

CITY COUNCIL AGENDA ITEM
CITY OF SHORELINE, WASHINGTON

AGENDA TITLE: Adoption of Ordinance No. 604 Granting a Non-exclusive Franchise to AboveNet Communication, Inc. for Ten years to Construct, Maintain, Operate, Replace and Repair and Underground Fiber Optic Telecommunications System In, Along, Under, Through and Below Public Rights-Of-Way in the City of Shoreline

DEPARTMENT: City Manager's Office (CMO)

PRESENTED BY: John Norris, CMO Management Analyst

ACTION: X Ordinance Resolution Motion Discussion

PROBLEM/ISSUE STATEMENT:

Fiber optic telecommunications firms which use the City's rights-of-way for maintenance of their fiber optic telecommunications systems are required to have a non-exclusive franchise with the City. The City's current franchise with AboveNet Communications, Inc. (AboveNet), which was granted by Shoreline Ordinance No. 249, expired on October 17, 2010. Although this franchise has been expired for ten months, the City and AboveNet have been operating under the terms and requirements of the old franchise agreement. Proposed Ordinance No. 604 would grant a renewed franchise for an additional ten years to AboveNet.

RESOURCE/FINANCIAL IMPACT:

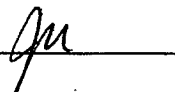
There is no fiscal impact to adopting Ordinance No. 604. As per state law, the City is precluded from imposing franchise fees upon a Service Provider, as defined in RCW 35.99.010, for use of the Right-of-Way. Given that AboveNet warrants that their operations are those of a Service Provider, the City is not able to collect franchise fees from AboveNet. Furthermore, given that there are no end-users of AboveNet's system in Shoreline, the City does not collect any utility taxes from AboveNet subscribers. If AboveNet provides services to subscribers within the City in the future, AboveNet shall become subject to the City's utility tax as set forth in Chapter 3.32 of the Shoreline Municipal Code. Upon franchise approval however, AboveNet shall be subject to a \$5,000 administrative fee for reimbursement of costs associated with the preparation, processing and approval of the franchise.

RECOMMENDATION:

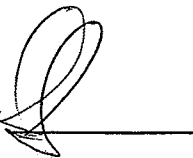
Staff recommends that Council adopt Ordinance No. 604.

Approved by:

City Manager



City Attorney



BACKGROUND:

Fiber optic telecommunications firms which use the City's rights-of-way for maintenance of their fiber telecommunications systems are required to have a non-exclusive franchise with the City. Shoreline Municipal Code (SMC) section 12.25.030 states that "it shall be unlawful to construct, install, maintain or operate any facility in, on, above, or below the public right-of-way without a valid franchise agreement obtained pursuant to the provision of this chapter."

On October 9, 2000, the City Council unanimously granted Metromedia Fiber Network Services (MFNS) a franchise to operate and maintain their fiber telecommunications system in Shoreline. At that time, MFNS was a new entrant to Shoreline, as they were preparing to install their fiber network shortly after franchise approval. This franchise, which was granted by Shoreline Ordinance No. 249, expired on October 17, 2010. A copy of the current MFNS franchise may be obtained on the City's website at: <http://shorelinewa.gov/index.aspx?page=547>.

On June 18, 2003, the City received notification that MFNS was being reorganized after their emergence from Title 11 bankruptcy protection, including a name change to AboveNet Communications, Inc. AboveNet is headquartered in White Plains, New York, and they provide both telecommunications capacity for other service providers to lease (referred to in the industry as "dark fiber"), as well as managed telecommunications and data services for clients. According to AboveNet's Right-of-Way Manager that negotiated the franchise on behalf of AboveNet, their end-users in the Puget Sound region are primarily large firms with high bandwidth needs in the Seattle area. An AboveNet Fact Sheet is attached to this staff report as Attachment A.

