

ORDINANCE NO. 2023 - ____

AN ORDINANCE granting a non-exclusive franchise to Fatbeam, LLC ("Fatbeam") 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.

BE IT ORDAINED BY THE CITY OF YAKIMA that a franchise is hereby granted to Fatbeam, LLC to operate and maintain a Telecommunications System 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 Fatbeam utilizing the Telecommunications System.

1.5 "Days" shall mean calendar days.

1.6 "Facility(ies)" means all wires, lines, cables, conduits, towers, antenna, equipment and supporting structures, and/or any other tangible component of Fatbeam's Telecommunications System, located in the City's rights-of-way, utilized by Fatbeam in the operation of activities authorized by this Franchise. The abandonment by Fatbeam 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 Fatbeam 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 Fatbeam shall extend its services.

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

1.11 "Gross Operating Revenues" shall have a meaning consistent with any existing or future City Code. Gross Operating Revenues shall include any and all compensation in whatever form, from any source, directly earned by Fatbeam or any affiliate of Fatbeam or any other person who would constitute an operator of Fatbeam'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 providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing telephonic, video, data or similar communication or transmission services for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. Network Telephone Service includes the provision of transmission to and from the site of an internet provider via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. Network Telephone service does not include the providing of competitive telephone service, the providing of cable television service, the provide of broadcast services by radio or television stations, nor the provision of internet access as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

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 the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between and among points. Telecommunications Services include such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice over internet protocol services or is classified by the Federal Communications Commission as enhanced or value added. Telecommunications Services do not include:

A. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information;

B. Installation or maintenance of wiring or equipment on a customer's premises;

C. Tangible personal property;

D. Advertising, including but not limited to directory advertising;

E. Billing and collection services provided to third parties;

F. Internet access service;

G. Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include but are not limited to cable service as defined in 47 U.S.C. Sec.

522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in section 20.3, Title 47 C.F.R.;

H. Ancillary services;

I. Digital products delivered electronically, including but not limited to music, video, reading materials, or ring tones; or

J. Software delivered electronically

1.20 "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles and other necessary Facilities owned or used by Fatbeam 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" or "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 Fatbeam, LLC a non-exclusive franchise which authorizes Fatbeam, 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 extended in accordance with the provisions in Sections 2.7 and 2.12 of this Franchise or terminated sooner in accordance with this Franchise. This provision does not affect the City's right to revoke this Franchise for cause, because of a breach of any promise, condition or stipulation stated herein.

2.3 Franchise Non-Exclusive. The franchise granted herein shall be non-exclusive. The City specifically reserves the right to grant, at any time, such additional franchises for a Telecommunications System as it deems appropriate provided, however, such

additional grants shall not operate to materially modify, revoke or terminate any rights previously granted to Fatbeam. The grant of any additional franchise shall not of itself be deemed to constitute a modification, revocation or termination of rights previously granted to Fatbeam. 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 Fatbeam to operate and maintain a Telecommunications System including the lines, equipment, conduit, antenna, towers, and other appurtenances and facilities 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. Fatbeam'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 Fatbeam's right to construct, erect, install or modify its Telecommunications System is specifically subject to the requirement that Fatbeam obtain permits as set forth in this Franchise.

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

D. Fatbeam 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 Fatbeam 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 Fatbeam 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 Fatbeam 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, Fatbeam's use is also subject to conditions now or hereafter recognized by the City as generally applicable to telecommunications or underground conduit utilities.

F. Pursuant to the Yakima City Charter, Article XI Section 3, the City may acquire the public utility for the exercise of which this franchise is granted, either by agreement or by condemnation, and that upon such purchase by the City, either by agreement or condemnation, no value of the franchise itself shall be taken into account in fixing the price to be paid by the City for such utility.

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 Fatbeam 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. Fatbeam 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. Fatbeam 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, Fatbeam 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. Fatbeam stipulates the City may grant similar permission to others.

E. Fatbeam 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, Fatbeam 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 Fatbeam any fee title property rights in or on any public or private property to which Fatbeam 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 Periodic Public Review of Franchise.

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

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

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

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

(4) Fatbeam fails, refuses, neglects or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Fatbeam'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 Fatbeam's payment of any fees or taxes due the City under this Franchise;

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

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

(5) Any failure by Fatbeam 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 Fatbeam of the occurrence and the proposed forfeiture and an opportunity for Fatbeam to be heard, the City may, by ordinance or other appropriate document, declare a forfeiture. In a hearing of Fatbeam, Fatbeam 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 Fatbeam 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 Fatbeam, 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) Extend this Franchise, as provided for herein, though nothing in this provision shall be construed to require such extension;

(2) Renew this Franchise, in accordance with applicable valid law;

(3) Invite additional franchise applications or proposals;

(4) Terminate this Franchise without further action; and

(5) Take such other action as the City deems appropriate.

