise, that its rights under this Franchise are subject to the police power of the City to adopt and enforce general ordinances necessary to the safety, health and welfare of the public and FB agrees to comply with all such applicable general laws and ordinances enacted by the City pursuant to such police power. The City, by the granting of this Franchise, does not render or to any extent lose, waive, impair or lessen the lawful powers and rights now or hereafter vested in the City to regulate the use of its rights-of-way and tax, regulate or license the use thereof, and FB, by its acceptance of this Franchise, acknowledges and agrees that all lawful powers and rights, whether regulatory or otherwise, as are or may be from time to time vested in or reserved to the City, shall be in full force and effect and FB shall be subject to the exercise thereof by the City at any time.

D. FB expressly acknowledges and agrees, by acceptance of this Franchise, that lines, equipment, conduits and other facilities and appurtenance in the City rights-of-way which are subsequently acquired by FB and which, if acquired prior to this original franchise grant, would have been subject to this Franchise and the permitting authority related thereto, shall be subject to the provisions of this Franchise and all permits related thereto.

E. In return for promises made and subject to the stipulations and conditions stated herein, the City grants to FB permission to use the City's rights-of-way to provide Telecommunications Services to persons within the Franchise Service Area. To the extent of the City's interests, permission is similarly granted to FB to use areas outside the City's rights-of-way, which are reserved by regulation, practice or dedication for public telephone utilities, but in such areas, FB's use is also subject to conditions now or hereafter recognized by the City as generally applicable to telecommunications or underground conduit utilities.

2.5 Limits on Permission.

A. As used in Section 2.4, E, "Telecommunications Services" means such services as those defined in Section 1.19 of this Franchise provided by FB to persons within the City. Permission is not granted to use the City rights-of-way for any other purpose, including but not limited to providing cable television service as defined in 47 USC § 522 or distribution of multi-channel video programming or any other video programming. FB stipulates that this Franchise extends no such rights or privileges.

B. Permission does not extend to areas outside those listed in Section 2.4, E of this Franchise, or otherwise to any area outside the authority of the City to extend franchised-use permission, such as buildings or private areas not reserved for utilities. FB is solely responsible to make its own arrangements for any access to such places.

C. This Franchise does not extend permission to municipal buildings or other municipally owned or controlled structures. For such locations, FB shall make specific arrangements directly with the municipal department or division controlling such building or other structure.

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D. Permission granted by this Franchise is non-exclusive. FB stipulates the City may grant similar permission to others.

E. FB shall not permit installations by others in the Franchise Service Area without assuring they have the necessary skills, certifications, insurance, bonds, and permits. FB is responsible for determining if the requirements of the City have been met. FB remains responsible for all third party installation, maintenance, and repair of the Telecommunications System for compliance with this Franchise.

F. No privilege or exemption is granted or conferred by this Franchise except as may be specifically prescribed.

G. Any privilege claimed under this Franchise in any street or right-of-way shall be subordinate to any prior lawful occupancy or any subsequent exercise of City police power. The grant of this Franchise shall not impart to FB any fee title property rights in or on any public or private property to which FB does not otherwise have title.

2.6 Franchise Service Area. The Franchise Service Area shall be that area within the present or future city limits of the City of Sunnyside, Washington.

2.7 Periodic Public Review of Franchise.

A. The City shall, at five-year intervals, conduct a comprehensive, public review of this Franchise. The first review shall begin upon the fifth anniversary of the effective date of this Franchise and occur every five (5) years thereafter. One purpose of such reviews shall be to ensure that this Franchise continues to effectively serve the public in light of new developments in telecommunications law and regulation, telecommunications technology, local regulatory environment and community needs and interests. Another purpose of such reviews shall be to accurately and completely evaluate compliance by FB with this Franchise and to identify any violations by FB of any provision(s) of this Franchise. Both the City and FB agree to make a full and good faith effort to participate in such reviews in a manner that accomplishes the goals stated.

B. During such reviews, the City may require FB to make available records, documents and other information necessary for the effective completion of such reviews and may inquire in particular whether FB is supplying services equivalent to those proposed by FB during the process leading to the granting of this Franchise.

C. The periodic reviews described in this Section may be, but need not be, made coincident with reviews involved in the consideration of FB requests for Franchise renewal, Franchise extension or approval of transfer of ownership of the Telecommunications System. Nothing in this Section shall be construed to prohibit the City and FB from engaging in a continuous review of the performance of FB. The City may also, at any time, conduct a public hearing on any issue related to compliance by FB with this Franchise or any permit related thereto.

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D. After completion of each such review described herein, if the City is satisfied FB has substantially complied with this Franchise during the previous five years and is satisfied the public interest will be served by extending the term of this Franchise, it may, with the consent of FB, extend the term set forth in Section 2.2 of this Franchise by one (1) additional year. In no event, however, shall the total term of this Franchise, including any extensions, exceed twenty-five (25) years.

2.8 Franchise Renewal or New Franchise.

A. The City may establish appropriate requirements for new franchises or franchise renewals consistent with federal, state, and local law.

B. Nothing in this Franchise shall be construed to require renewal of this Franchise.

2.9 Renegotiation. In the event that any provision of this Franchise becomes invalid or unenforceable and the City or FB expressly finds that such provision constituted a consideration material to entering into this Franchise, or in the event of significant change in the law regulating this Franchise or change in municipal authority to act under the terms of this Franchise, or in the event of significant change or advancement in technology governing FB's functions, the City and FB may mutually agree to renegotiate any or all of the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have one hundred twenty (120) days to conduct and complete the renegotiation. Nothing in this Franchise shall be construed to require acceptance by either the City or FB of an offer to renegotiate.

2.10 Revocation.

A. In addition to any rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture or otherwise revoke this Franchise and all rights and privileges pertaining thereto in the event that:

(1) The City determines FB is in violation of any material provision of this Franchise and fails to correct the violation after written notice of the violation and proposed forfeiture and a reasonable opportunity thereafter to correct the violation as noted in Section 9.2 of this Franchise; or

(2) FB is found by a court of competent jurisdiction to have engaged in any actual or attempted fraud or deceit upon the City, persons or customers; or

(3) FB becomes insolvent, unable or unwilling to pay its debts as they become due, or is adjudged a bankrupt; or

(4) FB fails, refuses, neglects or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding FB's construction, maintenance, and operation of its Telecommunications System.

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B. For purposes of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:

- (1) The invalidation, failure to pay or any suspension of FB's payment of any fees or taxes due the City under this Franchise;
- (2) Any failure by FB to submit timely reports regarding the calculation of any gross revenue-based fees or taxes due the City under this Franchise;
- (3) Any failure by FB to maintain the liability insurance required under this Franchise;
- (4) Any failure by FB to maintain and provide the City a copy of a Performance Bond as required under this Franchise;
- (5) Any failure by FB to otherwise fully comply with the requirements of this Franchise.

C. Upon occurrence of one or more of the events set out above, following sixty (60) days written notice to FB of the occurrence and the proposed forfeiture and an opportunity for FB to be heard, the City may, by ordinance or other appropriate document, declare a forfeiture. In a hearing of FB, FB shall be afforded due process rights as if the hearing were a contested case hearing subject to Washington law, including the right to cross-examine witnesses and to require that all testimony be on the record. Findings from the hearing shall be written and shall stipulate the reasons for the City's decision. If forfeiture is lawfully declared, all rights of FB under this Franchise shall immediately be divested without a further act upon the part of the City.