The AboveNet Fiber Optic Telecommunications System has no end-user customers in Shoreline, as their fiber cable runs the length of Aurora Avenue N., underground, as a "pass through." AboveNet's network is described as a "ring" that spans around 250 route miles in the Puget Sound region stretching from Mukilteo in the north to Tacoma in the south, with routes throughout downtown Seattle and around Lake Washington. A map of AboveNet's fiber system in Shoreline, which AboveNet has described as their "backbone cable", is attached to this staff report as Attachment B. As well, there have been no AboveNet-initiated permits issued by the City during the term of the current franchise to facilitate maintenance or operation of their fiber system. The only instance where AboveNet has worked in the right-of-way to alter their fiber system was during the City-initiated Aurora Corridor project.

Although the current MNFS (AboveNet) franchise has been expired for ten months, the City and AboveNet have been operating under the terms and requirements of the old franchise agreement. Proposed Ordinance No. 604, which is attached as Attachment C, would grant a renewed franchise for an additional ten years to AboveNet.

FRANCHISE TERMS:

The terms of the proposed AboveNet franchise are generally similar to the current MNFS franchise granted under Ordinance No. 249. New sections of the proposed franchise include:

- Sections 4-9, which provide contractual protections to the City (no rights by implication, conveyance of rights, no waiver, right-of-way vacation, etc.),
- Section 14, which provides the procedures and protocols for issuing a stop work order,
- Section 28, which provides liquidated damages protections for the City,
- Section 37, which provides binding acceptance protections, and
- Section 40, which identifies the venue for dispute resolution.

In addition to these new sections and other minor language and nomenclature changes, new indemnification language (section 22 of the franchise) was substituted for the initial indemnification language. This was done to keep this language consistent with the indemnification language that was used in other more recent franchise agreements.

The major difference between the new proposed franchise and previous franchise however is the removal of franchise fee language and an exhibit to the previous franchise that shows a schedule of right-of-way use charges that was conceived to be used as the basis for franchise fee valuations. When the previous franchise was adopted in 2000, staff felt that MFNS was subject to franchise fees under Washington State law. Although MFNS disagreed with this assessment, franchise fee language was left in the franchise and a "side agreement" was entered into in which MFNS agreed to the franchise fee language in exchange for a commitment from the City not to enforce that provision until the City's authority was clarified by further legal action (likely a court ruling.) This further legal action either never occurred or was not pursued by City staff, and thus, no franchise fees were ever collected from MFNS/AboveNet.

At the time, given that MFNS only provided dark fiber and not the direct data services they also provide now, City staff argued that the firm was not a "Service Provider" as defined by State law, and therefore was subject to franchise fees. Given that AboveNet now provides both dark fiber and direct services to clients, it is clear that they are a Service Provider and not subject to franchise fees. Due to this change, the franchise fee language has been removed from the proposed franchise, along with the accompanying exhibit. Supplanting this language however is a requirement that AboveNet provide a \$5,000 administrative fee for reimbursement of costs associated with the preparation, processing and approval of the franchise. This administrative fee is authorized by SMC section 12.25.040 and by state law.

FRANCHISE APPLICATION CONSIDERATION:

SMC section 12.25.070 identifies the considerations the City should review when granting a right-of-way franchise. For franchise renewals, they are:

1. The applicant's past service record in the city and in other communities
2. The nature of the proposed facilities and services
3. The proposed area of service

4. Whether the proposal would serve the public needs and the overall interests of the city residents
5. That the applicant has substantially complied with the material terms of the existing franchise
6. The quality of the applicant's service, response to consumer complaints, and billing practices
7. That the applicant has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the application
8. The applicant's proposal is reasonable to meet the future community needs and interests, taking into account the cost of meeting such needs and interests

In reviewing AboveNet's past service record, as noted earlier in this report, AboveNet has no end-users in Shoreline. Therefore, AboveNet has no Shoreline customer service, service quality, billing, or other type of retail service issues often associated with telecommunication service providers. Staff also did a cursory online review of AboveNet's service record in other communities and found no major issues. Also as noted earlier in this report, AboveNet's fiber cable runs through Shoreline as a "pass through". Thus, the nature of AboveNet's facilities and their service area in Shoreline is to connect system users on either side of the City. Although this does not currently serve the public needs and interests of the community, if large firms with high bandwidth needs locate in Shoreline in the future, the availability of this telecommunications system might serve these firms' needs. This has the potential to serve as an economic development incentive to firms that may be looking to locate in north King County.