2.13 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 Fatbeam, either by act of Fatbeam or operation of law, without the prior consent of the City, which shall not be unreasonably withheld, and 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, Fatbeam 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 Fatbeam.

C. Every such transfer as heretofore described, whether voluntary or involuntary, shall be deemed void and of no effect unless Fatbeam 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 Fatbeam'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 Fatbeam'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 No Stock to be Issued. Fatbeam 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. Fatbeam 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 Fatbeam, any payment or award on account of this Franchise or permission or its value. Fatbeam 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 Fatbeam's franchised activities. The City shall have no obligation to make any payment to Fatbeam or award in condemnation for any other asset or interest of Fatbeam, except as required under the State of Washington Constitution and the United States Constitution or as state or federal laws may preemptively require.

2.15 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.

2.16 Survival of Terms. Sections 4.9, 6, and 9 of this Franchise shall continue in effect as to Fatbeam 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 Division (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 Division (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 Fatbeam.

3.2 Grantee to Have No Recourse. Subject to state and federal law, Fatbeam shall have no recourse and be awarded no monetary recovery whatsoever other than non-monetary declaratory or injunctive relief against the City for any loss, cost, expense or damage 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. Fatbeam 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 Fatbeam 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

(4) The matters contained in Fatbeam'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. Fatbeam stipulates and agrees that this Franchise is subject to any lawful provisions contained within the City Charter of the City of Yakima. Fatbeam understands the Charter's provisions are incorporated herein, where applicable. Fatbeam 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 public rights-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. Fatbeam 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 Fatbeam's provision of Telecommunications Services shall, regardless of who performs installation, construction, alteration and/or maintenance, be and remain the responsibility of Fatbeam.

4.2 Construction or Alteration.

4.2.1 Permits. Fatbeam 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. Fatbeam 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. Fatbeam 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, Fatbeam 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. Fatbeam 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, Fatbeam 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. Fatbeam shall provide a map to the City's Community Relations Division, or its successor, showing the location of Fatbeam'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. Fatbeam 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 Fatbeam's Telecommunications System, such as, but not limited to, trenching, paving, compaction and locations, Fatbeam 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. Fatbeam 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. Fatbeam 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 Fatbeam 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. The City reserves the right to limit or exclude Fatbeam's access to a specific route, right-of-way or other location when there is inadequate space, a pavement cutting moratorium, potential for unnecessary damage to public property, public expense, inconvenience, interference with City utilities, or for any other reason determined by the City.

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 rights-of-way shall be used by Fatbeam 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. Fatbeam 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. Fatbeam shall, where possible in the case of aboveground lines, make use of existing poles and other facilities available to Fatbeam. Fatbeam 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, Fatbeam 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) Fatbeam 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).

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

4.4 Coordination with Other Users. Fatbeam 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 Fatbeam 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 Fatbeam 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, Fatbeam 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 Fatbeam'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 Fatbeam to change the location of its Telecommunications System within City streets and rights-of-way when the public convenience 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, towers, antenna, 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, Fatbeam 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 Fatbeam to remove or relocate its facilities located within City streets or rights-of-way, the City will make a reasonable effort to provide Fatbeam with an alternate location for its facilities within City streets or rights-of-way.

C. The City shall provide Fatbeam 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 Fatbeam 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 Fatbeam is using a facility which the requesting party has a right or duty to remove, and the City has determined that such removal or relocation serves the best interests of the City in the management of its rights-of-way, then Fatbeam shall remove or relocate its Telecommunications System Facilities at the requesting party's sole expense. Fatbeam may request payment in advance from such third party prior to any preparation for any removal or relocation. The City shall not be liable for any such cost(s).

E. Any person requesting Fatbeam to remove or relocate its facilities shall give Fatbeam no less than one hundred eighty (180) days advance written notice advising Fatbeam of the date or dates removal or relocation is to be undertaken.

F. If Fatbeam fails, neglects or refuses to remove or relocate its facilities as directed by the City, 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 Fatbeam's failure, neglect or refusal thereof, shall be paid solely by Fatbeam.

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

H. Fatbeam 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 Fatbeam's Telecommunications System Facilities.

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

4.7 Tree Trimming. Fatbeam, 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 Fatbeam.

4.8 Restoration.

A. Whenever Fatbeam damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, Fatbeam 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 to the satisfaction of the City.

B. Whenever any opening is made by Fatbeam in a hard surface pavement in any City street or rights-of-way, Fatbeam 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 Fatbeam until such time as the area is resurfaced or reconstructed.