2.11 Receivership. The City shall have the right to declare a forfeiture or otherwise revoke this Franchise one hundred eighty (180) days after the appointment of a receiver, or trustee, to take over and conduct the business of FB, whether in receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have vacated prior to the expiration of said one hundred eighty (180) days, or unless:

- (1) Within one hundred eighty (180) days after his/her election or appointment, such receiver or trustee shall have been approved by the City and shall fully have complied with all the provisions of this Franchise and remedied all defaults thereunder; and
- (2) Such receiver or trustee, within said one hundred eighty (180) days, shall have executed an agreement, duly approved by the City as well as the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Franchise.

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2.12 Expiration. Upon expiration of this Franchise, the City shall have the right, at its own election, to:

- (1) Extend this Franchise, as provided for herein, for up to a total of five (5) years, though nothing in this provision shall be construed to require such extension;
- (2) Renew this Franchise, in accordance with applicable valid law;
- (3) Invite additional franchise applications or proposals;
- (4) Terminate this Franchise without further action; and
- (5) Take such other action as the City deems appropriate.

2.13 Other Codes and Ordinances. Nothing in this Franchise shall be deemed to waive the requirements of the other lawful codes and ordinances of the City regarding permits, fees to be paid or manner of construction.

2.14 Survival of Terms. Sections 4.9, 6.3, 7 and 10 of this Franchise shall continue in effect as to FB notwithstanding any expiration, forfeiture or revocation of this Franchise.

SECTION 3 - ENFORCEMENT AND ADMINISTRATION BY THE CITY

3.1 City Jurisdiction and Supervision. The City, through its City Manager or designee shall have continuing regulatory jurisdiction and supervision over the operation and enforcement of this Franchise and may from time to time adopt such reasonable rules and regulations as it may deem necessary for the conduct of the business contemplated herein. All questions of application, interpretation, conflict or ambiguity arising out of or in connection with this Franchise are to be determined by the City Manager or designee except only where otherwise specifically stated, or in the event that a different person or body may be designated by the City through written notice to FB.

3.2 Grantee to Have No Recourse. Subject to state and federal law, FB shall have no recourse other than non-monetary declaratory or injunctive relief against the City and shall be awarded no monetary recovery whatsoever for any incidental or consequential damages, including but not limited to lost profits, arising out of any provision or requirement of this Franchise, nor from the City's regulation under this Franchise, nor from the City's exercise of its authority to grant additional franchises.

3.3 Acceptance of Power and Authority of City. FB expressly acknowledges by acceptance of this Franchise that:

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(1) It has relied upon its own investigation and understanding of the power and authority of the City to grant and enforce this Franchise and that it has no objection to the exercise of the City's power and authority therein;

(2) It has not been induced to enter into this Franchise arrangement by any understanding or promise or other statement, whether verbal or written, by or on behalf of the City concerning any term or condition of this Franchise that is not specifically included herein;

(3) It has carefully read the terms and conditions contained herein and FB is willing to and does accept all the obligations of such terms and conditions to the extent not inconsistent with state or federal law and further agrees that it will not set up as against the City any claim that any provision of this Franchise is unreasonable, arbitrary, invalid or void subject to its rights herein; and

(4) The matters contained in FB's application and all subsequent applications or proposals for renewals of this Franchise, and as stated in any and all other presentations to the City, except as inconsistent with law, regulations or local ordinance, are incorporated into this Franchise as though set out verbatim.

3.4 Acts Discretionary, Reservation of Authority. All City acts undertaken pursuant to this Franchise shall be deemed discretionary, guided by the provisions of this Franchise and considerations of the public health, safety, aesthetics and convenience. FB stipulates and agrees that this Franchise is subject to the Municipal Code of the City of Sunnyside. FB understands the Charter's provisions are incorporated herein, where applicable. FB agrees that the City reserves all municipal powers now or hereafter granted by law, including without limitation, the power to tax and license, regulate activities of land use, protect the public health and safety and regulate and control use of the public right-of-way.

3.5 Delegation of Authority to Regulate. The City reserves the right to delegate its regulatory authority wholly or in part to the federal government, state government and/or to agents of the City, including but not limited to an agency which may be formed to regulate several City franchises.

SECTION 4 - OPERATION IN STREETS AND RIGHTS-OF-WAY

4.1 Use of Streets. FB may, subject to terms of this Franchise, erect, install, construct, repair, replace, reconstruct and retain in, on, over, under, upon, across and along the City streets and rights-of-way such lines, cables, conductors, ducts, conduits, vaults, utility access covers, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of a Telecommunications System within the City. All installation, construction, alteration and/or maintenance of any and all Telecommunications System Facilities within City streets and rights-of-way incident to FB's provision of Telecommunications Services shall, regardless of who performs installation, construction, alteration and/or maintenance, be and remain the responsibility of FB.

4.2 Construction or Alteration.

4.2.1 Permits. FB shall in all cases comply with all lawful City ordinances and regulations regarding the acquisition of permits and other such items as may be reasonably required in order to install, construct, alter and maintain the Telecommunications System. FB shall apply for and obtain all permits necessary for installation, construction, alteration and/or maintenance of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City streets and rights-of-way. FB shall pay all applicable fees due for any such permits.

4.2.2 Schedule and Maps.

A. Prior to beginning installation, construction, alteration or maintenance of the Telecommunications System, FB shall provide the City with an initial work schedule for work to be conducted in City streets and rights-of-way and the estimated total cost of such work. FB shall, upon request, provide information to the City regarding its progress in completing or altering the Telecommunications System.

B. Upon completion of construction or alteration of the Telecommunications System, FB shall provide the City with a map showing the location of its installed Telecommunications System, as built. Such "as-built" maps shall be in a form acceptable to the City.

C. FB shall provide a map to the City showing the location of FB's optical fibers in City streets and rights-of-way on a scale of 3500 feet per inch or in whatever standard scale the City adopts for general use:

- (1) One year after the effective date of this Franchise; and
- (2) Annually thereafter.

4.2.3 Good Engineering.

A. FB promises all of its property and facilities shall be constructed, operated and maintained in good order and condition in accordance with good engineering practice. In connection with the civil works of FB's Telecommunications System, such as, but not limited to, trenching, paving, compaction and locations, FB promises to comply with the edition of the American Public Works Association Standard Specifications which is in current or future use by the City, together with the City's Supplemental Specifications thereto, all as now or hereafter amended.

B. FB promises that the Telecommunications System shall comply with the applicable federal, state and local laws, the National Electric Safety Code and the Washington Electrical Construction Code, where applicable.

4.3 Facilities Placement.

4.3.1 General Standards. The Telecommunications System shall be constructed and maintained in such manner as not to obstruct, hinder, damage or otherwise interfere with sewers, water pipes, other utility fixtures or any other property of the City, or any other pipes, wires, conduits or other facilities that may have been installed in City streets or rights-of-way by or under the City's authority. FB shall maintain a minimum underground horizontal separation of five (5) feet from City water facilities and ten (10) feet from above-ground City water facilities; PROVIDED, that for development in new areas, the City, together with FB and other utility purveyors or authorized users of City streets or rights-of-way, will develop and follow the City's determination of a consensus for guidelines and procedures for determining specific utility locations, subject additionally to this Franchise.