In addition to these considerations, AboveNet has also never worked on their system other than during the City-initiated Aurora Corridor project. Thus, the protections in the right-of-way franchise have never been triggered or utilized. In this sense, the AboveNet has substantially complied with the material terms of the existing franchise. AboveNet's proposal is also reasonable to meet the future needs and interests of the community, as AboveNet has stated that they would be willing to offer connectivity to their network if a firm were to locate in Shoreline that would be interested in use of their telecommunication system.

One additional consideration identified in the Municipal Code regards a franchise renewal applicant's past history with bankruptcy. SMC section 12.25.050 requires that an applicant provide an affirmed statement of whether the applicant has voluntarily filed for relief under any provision of the bankruptcy laws of the United States (Chapter 11 bankruptcy protection.) As noted earlier, MFNS did enter and emerge from bankruptcy protection in September of 2003, at which point they restructured the firm and changed their name to AboveNet Communications, Inc. In researching this issue and in speaking with AboveNet, their Chapter 11 filing was caused by a severe liquidity crisis that was the result of the 'bursting of the dot-com bubble' in 2002. Since emerging from Chapter 11, AboveNet has had a solid financial track record and has not re-entered bankruptcy protection.

AboveNet is a publicly traded company on the New York Stock Exchange and serves around 20 major urban markets in America and Europe. In the 1st Quarter of 2011, AboveNet had quarterly revenues of \$114.4 million, with first quarter adjusted earnings before interest, taxes, depreciation, and amortization (EBITDA) of \$51.5 million. Although AboveNet's financial health is strong, fluctuations in the market and the technology sector, such as the dot-com bubble burst of the last decade, do carry risk. To mitigate this risk, the proposed franchise includes requirements for insurance, a performance bond/letter of credit, and liquidated damages.

Based on this analysis, staff believes that AboveNet's franchise application meets the criteria identified in SMC section 12.25.070 and their franchise should be granted.

ALTERNATIVES:

The following alternatives are available with regard to proposed Ordinance No. 604:

1. *Adopt* – Council can adopt Ordinance No. 604, which would grant the proposed franchise to AboveNet. The terms of the new franchise agreement would take effect upon franchise execution.
2. *Deny* – Council can deny the franchise request from AboveNet and not adopt Ordinance No. 604. Denial would have to be based on the criteria described in the Shoreline Municipal Code (applicant has substantially complied with the terms of the current franchise, applicant has the financial, legal and technical ability to provide service, their franchise proposal is reasonable to meet the future community needs and interests, etc.) This action would likely result in AboveNet appealing the denial to the court of appropriate jurisdiction.

RESOURCE/FINANCIAL IMPACT:

There is no fiscal impact to adopting Ordinance No. 604. As per state law, the City is precluded from imposing franchise fees upon a Service Provider, as defined in RCW 35.99.010, for use of the Right-of-Way. Given that AboveNet warrants that their operations are those of a Service Provider, the City is not able to collect franchise fees from AboveNet. Furthermore, given that there are no end-users of AboveNet's system in Shoreline, the City does not collect any utility taxes from AboveNet subscribers. If AboveNet provides services to subscribers within the City in the future, AboveNet shall become subject to the City's utility tax as set forth in Chapter 3.32 of the Shoreline Municipal Code. Upon franchise approval however, AboveNet shall be subject to a \$5,000 administrative fee for reimbursement of costs associated with the preparation, processing and approval of the franchise.