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

E. Should Fatbeam fail, neglect, refuse or delay in performing any obligation here or elsewhere stated, or where the City deems necessary to protect public rights-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 Fatbeam's sole expense. Prior to undertaking corrective effort, the City shall make a reasonable effort to notify Fatbeam, 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 Fatbeam damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, Fatbeam stipulates that the City may, without limitation:

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

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

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

J. Fatbeam 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 Fatbeam to remove, at Fatbeam'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 Fatbeam fails to do so, the City may perform the work or cause such work to be performed

and collect the cost thereof from Fatbeam. The actual cost thereof, including direct and indirect administrative costs, shall be a lien upon all plant and property of Fatbeam effective upon filing of the lien with the Yakima County Auditor.

B. Any order by the City Council to remove any of Fatbeam's Telecommunications System Facilities shall be mailed to Fatbeam not later than thirty (30) calendar days following the date of expiration of this Franchise. Fatbeam 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. Fatbeam 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. Fatbeam 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, Fatbeam 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, Fatbeam shall notify the City of the need for such repairs. Fatbeam 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 Fatbeam 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 Fatbeam, 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 Fatbeam. In addition, the City may require Fatbeam to furnish certification from a qualified independent engineer that Fatbeam's Facilities are constructed in accordance with good engineering practice and are reasonably protected from damage and injury.

4.12 After-Acquired Facilities. Fatbeam 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 Fatbeam or upon addition or

annexation to the City of any area in which Fatbeam 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. Fatbeam hereby promises to maintain and supply to the City, at Fatbeam's sole expense, any information requested by the City to coordinate municipal functions with Fatbeam's activities within City streets and rights-of-way. Fatbeam 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. Fatbeam 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 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 Fatbeam 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.

5.2 General Minimum Standards. Fatbeam shall, throughout the term of this Franchise, at a minimum, make available to all customers all signals and/or services that are required to be made available as federal, state or local law provides.

5.3 Performance Testing. Fatbeam 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.

SECTION 6 - COMPENSATION AND FINANCIAL PROVISIONS

6.1 Taxes and Fees.

6.1.1 City Occupation Tax on Utilities.

A. Fatbeam and the City understand and agree that RCW 35.21.860, as of the effective date of this Franchise, prohibits a municipal franchise fee for permission to use the right-of-way for telephone business purposes. Fatbeam agrees if this prohibition is removed or in the event Fatbeam should add or modify the services it offers so that the prohibition against franchise fees did not apply, the City may assess a reasonable franchise

fee. Fatbeam and the City agree a reasonable amount would be no less than five percent (5%) of Fatbeam's gross receipts from its business activities within the City.

B. Fatbeam 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, Fatbeam and the City agree that nothing in this Franchise shall limit the City's power of taxation, as may now or hereafter exist.

C. Fatbeam 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, Fatbeam 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.

6.1.2 Other Fees.

A. Fatbeam 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, as well as expenses of retaining independent technical, legal, financial or other consultants or advisors. 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 Fatbeam, the City will submit proof of any charges or expenses incurred as defined in Section 6.1.2, A of this Franchise. Said charges or expenses shall be paid by Fatbeam no later than thirty (30) days after Fatbeam's receipt of the City's billing thereof.

C. Fatbeam 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.

6.2 Payments.

A. Fatbeam 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 Fatbeam 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, Fatbeam shall file with the City a written statement signed by the Telecommunication System manager of Fatbeam which identifies in detail the sources and amounts of gross revenues earned by Fatbeam 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 Fatbeam 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.

6.3 Financial Records.

A. Fatbeam 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 reasonable notice, all books, records, maps, plans, financial statements, service complaint logs, performance test results, records required to be kept by Fatbeam and/or any parent company of Fatbeam pursuant to the rules and regulations of the FCC, WUTC and other regulatory agencies, and other like materials Fatbeam and/or any parent company of Fatbeam which directly relate to the operation of this Franchise.

B. Access to the aforementioned records referenced in Section 6.3 A shall not be denied by Fatbeam 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 Fatbeam and/or any parent company of Fatbeam.

C. Fatbeam 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.

6.4 Auditing.

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

B. In the event it is determined, as a result of an audit conducted by the City or its authorized agent, that Fatbeam has underpaid City utility taxes by five percent (5%) or more than was due the City for any given period, then Fatbeam 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.

6.5 Insurance.

6.5.1 Coverages. Fatbeam shall maintain, throughout the term of this Franchise, liability insurance insuring Fatbeam, its officers, employees and agents, with regard to all claims and damages specified in Section 6.5 herein, in the minimum amounts as follows:

(1) Commercial Liability Insurance.