4.3.2 Limited Access. FB must follow the City's requirements for the placement of facilities in City streets and rights-of-way, including City requirements for location of facilities in specific City streets and rights-of-way, and must in any event install facilities in a manner that minimizes interference with the use of City streets and rights-of-way by others, including others that may have or may install telecommunications facilities in City streets and rights-of-way. The City may require that FB install facilities at a particular time, at a specific place and/or in a particular manner as a condition of access to a particular City street or right-of-way and the City may exclude FB's access to a particular street or right-of-way in accordance with City requirements for placement of facilities.

4.3.3 Consistency with Designated Use. Notwithstanding the grant to use City streets and rights-of-way contained in this Franchise, no street or right-of-way shall be used by FB if the City, in its sole opinion, determines that such use is inconsistent with the terms, conditions or provisions by which such street or rights-of-way were created or dedicated or presently used under state and local laws.

4.3.4 Non-Interference. FB shall exert its best efforts to construct and maintain the Telecommunications System so as not to interfere with other uses of City streets or rights-of-way. FB shall, where possible in the case of aboveground lines, make use of existing poles and other facilities available to FB. FB shall individually notify all residents affected by any proposed installation, construction, alteration or maintenance of the Telecommunications System of such work where and when such notification is reasonably possible.

4.3.5 Undergrounding. The City finds that overhead lines and aboveground wire facilities and installations in the streets or rights-of-way and other franchised areas adversely impact upon the public use and enjoyment of property in the City, including an aesthetic impact. Therefore, FB shall place underground all of its transmission lines that are located or are to be located above or within City streets or rights-of-way in the following cases where:

- (1) All existing utilities are located underground;

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(2) Transmission or distribution facilities of the local exchange carrier and/or the electric utility are underground or hereafter placed underground:

(3) Statute, ordinance, policy or other regulation of the City requires utilities to be placed underground;

(4) FB is unable to obtain pole clearance;

(5) Underground easements are obtained from developers of new residential areas; or

(6) Utilities are overhead but residents prefer same to be located underground (such undergrounding to be provided at residents' expense).

FB hereby states it is familiar with RCW 19.122, Washington State's "Underground Utilities" statute, and understands local procedures, custom and practice relating to the one-number locator service program. Consistent with any general municipal undergrounding policy or program now or hereafter developed, the City may require FB's participation in municipally imposed undergrounding or related requirements as a condition of FB's installation or continued maintenance of overhead facilities authorized under this Franchise. FB hereby agrees to coordinate its underground installation and planning activities with the City's underground plan and policies.

4.4 Coordination with Other Users. FB shall coordinate its activities with other utilities and users of City streets and rights-of-way scrupulously to avoid unnecessary cutting, damage or disturbance of such streets and rights-of-way and shall conduct its planning, design, installation, construction, alteration and maintenance of the Telecommunications System at all times so as to maximize the life and usefulness of the paving and municipal infrastructure. In addition, the City may determine with respect to franchised uses, in the exercise of reasonable discretion, when and where reasonable accommodation shall be made by FB to the City for public needs or, where requested, other third party needs, how such accommodation should be made and a reasonable apportionment of any expenses of same; PROVIDED, that this Franchise creates no third party beneficial interests or accommodation. Notwithstanding the foregoing, it remains the responsibility of FB to anticipate and avoid conflicts with other City streets or rights-of-way occupants or users, other utilities, franchisees or permittees. The City assumes no responsibility for such conflicts. Further, FB shall give appropriate notices to any other City streets or rights-of-way occupants or users, other utilities, franchisees, permittees, divisions of the City or other units of government owning or maintaining facilities which may be affected by FB's planning, design, installation, construction, alteration or maintenance of the Telecommunications System.

4.5 Relocation.

A. The City shall have the right during the term of this Franchise, as it may be extended, renewed or otherwise altered in accordance with this Franchise, to require FB to change the location of its Telecommunications System within City streets and rights-of-way when the public convenience and necessity requires such change. If the City or any

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government entity elects or requires a third party to alter, repair, realign, abandon, improve, vacate, reroute or change the grade of any street, public way or other public property; or to construct, maintain or repair any public improvement; or to replace, repair, install, maintain or otherwise alter any cable, wire, towers, antenna, wire conduit, pipe, line, pole, wire holding structure, structure or other facility, including a facility used for the provision of utility or other services or transportation of drainage, sewage or other liquids, FB shall, upon request, except as otherwise hereinafter provided, at no expense to the City, remove or relocate as necessary its poles, wires, cables, underground conduits, vaults, pedestals, utility access covers and any other facilities which it has installed.

B. If the City requires FB to remove or relocate its facilities located within City streets or rights-of-way, the City will make a reasonable effort to provide FB with an alternate location for its facilities within City streets or rights-of-way.

C. The City shall provide FB with the standard notice given under the circumstances to other franchisees, licensees or permittees.

D. If during the term of this Franchise, as it may be extended, renewed or otherwise altered in accordance with this Franchise, another entity which holds a franchise or any utility requests FB to remove or relocate its Telecommunications System Facilities to accommodate the construction, maintenance or repair of the requesting party's facilities, or the more efficient use of such facilities, or to "make ready" the requesting party's facilities for use by others, or because FB is using a facility which the requesting party has a right or duty to remove, FB shall do so. The parties involved may decide among themselves who is to bear the cost of removal or relocation; PROVIDED, that the City shall not be liable for any such cost(s).

E. Any person requesting FB to remove or relocate its facilities shall give FB no less than forty-five (45) days advance written notice advising FB of the date or dates removal or relocation is to be undertaken; PROVIDED, that no advance written notice shall be required in emergencies or in cases where public health and/or safety or property is endangered.

F. If FB fails, neglects or refuses to remove or relocate its facilities as directed by the City, or in emergencies or where public health and/or safety or property is endangered, the City may do such work or cause it to be done and the cost, including all direct, indirect and/or consequential costs and expenses incurred by the City due to FB's failure, neglect or refusal thereof shall be paid solely by FB. If FB fails, neglects or refuses to remove or relocate its facilities as directed by another franchisee or utility, that franchisee or utility may do such work or cause it to be done, and if FB would have been liable for the cost of performing such work, the cost, including all direct, indirect and/or consequential costs and expenses incurred by such franchisee or utility thereof to the party performing the work or having the work performed shall be paid solely by FB.

G. If FB causes any damage to private property or public property in the process of removing or relocating its facilities, FB shall pay the owner of the property for such damage.

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H. FB does hereby promise to protect and save harmless the City, its officers, agents and employees from any customer or third party claims for service interruption or other losses in connection with any removal or relocation of FB's Telecommunications System Facilities.

4.6 Movement of Buildings. FB shall, upon request by any person holding a building permit, franchise or other approval issued by the City, temporarily remove, raise or lower its transmission or other wires appurtenant to the Telecommunications System to permit the movement of buildings. The expense for such removal, raising or lowering shall be paid by the person requesting the same and FB shall be authorized to require such payment in advance. The City shall require all building movers to provide not less than three (3) business days notice to FB for such temporary wire changes.

4.7 Tree Trimming. FB, with twenty-four (24) hour notice to the property owner, shall have the authority to trim or cause to have trimmed trees upon and overhanging streets, alleys, sidewalks and rights-of-way so as to prevent the branches of such trees from coming in contact or otherwise interfering with the Telecommunications System; PROVIDED, that the cost for such trimming of trees shall be paid solely by FB.

