

ORDINANCE NO. 2022 –

AN ORDINANCE amending the non-exclusive franchise previously granted to Wholesail Networks LLC (Wholesail) by ordinance No. 2015-045 and amended by ordinance No. 2019-034 to add and include Wholesail’s affiliate Ziplly Fiber Pacific, LLC (Ziplly Fiber) (collectively referred to hereafter as “Wholesail”) to Wholesail’s franchise to construct, operate and maintain a Telecommunications System, with all necessary facilities, within the City of Yakima, Washington (the "City"); setting forth provisions, terms and conditions accompanying the grant of this Franchise; providing for City regulation of construction, operation, maintenance and use of the Telecommunications System; prescribing penalties for the violations of its provisions; and setting an effective date.

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BE IT ORDAINED BY THE CITY OF YAKIMA that the franchise already granted to Wholesail Networks LLC is amended to apply to and include its affiliate Ziplly Fiber Pacific, LLC, to operate and maintain Telecommunications Systems in the City of Yakima, Washington, upon the following express terms and conditions:

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 Yakima, 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 Yakima, Washington.

1.4 "Customer" means any person(s) who legally receives any one or more of the services provided by Wholesail 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 Wholesail's Telecommunications System, located in the City's rights-of-way, utilized by Wholesail in the operation of activities authorized by this Franchise. The abandonment by Wholesail of any Facilities as defined herein shall not act to remove the same from this definition.

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 Wholesail 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 Wholesail shall extend its services.

1.10 "Grantee" shall refer to, as incorporated or used herein, Wholesail Networks LLC and its affiliate Ziplly Fiber Pacific, 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 Wholesail or any affiliate of Wholesail or any other person who would constitute an operator of Wholesail'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 access to the local telephone network, local telephone switching service, toll service, or otherwise providing telephonic, data, video conferencing or similar communication or transmission services for hire via a local network, line, 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.

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 purpose of voice, video or data transmission;

B. Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video or data transmission;

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 purpose of voice, video or data transmission;

D. Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services for the purpose of voice, video or data transmission;

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 and other necessary Facilities owned or used by Wholesail 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

2.1 Grant of Franchise. The City hereby grants to Wholesail Networks LLC a non-exclusive franchise which authorizes Wholesail, 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, 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 ten (10) years from the effective date unless 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 Wholesail. The grant of any additional franchise shall not of itself be deemed to constitute a modification, revocation or termination of rights previously granted to Wholesail. 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 Wholesail to operate and maintain a Telecommunications System including the towers, antenna, satellite dishes, lines and other appurtenances necessary for the provision of Network Telephone Service, as defined in Section 1.12 of this Franchise and in RCW 82.04.065, and other Telecommunications Services as defined herein, in, upon, along, above, over and under the streets and rights-of-way in the City.

B. Wholesail'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 Charter and Wholesail's right to construct, erect, install or modify its Telecommunications System is specifically subject to the requirement that Wholesail obtain permits as set forth in this Franchise.

C. Wholesail 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 Wholesail 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 Wholesail, 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 Wholesail shall be subject to the exercise thereof by the City at any time.

D. Wholesail 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 Wholesail 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 Wholesail 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 Wholesail 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, Wholesail'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 Wholesail 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. Wholesail 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. Wholesail 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, Wholesail shall make specific arrangements directly with the municipal department or division controlling such building or other structure.

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

E. Wholesail shall not permit installations by others in the Franchise Service Area without written approval of the City. Such approval shall not be in lieu of a franchise or other requirements of the City. Whether or not permitted, Wholesail remains responsible for all third party users 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 Wholesail any fee title property rights in or on any public or private property to which Wholesail 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 Yakima, Washington.