On or before the date this Franchise is fully executed by the parties, Fatbeam 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 per occurrence and Two Million Dollars (\$2,000,000) in the aggregate. This coverage will have 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 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. Said policy shall be in effect for the duration of this Franchise. The policy shall name the City, its elected officials, officers, agents and employees as additional insureds. The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and authorized to conduct business in the State of Washington. If Fatbeam 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) Business Automobile Liability Insurance.

On or before the date this Franchise is fully executed by the parties, Fatbeam shall provide the City with a certificate of insurance as proof of business 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 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. Said policy shall be in effect for the duration of this Franchise. The policy shall name the City, its elected officials, officers, agents and employees as additional insureds. The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and authorized to conduct business in the State of Washington. If Fatbeam 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 "Business Automobile Liability Insurance."

(3) Umbrella Liability Insurance.

Fatbeam 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, Fatbeam shall provide the City with a certificate of insurance as proof of umbrella coverage with a minimum liability limit of Five Million Dollars (\$5,000,000). The insurance shall be with an insurance company or companies rated A-VII or higher in Best's Guide and authorized to conduct business in the State of Washington.

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

6.5.2 Proof of Insurance. Fatbeam 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. Fatbeam shall file a certificate of insurance along with written evidence of payment of the required premiums with the manager of the City Community Relations Division or his or her designee.

6.5.3 Alteration of Insurance. Insurance coverages, as required by this Franchise, shall not be changed, cancelled or otherwise altered without approval of the City. Fatbeam 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, Fatbeam and Fatbeam's officers, agents and employees, the City may require additional insurance to be acquired by Fatbeam. Should the City exercise its right to require additional insurance, the City will provide Fatbeam with no less than thirty (30) days prior written notice.

6.5.4 Failure to Procure. Fatbeam acknowledges and agrees, by acceptance of this Franchise, that failure to procure and maintain the insurance coverages as detailed in Section 6.5.1 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 the City may immediately suspend Fatbeam'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 Fatbeam for all premiums in connection therewith.

6.6 Performance Bond. Prior to the effective date of this Franchise, Fatbeam shall furnish to the City proof of the posting of a performance bond running to the City, with surety rated A-VII or higher in Best' Guide in the penal sum of Fifty Thousand Dollars (\$50,000), conditioned that Fatbeam shall well and truly observe, fulfill and perform each term and condition of this Franchise. Fatbeam 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 Fatbeam or any successor or assign of Fatbeam has liquidated all of its obligations with the City that may have arisen from the acceptance of this Franchise by Fatbeam 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. Fatbeam shall provide said bond to the City and said bond shall be kept on file at the City Community Relations Division 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 Fatbeam or to limit liability of Fatbeam under this Franchise either to the full amount of the performance bond or otherwise, except as otherwise provided herein.

6.7 Waiver, Indemnity, No Estoppel, No Duty.

A. Fatbeam hereby waives all claims, direct or indirect, for loss or liability against the City arising out of Fatbeam's franchised or permitted operations.

B. Fatbeam 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, or actions, brought by a third party ("Claims"), and any damages, losses, liens, liabilities, penalties, fines, judgments, awards, reasonable costs and expenses finally awarded by a court of competency, in connection with the performance or non-performance, by reason of any intentional or negligent act, occurrence or omission of Fatbeam, 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

but 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 Fatbeam'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 Fatbeam's failure to comply with any and all provisions of any applicable statute, regulation or resolution of the United States, State of Washington or any local agency applicable to Fatbeam 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 Fatbeam from its duty of defense against liability or of paying any judgment entered against such party.

C. Fatbeam hereby waives immunity under Title 51 RCW and affirms that the City and Fatbeam have specifically negotiated this provision, as required by RCW 4.24.115, to the extent that it may apply.

D. 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 Fatbeam, not only as to the amount of such damage, but as to its liability, provided Fatbeam has reasonable notice or actually knew, or should have known, of the pendency of such suit. Under such circumstances, Fatbeam 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.

E. 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 Fatbeam, 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.

F. 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.

G. NEITHER PARTY WILL BE LIABLE FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, INDIRECT, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING ATTORNEY FEES OR LOST PROFITS, TIME, SAVINGS, GOODWILL, LOST REVENUES, AND LOSS OF BUSINESS OPPORTUNITY, ARISING FROM OR IN CONNECTION TO THIS AGREEMENT REGARDLESS OF THE CAUSE OF ACTION WHETHER OR NOT THE OTHER PARTY WAS AWARE OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF THESE DAMAGES.