4.8 Restoration.

A. Whenever FB damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, FB shall, at its sole cost, expense and liability, restore such area in or near City streets, rights-of-way, paved area or public improvement to at least its prior condition, or the City standard, whichever is greater, to the satisfaction of the City.

B. Whenever any opening is made by FB in a hard surface pavement in any City street or right-of-way, FB shall refill, restore, patch and repave entirely all surfaces opened as determined necessary by the City in order to maintain and preserve the useful life thereof.

C. For pavement restorations, any patch or restoration shall be thereafter properly maintained in good condition and repair by FB until such time as the area is resurfaced or reconstructed.

D. The City hereby reserves the right, after providing reasonable notice to FB, to remove and/or repair any work done by FB which, in the determination of the City, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid solely by FB.

E. Should FB fail, neglect, refuse or delay in performing any obligation here or elsewhere stated, or where the City deems necessary to protect the public right-of-way or to avoid liability, risk or injury to the public or the City, the City may proceed to perform or cause to have performed such obligation, including any remedial or preventative action deemed necessary, at FB's sole expense and liability, but no action or inaction by the City shall relieve FB of its obligation to hold the City harmless as set forth in Section 7.7 of this

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Franchise. Prior to undertaking corrective effort, the City shall make a reasonable effort to notify FB, except no notice is needed if the City declares an emergency or determines a need for expedient action. This remedy is supplemental and not alternative to any other municipal right.

F. Whenever FB damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, FB stipulates that the City may, without limitation:

(1) Require FB to repave an entire lane or greater affected area within any cut or disturbed location; and/or

(2) Require FB to common trench with any other underground installation in City streets or rights-of-way, with cost sharing to be negotiated between the parties involved, or in the absence of agreement, as directed by the City in a non-discriminatory manner.

G. All requirements of this Section pertaining to public property shall also apply to the restoration of private easements and other private property.

H. If FB causes any damage to private property in the process of restoring facilities, FB shall pay the owner of the property for such damage.

I. All of FB's work under this Section shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

J. FB shall perform all restoration work promptly.

4.9 City Right to Require Removal of Property.

A. At the expiration of the term for which this Franchise is granted, providing no extension or renewal is granted by the City, or upon the forfeiture or revocation of this Franchise, as provided for in this Franchise, the City shall have the right to require FB to remove, at FB's sole expense, all or any part of the Telecommunications System from all City streets and rights-of-way within the Franchise Service Area, where the abandoned Facilities interfere with reasonable uses of City streets and rights-of-way. If FB fails to do so, the City may perform the work and collect the cost thereof from FB. The actual cost thereof, including direct and indirect administrative costs, shall be a lien upon all plant and property of FB effective upon filing of the lien with the Spokane County Auditor.

B. Any order by the City Council to remove any of FB's Telecommunications System Facilities shall be mailed to FB not later than thirty (30) calendar days following the date of expiration of this Franchise. FB shall file written notice with the Clerk of the City Council not later than thirty (30) calendar days following the date of expiration or termination of this Franchise of its intention to remove any Telecommunications System Facilities intended to be removed and a schedule for removal by location. The schedule and timing of removal shall be subject to approval and regulation by

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the City. Removal shall be completed not later than twelve (12) months following the date of expiration of this Franchise.

C. FB shall not remove any underground Facilities which require trenching or other opening of City streets or rights-of-way along the extension of the Facilities to be removed, except as hereinafter provided. FB may voluntarily remove any underground Facilities from City streets and rights-of-way which have been installed in such a manner that they can be removed without trenching or other opening of City streets and rights-of-way along the extension of the Facilities to be removed.

D. Subject to applicable law, FB shall remove, at its sole cost and expense, any underground Facilities by trenching or opening City streets and rights-of-way along the extension thereof or otherwise which is ordered to be removed by the City Council based upon a determination, in the sole discretion of said Council, that removal is required in order to eliminate or prevent a hazardous condition. Underground Facilities in City streets and rights-of-way that are not removed shall be deemed abandoned and title thereto shall be vested in the City.

4.10 Emergency Repairs. In the event that emergency repairs to the Telecommunications System are necessary, FB shall notify the City of the need for such repairs. FB may immediately initiate such emergency repairs and shall apply for appropriate permits the next business day following discovery of the emergency.

4.11 City Right of Inspection. The City shall have the right to inspect and approve all installation, construction, alteration or maintenance work performed by FB within the Franchise Service Area and to make such tests as it deems necessary to ensure compliance with the terms and conditions of this Franchise and other pertinent provisions of law, the cost thereof to be paid solely by FB, but no action or inaction by the City shall create any duty or obligation by the City to inspect, test or approve any installation, construction, alteration or maintenance work performed by FB. In addition, the City may require FB to furnish certification from a qualified independent engineer that FB's Facilities are constructed in accordance with good engineering practice and are reasonably protected from damage and injury.

4.12 After-Acquired Facilities. FB expressly acknowledges and agrees, by acceptance of this Franchise, that any Telecommunications System Facilities located within City streets or rights-of-way which are subsequently acquired by FB or upon addition or annexation to the City of any area in which FB retains or acquires any such Facilities (if acquired prior to this original Franchise grant) and which would have been subject to this Franchise and the permitting authority related thereto shall immediately be subject to the provisions of this Franchise and all permits related thereto.

4.13 Information. FB hereby promises to maintain and supply to the City, at FB's sole expense, any information requested by the City to coordinate municipal functions with FB's activities within City streets and rights-of-way. FB shall provide such information, upon request, either in hard copy and/or electronic format compatible with the City's data base system, as now or hereafter existing, including the City's geographic information service

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(GIS) data base. FB shall keep the City informed of its long-range plans so as to allow coordination with the City's long-range plans.

SECTION 5 - SYSTEM DESIGN AND STANDARDS

5.1 Initial Telecommunications System Construction.

5.1.1 Construction Schedule. A detailed construction schedule, which shall be subject to City approval, shall be submitted by FB to the City's Telecommunications Division no later than forty-five (45) days prior to the commencement of construction. For the purposes of this Franchise, "commencement of construction," as finally determined by the City if necessary, shall mean the beginning of installation of any part of the Telecommunications System including, but not limited to, strand mapping, system design, the construction of any facility, building or structure, or the stringing of any wire or the laying of any conduit, or the installation of any active or passive electronic equipment to facilitate the activation of the Telecommunications System.

5.1.2 Construction Timeline. FB shall commence construction of the Telecommunications System during the calendar year 2011 and shall complete initial activation procedures within six (6) months of the effective date of this Franchise.

5.2 Technical Standards. The technical standards used in the design, construction, alteration, maintenance and operation of the Telecommunications System shall comply, at a minimum, with the applicable technical standards promulgated by the Federal Communications Commission ("FCC") or the Washington Utilities and Transportation Commission ("WUTC"), as now or hereafter constituted or amended, and any and all other applicable federal, state or local law, regulations or technical standards which may currently or may subsequently concern any services which FB provides or may provide using the Telecommunications System. The City may establish reasonable technical standards for the performance of the Telecommunications System if the FCC or WUTC permit it to do so or if the FCC or WUTC standards are repealed in whole or in part.

5.3 Performance Testing. FB shall perform all tests of the Telecommunications System as required by and at the intervals as required by the FCC and/or any and all federal, state and local law or regulations, and all other tests reasonably necessary to determine compliance with technical standards required by this Franchise.