2.7 Public Review of Franchise. The field of requirements and conditions applicable to this franchise continue to evolve. Therefore, in order to provide for a maximum degree of flexibility in this Franchise, and the help achieve a continued advanced and modern Telecommunications System, the following evaluation provision will apply:

A. Following year five (5) of this Franchise, and only upon the request of either party, a public review may be held, should there be a material change to law, technology or services that may have an effect on the terms and conditions of this Franchise.

B. As a result of such public review, either party may request a change or amendment in the terms of this Franchise. Parties will, in good faith, review and negotiate the terms of the change and any amendment required to this Franchise. Based on such public review and adoption of such a change or new requirement through a mutually acceptable Franchise amendment, such change will become effective.

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 Wholesail 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 Wholesail's functions, the City and Wholesail 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 Wholesail 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 Wholesail 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) Wholesail 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) Wholesail becomes insolvent, unable or unwilling to pay its debts as they become due, or is adjudged a bankrupt; or

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

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 Wholesail's payment of any fees or taxes due the City under this Franchise;

(2) Any failure by Wholesail 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 Wholesail to maintain the liability insurance required under this Franchise;

(4) Any failure by Wholesail to maintain and provide the City a copy of a Performance Bond as required under this Franchise;

(5) Any failure by Wholesail 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 Wholesail of the occurrence and the proposed forfeiture and an opportunity for Wholesail to be heard, the City may, by ordinance or other appropriate document, declare a forfeiture. In a hearing of Wholesail, Wholesail 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 a forfeiture is lawfully declared, all rights of Wholesail 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 Wholesail, 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.

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

- (1) Renew this Franchise, in accordance with applicable valid law;
- (2) Invite additional franchise applications or proposals;
- (3) Terminate this Franchise without further action; and
- (4) Take such other action as the City deems appropriate.

2.13 Transfer of Ownership.

A. This Franchise shall not be sold, leased, mortgaged, assigned or otherwise transferred, nor shall any of the rights or privileges herein granted or authorized be sold, leased, mortgaged, assigned or otherwise transferred, either in whole or in part, nor shall title hereto, either legal or equitable, or any right, interest or property herein, pass to or vest in any person, except Wholesail, either by act of Wholesail or operation of law, without the prior consent of the City, expressed in writing. The granting of such prior consent in one instance shall not render unnecessary any subsequent prior consent in another instance. Any transfer of ownership shall make this Franchise subject to revocation unless and until the City shall have given written prior consent.

B. Upon any transfer as heretofore described, Wholesail shall, within sixty (60) days thereafter, file with the City a copy of the deed, agreement, mortgage, lease or other written instrument evidencing such sale, lease, mortgage, assignment or transfer, certified and sworn as correct by Wholesail.

C. Every such transfer as heretofore described, whether voluntary or involuntary, shall be deemed void and of no effect unless Wholesail shall, within sixty (60) days after such transfer has been made, file such certified copy as is required.

D. The requirements of this Section shall not be deemed to prohibit the use of Wholesail's property as collateral for security in financing the construction or acquisition of all or part of the Telecommunications System franchised hereunder. However, such financing shall be subject to the provisions of this Franchise.

E. The City reserves the right to invoke any or all provisions of this Franchise upon Wholesail's successors or assigns, judgment creditors or distributees of facilities or property used in enjoyment of privileges conferred herein, whether or not stated elsewhere, all without waiver of the right to withhold consent not expressly given of any such transfer and/or require a new franchise.

2.14 Change in Control. Wholesail shall promptly notify the City through the City Council of any proposed change in, transfer of or acquisition by any other party of control of Wholesail. If beneficial ownership of thirty percent (30%) or more of the stock of Wholesail, or any parent company of Wholesail immediate or otherwise, or of any entity now owning or later acquiring such a beneficial interest is acquired by a single entity or by several entities under common control, and if such entity or agent of common control is other than an

organization a) whose primary business is telecommunications system operation, and b) is more than fifty percent (50%) owned by Wholesail or a parent of Wholesail, then a change in control will be deemed to have taken place unless the City, upon request of Wholesail, finds otherwise. Such a change in control shall make this Franchise subject to revocation unless and until the City shall have given written consent thereto. For the purpose of determining whether it will consent to such change, transfer or acquisition of control, the City may inquire into the qualifications of the prospective controlling party to perform the obligations of Wholesail under this Franchise. Wholesail shall assist the City in any such inquiry. The City may condition its consent upon such terms and conditions as it deems appropriate. Consent to the transfer shall not be unreasonably withheld.