SECTION 7 – REPORTING REQUIREMENTS

All reports required under Section 7 of this Franchise may be requested by the City to be provided by Fatbeam in hard copy and/or electronic format compatible with City databases, including, but not limited to, the GIS system.

7.1 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, Fatbeam shall submit to the City a completed form reporting any and all revenues and customer counts by categories for the previous month. Said reports shall be verified by an officer or other authorized representative of Fatbeam. Said reports shall contain an accurate statement in summarized form, as well as in detail, of Fatbeam'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.

7.2 Additional Reports. Fatbeam 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 such regulatory authority.

7.3 Preservation of Confidential Information. The City shall protect information provided to the City by Fatbeam designated as confidential or proprietary by Fatbeam, 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 8 – REMEDIES AND PROCEDURE FOR REMEDYING FRANCHISE VIOLATIONS

8.1 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 Fatbeam 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 6.6 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, Fatbeam 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 Fatbeam has a history of previous violations of the same or similar kind and such other considerations as are appropriate under the circumstances.

8.2 Procedure for Remediating Franchise Violations.

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

8.2.2 Fatbeam's Right to Cure or Respond. Fatbeam 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.

8.2.3 Public Hearing. In the event Fatbeam fails to respond to a notice, as described herein, or in the event Fatbeam 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 Fatbeam twenty (20) calendar days notice of the time and place of such hearing and provide Fatbeam an opportunity to be heard at such hearing.

8.3 Enforcement. In the event the City, after such hearing as described in subsection 8.2.3 of this Franchise has been conducted, upholds its determination that Fatbeam has violated or defaulted on any provision of this Franchise, the City may impose any of the remedies set out in Section 8.1, A of this Franchise.

8.4 Failure to Enforce. Fatbeam 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 Fatbeam's conduct.

8.5 Acts of Nature. Fatbeam 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, Fatbeam shall take all reasonable steps necessary to provide service despite such occurrences.

8.6 Alternative Remedies. Nothing in this Franchise shall be deemed to bar the right of the City 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 Fatbeam, or to seek and obtain judicial enforcement of Fatbeam'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 9 – MISCELLANEOUS PROVISIONS

9.1 Posting and Publication. Fatbeam 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 Fatbeam's filing of acceptance of this Franchise.

9.2 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, Community Relations Manager
City of Yakima Community Relations Division
124 South 2nd Street
Yakima, WA 98901
Facsimile Number: (509) 576-6380

Notices to Fatbeam shall be addressed to the following:

Fatbeam, LLC
2065 W Riverstone Drive, Suite 202
Coeur d'Alene, ID 83814
Attn: Legal

9.3 Compliance with Laws. Fatbeam shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as the lawful 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.

9.4 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. In case of conflict or ambiguity between this document and Fatbeam's Request, this document shall be controlling. In any action or suit to enforce any right or remedy under this Franchise, the prevailing party shall be entitled to recover its cost, including without limitation attorney's fees.

9.5 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 Fatbeam 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 Fatbeam 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.

9.6 Guarantee of Performance. Fatbeam 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 ten (10) year franchise. Performance pursuant to the terms and conditions of this Franchise is guaranteed by Fatbeam.

9.7 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 Fatbeam is wholly or partially unable to carry out its obligations under this Franchise as a result of a Force Majeure, Fatbeam shall provide the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Fatbeam'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. Fatbeam agrees to use its best efforts to remedy as soon as possible, under the circumstances, Fatbeam's inability, by reason of Force Majeure, to carry out its responsibilities and duties under this Franchise.

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

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

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

9.11 Franchise Ordinance Acceptance. Fatbeam 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 Fatbeam 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, Fatbeam 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 Fatbeam and the City and that Fatbeam 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 6.6 of this Franchise and evidence of insurance as required in Sections 6.5.1 and 6.5.2 of this Franchise. In the event Fatbeam 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.

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

9.13 Effective Date. This Franchise and the Franchise Ordinance shall be effective thirty (30) days after its adoption; PROVIDED, however, that if Fatbeam does not accept this Franchise pursuant to Section 9.11 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.

PASSED BY THE CITY COUNCIL, signed and approved this _____ day of _____, 2023.

CITY OF YAKIMA

FATBEAM, LLC

Janice Deccio, Mayor

By: _____
Its: COO

Attest:

City Clerk

City Contract No: _____
Ordinance No: _____

State of Idaho)
)ss.
County of Kootenai)

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

Dated this 16th day of February, 2023.



H Osborn
Print Name: Heidi Osborn
NOTARY PUBLIC in and for the State of Idaho, residing at 12219 W Parkview Dr. Post Falls

My commission expires: 5/26/28