SECTION 6 - CUSTOMER SERVICE POLICIES

6.1 City Reservation of Rights. The City reserves the right to enforce any and all customer service and consumer protection standards at any time that such standards are established by state or federal law or regulation as applicable to telecommunications system operations should such right be granted to the City by such state or federal law or regulation.

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6.2 Response to Customers. FB shall promptly respond to all requests from customers of the Telecommunications System for service, repair, installation, information or any other such reasonable and appropriate requests and shall render effective service, make repairs promptly and interrupt service only for good cause and for the shortest time possible as required by state and/or federal law or regulation. FB shall promptly respond to complaints from customers of the Telecommunications System and shall attempt to promptly resolve such complaints as required by state and/or federal law or regulation.

6.3 City Franchise Contact Identified. FB shall provide all appropriate and pertinent contact information for the person identified by the City as responsible for handling questions and complaints for the City regarding FB's operation in City streets and rights-of-way to any and all customers of the Telecommunications System and any interested persons. Said information shall be provided to such customers in a format acceptable to the City.

6.4 Notice of Change in Services. Throughout the term of this Franchise, FB shall provide the City written notice of any intended deletions, additions or other modifications to the Telecommunications Services authorized by this Franchise to be provided by FB.

6.5 Complaints. FB hereby acknowledges the City's interest in the prompt resolution of all complaints made to the City regarding FB's operation in City streets and rights-of-way and FB shall work in close cooperation with the City to resolve such complaints.

6.6 Regulation of Rates and Charges. The City expressly reserves the right to regulate rates and charges for Telecommunications Services and equipment in accordance with and to the extent provided by applicable federal or state laws, rules or regulations.

SECTION 7 - COMPENSATION AND FINANCIAL PROVISIONS

7.1 Taxes and Fees.

7.1.1 City Occupation Tax on Utilities.

A. FB and the City understand that RCW 35.21.860, as of the effective date of this Franchise, prohibits imposition of a municipal franchise fee applicable to revenues from telephone business activities. FB agrees that if this statutory prohibition is removed, and the City obtains the explicit authority from the State to impose a municipal franchise fee applicable to revenue from telephone business activities, and if the City imposes such a fee on all other entities engaged in telephone business activities within the City, then FB's Gross Receipts for telephone business activities will be included in the Gross Receipts from its business activities and subject to a franchise fee. Further, if, during the term of this Franchise, FB should add to or modify the services it offers in such a way so that the aforementioned prohibition against imposition of a municipal franchise fee did not apply, the City may assess a reasonable franchise fee. FB and the City agree that a reasonable franchise fee would be no less than three percent (3%) of FB's Gross Receipts for telephone business

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activities within the City. FB and the City agree that nothing in this Section limits the right of FB to challenge imposition of a municipal franchise fee pursuant to 47 USC § 253.

B. FB and the City further understand and agree that RCW 35.21.870, as of the effective date of this Franchise, limits the rate of City tax upon telephone business activities as defined in Sunnyside Municipal Code ("SMC") Section 5.04.050 to six percent (6%) of gross receipts, unless a higher rate is approved by a vote of the people. However, FB and the City agree that nothing in this Franchise shall limit the City's power of taxation, as may now or hereafter exist.

C. FB hereby stipulates that all of its business activities in the City as identified in Section 1.19, A through F, Section 2.4, and Section 2.5, A of this Franchise are taxable activities subject to the six percent (6%) rate to be included in gross receipts received, as imposed under the City's occupation taxes on utilities, adopted in SMC Section 5.04.050. Therefore, throughout the term of this Franchise, FB shall include all revenue received from all of its business activities within the City as taxable activities, subject to the six percent (6%) rate imposed under the City's occupation taxes on utilities as adopted in SMC Section 5.04.050.

7.1.2 Other Fees.

A. FB shall pay the City all reasonable costs of granting, enforcing or reviewing the provisions of this Franchise as ordered by the City Manager or designee, whether as a result of accrued in-house staff time or out-of-pocket expenses or administrative costs. Such obligation further includes municipal fees related to receiving and approving permits, licenses or other required approvals, inspecting plans and construction, or relating to the preparation of a detailed statement pursuant to RCW 43.21C.

B. Upon request of FB, the City will submit proof of any charges or expenses incurred as defined in Section 7.1.2, A of this Franchise. Said charges or expenses shall be paid by FB no later than thirty (30) days after FB's receipt of the City's billing thereof.

C. FB shall pay all other taxes and fees applicable to its operations and activities within the City, all such obligations also being a condition of this Franchise. Such payments shall not be deemed franchise fees or payments in lieu thereof.

7.2 Payments.

A. FB shall make all required payments in the form, intervals and manner requested by the City Finance Director and shall furnish the City any and all information related to the City's revenue collection functions reasonably requested.

B. City occupation tax on utilities payments shall be paid by FB to the City of Sunnyside as directed by the City. No acceptance of any payment by the City shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall such

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acceptance of payment be construed as a release of any claim, which the City may have for further or additional sums payable under the provisions of this Franchise.

C. Neither current nor previously paid utility taxes may be subtracted from the gross revenue amount upon which utility tax payments are calculated and due for any period. Nor shall any license fee(s) paid by FB be subtracted from gross revenues for purposes of calculating utility tax payments.

D. Any utility taxes owing pursuant to this Franchise which remain unpaid for more than ten (10) days after the dates specified herein shall be delinquent and shall thereafter accrue interest at twelve percent (12%) per annum or two percent (2%) above prime lending rate as quoted by major Seattle banks, whichever is greater.

7.3 Financial Records.

A. FB shall manage all of its operations in accordance with a policy of keeping books and records open and accessible to the City. The City shall have the right, as necessary or desirable for effectively administering and enforcing this Franchise, to inspect at any time during normal business hours upon thirty (30) days prior written notice, all books, records, maps, plans, financial statements, service complaint logs, performance test results, records required to be kept by FB and/or any parent company of FB pursuant to the rules and regulations of the FCC, WUTC and other regulatory agencies, and other like materials FB and/or any parent company of FB which directly relate to the operation of this Franchise.

B. Access to the aforementioned records referenced in Section 7.3, A shall not be denied by FB to representatives of the City on the basis that said records contain "proprietary" information. However, to the extent allowed by Washington law, the City shall protect the trade secrets and other confidential information of FB and/or any parent company of FB.

C. FB hereby agrees to meet with a representative of the City upon request to review its methodology of record keeping, financial reporting, computing utility tax payments and other procedures, the understanding of which the City deems necessary for understanding the meaning of such reports and records.

D. The City agrees to request access to only those books and records, in exercising its rights under this Franchise, which it deems reasonably necessary for the enforcement and administration of this Franchise.

7.4 Auditing.

A. The City or its authorized agent may at any time conduct an independent audit of the revenues of FB in order to verify the accuracy of utility tax payments made to the City. FB and each parent company of FB shall cooperate fully in the conduct of such audit. In case of audit, the City director of budget and finance may require FB to furnish a verified statement of compliance with FB's obligations or in response to any questions. Said certificate may be required from an independent certified public accountant at FB's sole

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expense. All audits will take place on FB's premises or at offices furnished by FB, which shall be a location within the City of Sunnyside. FB agrees, upon request of the City Finance Director, to provide copies of all documents filed with any federal, state or local regulatory agency, to mail to the City on the same day as filed, postage prepaid, affecting any of FB's facilities or business operations in City.