2.15 No Stock to be Issued. Wholesail promises never to issue any capital stock on account of this Franchise or any permission granted under the terms of this Franchise, or the value thereof. Wholesail further agrees it will not have any right to receive, upon a condemnation proceeding or other negotiation by the City to acquire the properties of Wholesail, any payment or award on account of this Franchise or permission or its value. Wholesail waives all such claims against the City and also any claims for any municipal revision, action, inaction, curtailment, suspension, revocation or change in municipal policy or regulation relating to Wholesail's franchised activities. The City shall have no obligation to make any payment to Wholesail or award in condemnation for any other asset or interest of Wholesail, except as required under the State of Washington Constitution and United States Constitution or as state or federal laws may preemptively require.

2.16 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.

2.17 Survival of Terms. Sections 4.9, 6.3, 7 and 10 of this Franchise shall continue in effect as to Wholesail 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 Community Relations office (or its successor(s)), 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 manager of the Community Relations office (or his/her successor(s)), 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 Wholesail.

3.2 Grantee to Have No Recourse. Subject to state and federal law, Wholesail 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. Wholesail expressly acknowledges by acceptance of this Franchise that:

(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 Wholesail 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 Wholesail'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. Wholesail stipulates and agrees that this Franchise is subject to the City Charter of the City of Yakima. Wholesail understands the Charter's provisions are incorporated herein, where applicable. Wholesail 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. Wholesail 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 Wholesail's provision of Telecommunications Services shall, regardless of who performs installation, construction, alteration and/or maintenance, be and remain the responsibility of Wholesail.

4.2 Construction or Alteration.

4.2.1 Permits. Wholesail 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. Wholesail 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. Wholesail 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, Wholesail 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. Wholesail 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, Wholesail 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. Wholesail shall provide a map to the City showing the location of Wholesail'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. Wholesail 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 Wholesail's Telecommunications System, such as, but not limited to, trenching, paving, compaction and locations, Wholesail 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. Wholesail 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. Wholesail 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 Wholesail 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. Wholesail 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 Wholesail 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 Wholesail'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 Wholesail 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. Wholesail 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. Wholesail shall, where possible in the case of aboveground lines, make use of existing poles and other facilities available to Wholesail. Wholesail 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, Wholesail 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;
- (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) Wholesail 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).

Wholesail hereby states it is familiar with RCW Ch. 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 Wholesail's participation in municipally imposed undergrounding or related requirements as a condition of Wholesail's installation or continued maintenance of overhead facilities authorized under this Franchise. Wholesail hereby agrees to coordinate its underground installation and planning activities with the City's underground plan and policies.

4.4 Coordination with Other Users. Wholesail 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 Wholesail 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 Wholesail 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, Wholesail 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 Wholesail'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 Wholesail 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 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, wire conduit, pipe, line, pole, wireholding 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, Wholesail 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 Wholesail to remove or relocate its facilities located within City streets or rights-of-way, the City will make a reasonable effort to provide Wholesail with an alternate location for its facilities within City streets or rights-of-way.

C. The City shall provide Wholesail 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 Wholesail 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 Wholesail is using a facility which the requesting party has a right or duty to remove, Wholesail 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 Wholesail to remove or relocate its facilities shall give Wholesail no less than forty-five (45) days advance written notice advising Wholesail 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 Wholesail 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 Wholesail's failure, neglect or refusal thereof shall be paid solely by Wholesail. If Wholesail 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 Wholesail 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 Wholesail.