B. FB shall pay any back utility taxes with interest accrued at twelve percent (12%) per annum or two percent (2%) above prime lending rate as quoted by major Seattle banks, whichever is greater. In the event it is determined, as a result of an audit conducted by the City or its authorized agent, that FB has underpaid City utility taxes by five percent (5%) or more than was due the City for any given period, then FB shall reimburse the City for the entire cost of such audit within thirty (30) days of the completion and acceptance of the audit by the City.

7.5 Insurance.

7.5.1 Coverages. FB shall maintain, throughout the term of this Franchise, liability insurance insuring FB, its officers, employees and agents, with regard to all claims and damages specified in Section 7.5 herein, in the minimum amounts as follows:

(1) Commercial Liability Insurance.

On or before the date this Franchise is fully executed by the parties, FB shall provide the City with a certificate of insurance as proof of commercial liability insurance with a minimum liability limit of One Million Dollars (\$1,000,000) combined single limit bodily injury and property damage. This coverage will have a per job aggregate endorsement and Washington stop gap coverage. Said certificate of insurance shall clearly state who the provider is, the amount of coverage, the policy number, and when the policy and provisions provided are in effect. Said policy shall be in effect for the duration of this Franchise. The policy shall name the City, its elected and appointed officials, officers, agents and employees as additional insureds, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the City thirty (30) calendar days prior written notice (any language in the clause to the effect of "but failure to mail such notice shall impose no obligation or liability of any kind upon the company" shall be crossed out and initialed by the insurance agent). The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and admitted in the State of Washington. If FB uses any contractors and/or subcontractors to perform any of the work referenced in this Franchise, such contractors and/or subcontractors shall maintain the same minimum limits of liability and comply with all other provisions discussed above in this subsection entitled "Commercial Liability Insurance."

(2) Commercial Automobile Liability Insurance.

On or before the date this Franchise is fully executed by the parties, FB shall provide the City with a certificate of insurance as proof of commercial automobile liability insurance with a minimum liability limit of One Million Dollars (\$1,000,000) combined single limit bodily injury and property damage. Said certificate of insurance shall clearly state who the provider is, the amount of coverage, the policy

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number, and when the policy and provisions provided are in effect. Said policy shall be in effect for the duration of this Franchise. The policy shall name the City, its elected and appointed officials, officers, agents and employees as additional insureds, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the City thirty (30) calendar days prior written notice (any language in the clause to the effect of "but failure to mail such notice shall impose no obligation or liability of any kind upon the company" shall be crossed out and initialed by the insurance agent). The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and admitted in the State of Washington. If FB uses any contractors and/or subcontractors to perform any of the work referenced in this Franchise, such contractors and/or subcontractors shall maintain the same minimum limits of liability and comply with all other provisions discussed above in this subsection entitled "Commercial Automobile Liability Insurance."

(3) Umbrella Liability Insurance.

FB and its contractors and/or subcontractors shall maintain umbrella liability insurance coverage, in an occurrence form, over underlying commercial liability and automobile liability. On or before the date this Franchise is fully executed by the parties, FB shall provide the City with a certificate of insurance as proof of umbrella coverage with a minimum liability limit of Three Million Dollars (\$3,000,000). The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and admitted in the State of Washington.

Providing coverage in the amounts as set forth above shall not be construed to relieve FB from liability in excess of those limits.

7.5.2 Proof of Insurance. FB shall file with the City copies of all certificates of insurance showing up-to-date coverages, additional insured coverages and evidence of payment of premiums as set forth above. FB shall file and maintain a certificate of insurance along with written evidence of payment of the required premiums with the manager of the City Telecommunications Division, or his or her designee.

7.5.3 Alteration of Insurance. Insurance coverages, as required by this Franchise, shall not be changed, cancelled or otherwise altered without approval of the City. FB shall provide the City no less than thirty (30) days prior written notice of any such proposed change, cancellation or other alteration. The City may, at its option, review all insurance coverages. If it is determined by the City that circumstances require and that it is reasonable and necessary to increase insurance coverage and liability limits above such coverage and limits as are set forth in this Franchise, in order to adequately cover the risks of the City, FB and FB's officers, agents and employees, the City may require additional insurance to be acquired by FB. Should the City exercise its right to require additional insurance, the City will provide FB with written notice.

7.5.4 Failure to Procure. FB acknowledges and agrees, by acceptance of this Franchise, that failure to procure and maintain the insurance coverages as detailed in Section 7.5.1 of this Franchise shall constitute a material breach of this Franchise, as provided

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for in Section 2.10, B, 3) of this Franchise. In the event of such failure to procure and maintain the referenced insurance coverages, the City may immediately suspend FB's operations under this Franchise, terminate or otherwise revoke this Franchise and/or, at its discretion, procure or renew such insurance in order to protect the City's interests and be reimbursed by FB for all premiums in connection therewith.

7.6 Performance Bond. Prior to the effective date of this Franchise, FB shall furnish to the City proof of the posting of a performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of Twenty-Five Thousand Dollars (\$25,000), conditioned that FB shall well and truly observe, fulfill and perform each term and condition of this Franchise. FB shall pay all premiums charged for said bond. Said bond shall be effective to continue obligation for the term of this Franchise, including any extensions, and thereafter until FB or any successor or assign of FB has liquidated all of its obligations with the City that may have arisen from the acceptance of this Franchise by FB or from its exercise of any privilege herein granted. Said bond shall contain a provision stating that said bond shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice having been provided to the City. The form and content of said bond and any associated documents shall be approved in advance by the City Attorney, or his or her designee. FB shall provide a duplicate copy of said bond to the City and said duplicate copy shall be kept on file at the City Manager's office or its successor(s). Neither the provisions of this Section nor any performance bond accepted by the City pursuant thereto, nor any damages or other amounts recovered by the City thereunder, shall be construed to excuse faithful performance by FB or to limit liability of FB under this Franchise either to the full amount of the performance bond or otherwise, except as otherwise provided herein.

7.7 Indemnity, No Estoppel, No Duty.

A. FB shall, at its sole expense, protect, defend, indemnify and hold harmless the City, its elected officials, and in their capacity as such, the officials, agents, officers and employees of the City from any and all claims, lawsuits, demands, actions, accidents, damages, losses, liens, liabilities, penalties, fines, judgments, awards, costs and expenses arising directly or indirectly from or out of, relating to or in any way connected with the performance or non-performance, by reason of any intentional or negligent act, occurrence or omission of FB, whether singularly or jointly with others, its representatives, permittees, employees, contractors or subcontractors, whether or not such acts or omissions were authorized or contemplated by this Franchise or applicable law, including by not limited to the construction, installation, maintenance, alteration or modification of the Telecommunication System; arising from actual or alleged injury to persons or property, including the loss of use of property due to an occurrence, whether or not such property is physically damaged or destroyed; arising out of or alleged to arise out of any claim for damages for FB's invasion of privacy, defamation of any person, firm or corporation, or the violation or infringement of any copyright, trademark, trade name, service mark or patent, or of any other right of any person, firm or corporation; arising out of or alleged to arise out of FB's failure to comply with any and all provisions of any statute, regulation or resolution of the United States, State of Washington or any local agency applicable to FB and its business. Nothing herein shall be deemed to prevent the parties indemnified and held harmless herein from participating in the defense of any litigation by their own counsel at such parties'

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expense. Such participation shall not under any circumstances relieve FB from its duty of defense against liability or of paying any judgment entered against such party. Notwithstanding any provision of this Section to the contrary, FB shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand, lien, damage or liability arises out of or in connection with negligent acts or omissions of the City.

B. FB hereby waives immunity under Title 51 RCW and affirms that the City and FB have specifically negotiated these provisions, as required by RCW 4.24.115, to the extent that it may apply.

C. Whenever any judgment is recovered against the City or any other indemnitee for any such liability, costs, or expenses, such judgment shall be conclusive against FB, not only as to the amount of such damage, but as to its liability, provided FB has reasonable notice or actually knew, or should have known, of the pendency of such suit. Under such circumstances, FB may also request the opportunity to defend or participate in the suit with legal counsel of its choice, at its expense, said request not to be unreasonably denied.

D. No action, error or omission, or failure to act by the City, its agents, officers, officials or employees, in connection with administering its rights, duties or regulatory functions related to this Franchise shall be asserted by FB, directly, indirectly or by way of seeking indemnification or as an assertion that the City has waived or is estopped to assert any municipal right hereunder, against the City, its boards, departments, divisions, officers, officials or employees.

E. It is not the intent of this Franchise to acknowledge, create, imply or expand any duty or liability of the City with respect to its role as a franchising authority, in the exercise of its police powers or for any other purpose. Any City duty nonetheless deemed created shall be a duty to the general public and not to any specific party, group or entity.

SECTION 8 – REPORTING REQUIREMENTS

All reports required under Section 8 of this Franchise may be requested by the City to be provided by FB in hard copy and/or electronic format compatible with City databases, including, but not limited to, the GIS system.

8.1 Quarterly Reports. Within twenty-five (25) calendar days after the end of the previous quarter, FB shall submit to the City a completed form reporting any and all revenues for the previous quarter. Said reports shall be verified by an officer or other authorized representative of FB. Said reports shall contain an accurate statement in summarized form, as well as in detail, of FB's gross revenues and the computation basis and method. These reports shall be in a form reasonably required by the City. The City may, from time to time, make such reasonable amendments to the forms as are required to ensure that all gross revenues are reported clearly and accurately.

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8.2 Annual Reports. Not later than sixty (60) days following the end of FB's fiscal year each year, FB shall present, at its sole expense, a written report to the City which shall include:

(1) Full financial statements for the previous year, including income statement, balance sheet, cash flow statement, and appropriate explanatory footnotes, for FB Communications of Washington, Inc., and a full income statement with appropriate explanatory footnotes for the Telecommunications System with specific breakouts for the System within the corporate limits of the City of Sunnyside. All financial statements shall be certified by an officer or other authorized representative of FB to be an accurate reflection of FB's books and records. In the event any audited financial report has not been published by the date due under this Section, then the audited financial report shall be deemed presented on time if presented within thirty (30) days after publication.

(2) A current list of all of FB's officers and directors or partners, if any, including postal addresses, telephone numbers and, where applicable, electronic mail addresses.

(3) The names and business postal addresses, telephone numbers and, where applicable, the electronic mail addresses of the Telecommunications System's local manager and engineer.

(4) Complete and accurate maps of the Telecommunications System including the location of Facilities.

(5) A description of future plans by FB to expand or alter the Telecommunications System and/or expand or alter services provided over the Telecommunications System.

8.3 Monitoring and Compliance Reports. Only upon request of the City, but no more than once per year, FB shall provide a written report of any and all technical performance tests for the Telecommunications System required by the FCC, WUTC or any other governmental agency having jurisdiction over the Telecommunications System.

8.4 Additional Reports. FB shall prepare and furnish to the City or any other entity exercising lawful regulatory authority in connection with this Franchise, at the times and in the form prescribed by the City or such other regulatory entity, such additional reports with respect to FB's operations, affairs, transactions or property, as may be reasonably necessary and appropriate to the performance of the rights, functions or duties of the City or such other regulatory entity in connection with this Franchise.

8.5 Communication with Regulatory Agencies. FB shall simultaneously file with the City a copy of each petition, application, tariff, report or any other communication related to the Telecommunications System transmitted by FB to, or received by FB from, any federal, state or other regulatory commissions or agencies having competent jurisdiction to regulate the construction or operation of the Telecommunications System, including,

specifically, the FCC and the WUTC. In addition, FB and its affiliates shall within ten (10) days of any communication transmitted by FB to, or received by FB from, any judicial or regulatory agency regarding any alleged or actual violation of a law, regulation or other requirement related to the Telecommunications System, provide the City a copy of the communication, whether specifically requested by the City to do so or not.

8.6 Preservation of Confidential Information. The City shall protect information provided to the City by FB designated as confidential or proprietary by FB, given such information had been so designated at the time it was provided to the City, to the maximum extent permissible under RCW 42.17, or as provided by other state law as it may now or hereafter exist.

**SECTION 9 – REMEDIES AND PROCEDURE FOR REMEDYING
FRANCHISE VIOLATIONS**

9.1 Remedies for Franchise Violations.

A. In addition to the remedies set forth elsewhere in this Franchise, the City shall have the right to assert any or all of the following remedies in the event FB violates or defaults on, as determined by the City, any provision of this Franchise:

(1) Drawing upon or foreclosing all or any part of any security provided under this Franchise, including without limitation the Faithful Performance Bond provided for under Section 7.6 herein; PROVIDED, however, such drawing or foreclosure shall be only in such a manner and in such amount as the City reasonably determines is necessary to remedy the violation or default. Should the City take such action as described herein, FB shall be responsible for all direct and actual costs related to such action, including, but not limited to, legal and administrative costs incurred by the City;

(2) Commence an action at law for monetary damages or seek other equitable relief;

(3) In the case of substantial violation or default, as determined by the City, of a material provision of this Franchise, declare this Franchise to be revoked;

(4) Seek specific performance of any provision of this Franchise, which reasonably lends itself to such remedy, as an alternative to seeking damages.

B. In determining which remedy or remedies, as set forth herein, are appropriate, the City shall take into consideration the nature and extent of the violation or default, the remedy needed to prevent such violations or defaults from occurring in the future, whether FB has a history of previous violations of the same or similar kind and such other considerations as are appropriate under the circumstances.

9.2 Procedure for Remedying Franchise Violations.

9.2.1 Notice of Violation. In the event the City determines FB has not complied with any term or condition of this Franchise, the City shall notify FB of the exact nature of the alleged noncompliance.

9.2.2 FB's Right to Cure or Respond. FB shall have thirty (30) days from receipt of notice by the City of any alleged noncompliance with any term or condition of this Franchise to:

(1) Respond to the City contesting the assertion of noncompliance; or

(2) Cure such violation or default or, in the event that by the nature of the violation or default such violation or default cannot be cured within a thirty (30) day period, initiate reasonable steps to remedy such violation or default and notify the City of the steps being taken and the projected date such remedy will be completed.

9.2.3 Public Hearing. In the event FB fails to respond to a notice, as described herein, or in the event FB fails to cure such violation or default pursuant to the procedures set forth herein, the City shall schedule a public hearing to investigate any alleged violation or default. The City shall provide FB twenty (20) calendar days notice of the time and place of such hearing and provide FB an opportunity to be heard at such hearing.

9.3 Enforcement. In the event the City, after such hearing as described in subsection 9.2.3 of this Franchise has been conducted, upholds its determination that FB has violated or defaulted on any provision of this Franchise, the City may impose any of the remedies set out in Section 9.1, A of this Franchise.