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

H. Wholesail 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 Wholesail's Telecommunications System Facilities.

4.6 Movement of Buildings. Wholesail 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 Wholesail 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 Wholesail for such temporary wire changes.

4.7 Tree Trimming. Wholesail, 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 Wholesail.

4.8 Restoration.

A. Whenever Wholesail damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, Wholesail 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 Wholesail in a hard surface pavement in any City street or right-of-way, Wholesail 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 Wholesail until such time as the area is resurfaced or reconstructed.

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

E. Should Wholesail 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 Wholesail's sole expense and liability, but no action or inaction by the City shall relieve Wholesail of its obligation to hold the City harmless as set forth in Section 7.7 of this Franchise. Prior to undertaking corrective effort, the City shall make a reasonable effort to notify Wholesail, 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 Wholesail damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, Wholesail stipulates that the City may, without limitation:

- (1) Require Wholesail to repave an entire lane or greater affected area within any cut or disturbed location; and/or
- (2) Require Wholesail 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 Wholesail causes any damage to private property in the process of restoring facilities, Wholesail shall pay the owner of the property for such damage.

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

J. Wholesail 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 Wholesail to remove, at Wholesail'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 Wholesail fails to do so, the City may perform the work and collect the cost thereof from Wholesail. The actual cost thereof, including direct and indirect administrative costs, shall be a lien upon all plant and property of Wholesail effective upon filing of the lien with the Yakima County Auditor.

B. Any order by the City Council to remove any of Wholesail's Telecommunications System Facilities shall be mailed to Wholesail not later than thirty (30) calendar days following the date of expiration of this Franchise. Wholesail 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 the City. Removal shall be completed not later than twelve (12) months following the date of expiration of this Franchise.

C. Wholesail 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. Wholesail 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, Wholesail 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, Wholesail shall notify the City of the need for

such repairs. Wholesail 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 Wholesail 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 Wholesail, 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 Wholesail. In addition, the City may require Wholesail to furnish certification from a qualified independent engineer that Wholesail's Facilities are constructed in accordance with good engineering practice and are reasonably protected from damage and injury.

4.12 After-Acquired Facilities. Wholesail 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 Wholesail or upon addition or annexation to the City of any area in which Wholesail 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. Wholesail hereby promises to maintain and supply to the City, at Wholesail's sole expense, any information requested by the City to coordinate municipal functions with Wholesail's activities within City streets and rights-of-way. Wholesail 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 (GIS) data base. Wholesail 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 Wholesail to the City 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. Wholesail shall commence construction of the Telecommunications System during the calendar year 2001 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 Wholesail 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. Wholesail 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.

6.2 Response to Customers. Wholesail 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. Wholesail 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. Wholesail 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 Wholesail'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, Wholesail 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 Wholesail.

6.5 Complaints. Wholesail hereby acknowledges the City's interest in the prompt resolution of all complaints made to the City regarding Wholesail's operation in City streets and rights-of-way and Wholesail 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. Wholesail 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. Wholesail 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 Wholesail'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, Wholesail 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. Wholesail and the City agree that a reasonable franchise fee would be no less than five percent (5%) of Wholesail's Gross Receipts for telephone business activities within the City. Wholesail and the City agree that nothing in this Section limits the right of Wholesail to challenge imposition of a municipal franchise fee pursuant to 47 USC § 253.

B. Wholesail 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 Yakima Municipal Code ("YMC") Section 5.50.050 to six percent (6%) of gross receipts, unless a higher rate is approved by a vote of the people. However, Wholesail and the City agree that nothing in this Franchise shall limit the City's power of taxation, as may now or hereafter exist.

C. Wholesail 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 Yakima Municipal Code Section 5.50.050. Therefore, throughout the term of this Franchise, Wholesail 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 Yakima Municipal Code Section 5.50.050.

7.1.2 Other Fees.

A. Wholesail 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 Wholesail, 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 Wholesail no later than thirty (30) days after Wholesail's receipt of the City's billing thereof.

C. Wholesail 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. Wholesail shall make all required payments in the form, intervals and manner requested by the City director of budget and finance and shall furnish the City any and all information related to the City's revenue collection functions reasonably requested.

B. As provided for in Section 5.50.090 of the Yakima Municipal Code, City occupation tax on utilities payments shall be transmitted by Wholesail monthly by electronic funds transfer to such City of Yakima bank account as may be designated by the City director of budget and finance. Said payments shall be received by the City no later than the 25th of each month for the preceding calendar month. Not later than the date of each payment, Wholesail shall file with the City a written statement signed by the Telecommunication System manager of Wholesail which identifies in detail the sources and amounts of gross revenues earned by Wholesail during the month for which payment is made, in accordance with Section 8.1 of this Franchise. 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 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 Wholesail 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. Wholesail 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 Wholesail and/or any parent company of Wholesail pursuant to the rules and regulations of the FCC, WUTC and other regulatory agencies, and other like materials Wholesail and/or any parent company of Wholesail 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 Wholesail 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 Wholesail and/or any parent company of Wholesail.

C. Wholesail 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 Wholesail in order to verify the accuracy of utility tax payments made to the City. Wholesail and each parent company of Wholesail shall cooperate fully in the conduct of such audit. In case of audit, the City director of budget and finance may require Wholesail to furnish a verified statement of compliance with Wholesail's obligations or in response to any questions. Said certificate may be required from an independent certified public accountant at Wholesail's sole expense. All audits will take place on Wholesail's premises or at offices furnished by Wholesail, which shall be a location within the City of Yakima. Wholesail agrees, upon request of the City director of budget and finance, 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 Wholesail's facilities or business operations in City.

B. In the event it is determined, as a result of an audit conducted by the City or its authorized agent, that Wholesail has underpaid City utility taxes by five percent (5%) or more than was due the City for any given period, then Wholesail shall reimburse the City for the entire cost of such audit and 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, within thirty (30) days of the completion and acceptance of the audit by the City.

7.5 Insurance.

7.5.1 Coverages. Wholesail shall maintain, throughout the term of this Franchise, liability insurance insuring Wholesail, 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, Wholesail 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 Wholesail 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, Wholesail 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 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 Wholesail 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.

Wholesail 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, Wholesail 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 Wholesail from liability in excess of those limits.

7.5.2 Proof of Insurance. Wholesail 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. Wholesail shall file and maintain a certificate of insurance along with written evidence of payment of the required premiums with the manager of the City Community Relations office, 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.

Wholesail 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, Wholesail and Wholesail's officers, agents and employees, the City may require additional insurance to be acquired by Wholesail. Should the City exercise its right to require additional insurance, the City will provide Wholesail with written notice.

7.5.4 Failure to Procure. Wholesail 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 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 Wholesail'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 Wholesail for all premiums in connection therewith.

7.6 Performance Bond. Prior to the effective date of this Franchise, Wholesail 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 One Hundred Thousand Dollars (\$100,000), conditioned that Wholesail shall well and truly observe, fulfill and perform each term and condition of this Franchise. Wholesail 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 Wholesail or any successor or assign of Wholesail has liquidated all of its obligations with the City that may have arisen from the acceptance of this Franchise by Wholesail 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. Wholesail shall provide a duplicate copy of said bond to the City and said duplicate copy shall be kept on file at the City Community Relations 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 Wholesail or to limit liability of Wholesail 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. Wholesail 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 Wholesail, 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 Wholesail'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 Wholesail'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 Wholesail 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' expense. Such participation shall not under any circumstances relieve Wholesail 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, Wholesail 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. Wholesail hereby waives immunity under Title 51 RCW and affirms that the City and Wholesail 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 Wholesail, not only as to the amount of such damage, but as to its liability, provided Wholesail has reasonable notice or actually knew, or should have known, of the pendency of such suit. Under such circumstances, Wholesail 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 Wholesail, 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 Wholesail in hard copy and/or electronic format compatible with City databases, including, but not limited to, the GIS system.