9.4 Failure to Enforce. FB shall not be relieved of any of its obligations to comply promptly with any provision of this Franchise by reason of any failure of the City to enforce prompt compliance, and the City's failure to enforce shall not constitute a waiver of rights or acquiescence in FB's conduct.

9.5 Acts of Nature. FB shall not be held in violation, default or noncompliance with the provisions of this Franchise, nor suffer any enforcement or penalty related thereto, where such violation, default or noncompliance is caused by acts of nature, power outages or other events reasonably beyond its ability to control. However, FB shall take all reasonable steps necessary to provide service despite such occurrences.

9.6 Alternative Remedies. Nothing in this Franchise shall be deemed to bar the right of the City or FB to seek or obtain judicial relief from any violation of this Franchise or any rule, regulation, requirement or directive promulgated thereunder. Neither the existence of other remedies identified in this Franchise nor the exercise thereof shall be deemed to bar or otherwise limit the right of the City to recover monetary damages for such violation by FB, or to seek and obtain judicial enforcement of FB's obligations under this Franchise by means of specific performance, injunctive relief or mandate, or any other judicial remedy at law or in equity.

SECTION 10 – MISCELLANEOUS PROVISIONS

10.1 Posting and Publication. FB shall assume the cost of posting and publication of this Franchise as such posting and publication is required by law, and such is payable upon FB's filing of acceptance of this Franchise.

10.2 Service of Notice. Except as otherwise specifically provided herein, any notice required or permitted to be given under this Franchise shall be deemed sufficient if provided in writing and when (1) delivered personally to the following addressee(s) or deposited with the United States Postal Service, postage paid, certified or registered mail; (2) sent by overnight or commercial air courier; or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

Notices to the City shall be addressed to the following:

Sunnyside City Hall
818 E. Edison Ave.
Sunnyside, WA 98944
Attn:
Facsimile Number: 509-837-3294

Notices to FB shall be addressed to the following:

Fatbeam, LLC
971 S. Clearwater Lp
Post Falls, ID 83854
Attn: Greg Green
Facsimile Number: 208-777-4708

With a copy to:

Fatbeam, LLC
111 Teal Ln
Sagle, ID 83860
Attn: Susan Lamb
Facsimile Number: 678-693-5391

10.3 Compliance with Laws. FB shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as the general ordinances, resolutions, rules and regulations of the City, pursuant to the City's lawful authority, heretofore or hereafter adopted or established during the entire term of this Franchise. In the event any valid and superior law, rule or regulation of any governing authority or agency having jurisdiction contravenes the provisions of this Franchise subsequent to its adoption, then the provisions of this Franchise shall be superseded only to

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the limited extent that the provisions hereof are in conflict and contrary to any such law, rule or regulation. Nothing in this Franchise shall limit the City's right of eminent domain under state law. Nothing in this Franchise shall be deemed to waive the requirements of any lawful code or resolution of the City regarding permits, fees to be paid or manner of construction.

10.4 Governing Law and Venue. This Franchise shall be governed by and construed in accordance with the laws of the State of Washington, and venue for any litigation arising out of or in connection with privileges extended herein is stipulated to be in Spokane County.

10.5 Severability. If any section, subsection, sentence, clause, phrase or portion of this Franchise is for any reason declared by a court of competent jurisdiction to be void, invalid or unenforceable, such portion shall be deemed a separate, distinct and independent provision and such declaration shall not affect the validity of the remaining portions thereof. In such event, the City and FB shall negotiate in good faith to modify this Franchise as may be necessary to meet the requirements of the law and/or to effectuate the intention of this Franchise. In the event that such modifications are barred by any legal requirements governing any party, the City and FB shall use their best efforts to otherwise avoid prejudice to the respective parties' interests and to implement changes to effectuate the intent in entering into this Franchise.

10.6 Guarantee of Performance. FB hereby agrees that it enters into this Franchise voluntarily and in order to secure and in consideration of the grant from the City of a Twenty-year franchise. Performance pursuant to the terms and conditions of this Franchise is guaranteed by FB.

10.7 Force Majeure.

A. For the purposes of this Section, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within in the control of the parties hereto.

B. If FB is wholly or partially unable to carry out its obligations under this Franchise as a result of a Force Majeure, FB shall provide the City prompt notice of such Force Majeure, describing the same in reasonable detail, and FB's obligations under this Franchise, other than for payment of moneys due, shall not be deemed in violation or default for the duration of the Force Majeure. FB agrees to use its best efforts to remedy as soon as possible, under the circumstances, FB's inability, by reason of Force Majeure, to carry out its responsibilities and duties under this Franchise.

10.8 City Right of Intervention. If the City otherwise has the right to intervene, FB expressly acknowledges and agrees, by acceptance of this Franchise, not to oppose such intervention by the City in any suit or proceeding to which FB is a party related to this Franchise.

EXHIBIT "A"

10.9 Consent. Wherever the consent or approval of either FB or the City is specifically required in this Franchise, such consent or approval shall not be unreasonably withheld.

10.10 No Third Party Beneficiaries. There shall be no third party beneficiaries of this Franchise.

10.11 Franchise Ordinance Acceptance. FB shall execute and return to the City, within sixty (60) days after the date of adoption of the Franchise Ordinance by the Sunnyside City Council, three (3) original Franchise Agreements, by which FB acknowledges that it has carefully read the terms and conditions of the Franchise Ordinance and accepts all of the terms and conditions of the Franchise Ordinance and this Franchise and agrees to abide by the same. In accepting this Franchise, FB shall indicate that it has relied upon its own investigation of all relevant facts, that it has had the assistance of counsel, that it was not induced to accept this Franchise, that the Franchise Ordinance represents the entire agreement between FB and the City and that FB accepts all reasonable risks related to the interpretation of the Franchise Ordinance and this Franchise. The executed Franchise Agreements shall be returned to the City accompanied by the Letter of Credit as required in Section 7.6 of this Franchise and evidence of insurance as required in Sections 7.5.1 and 7.5.2 of this Franchise. In the event FB fails to submit a Franchise Agreement as provided for herein, or fails to provide the required accompanying documents, this Franchise shall be null and void.

10.12 Previous Rights Abandoned. This Franchise supersedes any and all other rights, privileges, powers, immunities and authorities owned, possessed, controlled or exercisable by FB pursuant to any previous franchise in the City.

10.13 Effective Date. This Franchise and the Franchise Ordinance shall be effective thirty days after adoption by the City Council, approval by the City Manager, acceptance by FB and publication as required by law.

EXHIBIT "A"

PASSED BY THE CITY COUNCIL and signed and approved this ____ day of _____, 2011.

CITY OF SUNNYSIDE

FATBEAM, LLC

Mark J. Gervasi, City Manager

By: _____
Its: Gregory Green, President

Attest:

City Finance Director

Approved as to Form:

City Attorney

State of Washington)
)ss.
County of Spokane)

I hereby certify that I know or have satisfactory evidence that Gregory Green is the person who appeared before me, and said person acknowledged that he signed this instrument, and on oath stated that he was authorized to execute the instrument on behalf of Fatbeam, LLC, and acknowledged it as the President of Fatbeam, LLC, to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

Dated this _____ day of _____, 2011.

Print Name: _____

NOTARY PUBLIC in and for the State of
Washington, residing at

My commission expires: _____