8.1 Monthly Reports. As provided for in Section 5.50.090 of the Yakima Municipal Code, within twenty-five (25) calendar days after the end of the previous month, Wholesail shall submit to the City a completed form reporting any and all revenues for the previous month. Said reports shall be verified by an officer or other authorized representative of Wholesail. Said reports shall contain an accurate statement in

summarized form, as well as in detail, of Wholesail'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.

8.2 Annual Reports. Not later than sixty (60) days following the end of Wholesail's fiscal year each year, Wholesail 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 Wholesail Networks LLC, 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 Yakima. All financial statements shall be certified by an officer or other authorized representative of Wholesail to be an accurate reflection of Wholesail'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 Wholesail'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 Wholesail 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, Wholesail 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. Wholesail 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 Wholesail'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. Wholesail 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 Wholesail to, or received by Wholesail 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, Wholesail and its affiliates shall within ten (10) days of any communication transmitted by Wholesail to, or received by Wholesail 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 Wholesail designated as confidential or proprietary by Wholesail, given such information had been so designated at the time it was provided to the City, to the maximum extent permissible under Chapter 42.17 RCW, 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 Wholesail 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, Wholesail 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 Wholesail 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 Remediating Franchise Violations.

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

9.2.2 Wholesail's Right to Cure or Respond. Wholesail 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 Wholesail fails to respond to a notice, as described herein, or in the event Wholesail 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 Wholesail twenty (20) calendar days notice of the time and place of such hearing and provide Wholesail 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 Wholesail 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. Wholesail 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 Wholesail's conduct.

9.5 Acts of Nature. Wholesail 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, Wholesail 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 Wholesail 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 Wholesail, or to seek and obtain judicial enforcement of Wholesail'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. Wholesail 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 Wholesail'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:

Randy Beehler, Communications & Public Affairs Director
City of Yakima Community Relations office
129 N. 2nd Street
Yakima, WA 98901

Notices to Wholesail shall be addressed to the following:

Wholesail Networks LLC
135 Lake Street So., Suite 155
Kirkland, WA 98033
Attn: Legal

With a copy to:

Wholesail Networks LLC
1801 41st St., N-100
Everett, WA 98203
Attn: Legal

10.3 Compliance with Laws. Wholesail 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 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 Yakima 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 Wholesail 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 Wholesail 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. Wholesail 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 nine-year franchise. Performance pursuant to the terms and conditions of this Franchise is guaranteed by Wholesail.

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 Wholesail is wholly or partially unable to carry out its obligations under this Franchise as a result of a Force Majeure, Wholesail shall provide the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Wholesail'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. Wholesail agrees to use its best efforts to remedy as soon as possible, under the circumstances, Wholesail'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, Wholesail expressly acknowledges and agrees, by acceptance of this Franchise, not to oppose such intervention by the City in any suit or proceeding to which Wholesail is a party related to this Franchise.

10.9 Consent. Wherever the consent or approval of either Wholesail 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. Wholesail shall execute and return to the City, within sixty (60) days after the date of adoption of the Franchise Ordinance by the Yakima City Council, three (3) original Franchise Agreements, by which Wholesail 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, Wholesail 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 Wholesail and the City and that Wholesail 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 Wholesail 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 Wholesail pursuant to any previous franchise in the City.

10.13 Effective Date. This Franchise and the Franchise Ordinance shall be effective thirty (30) days after its adoption; PROVIDED, however, that if Wholesail does not accept this Franchise pursuant to Section 10.11 of this Franchise and comply with all conditions for such acceptance set forth herein within sixty (60) days after the adoption of the Franchise Ordinance, this Franchise and the Franchise Ordinance shall be null and void.