RECOMMENDATION:

Staff recommends that Council adopt Ordinance No. 604.

ATTACHMENTS:

- A: AboveNet Communications, Inc. Fact Sheet
- B: Map of AboveNet Fiber Facilities in Shoreline (Backbone Cable)
- C: Proposed Ordinance No. 604



AboveNet

AboveNet Fact Sheet

About AboveNet

AboveNet, Inc. provides high bandwidth connectivity solutions for business and carriers. Its private optical network delivers key network and IP services in and among top U.S. and European markets. AboveNet's network is widely used in demanding markets such as financial services, media, health care, retail and government.

Approximately 2.3 million fiber miles

Private, purpose-built networking providing end-to-end connectivity in and among top U.S. and European markets

Management Team

Bill LaPerch, Chief Executive Officer
Rajiv Datta, Chief Operating Officer
Joe Ciavarella, Chief Financial Officer
John Jacquay, SVP Sales and Marketing
Doug Jendras, SVP Operations
Rob Sokota, SVP, General Counsel & CAO
John Donaldson, SVP and Managing Director-UK

Employees

Approximately 600

Stock Ticker

NYSE: ABVT

Worldwide Headquarters

360 Hamilton Avenue
 White Plains, NY 10601
 General Info: 866 859 6971
 Sales: 877 462 2683

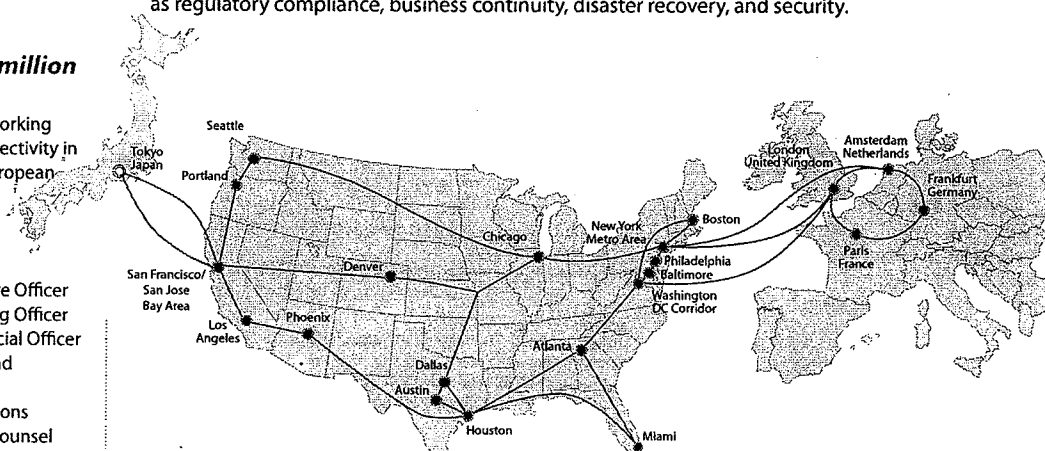
European Headquarters

Centurion House
 24 Monument Street
 London, EC3R 8AJ
 Main: +44(0)20 7220 3800
 Fax: +44(0)20 7623 9001

Overview

AboveNet is a leading provider of high bandwidth connectivity solutions that manages and maintains its own facilities-based private network. AboveNet offers solutions that are diverse from and bypass the ILEC/CLEC networks. This network design enables our customers to create efficient, cost-effective networks that can exceed the performance and economic barriers of the last mile of complex and vulnerable legacy telecom infrastructures. The result is lower total cost of ownership for our customer's networks.

AboveNet takes a Data Center neutral approach to help customers access the high bandwidth network solutions they need most, while providing fiber optic connectivity to more than 400 Data Centers. The AboveNet network provides high bandwidth metro access to WDM, Ethernet, VPN and IP networks, and managed services tailored to solve critical IT business issues for its customers, such as regulatory compliance, business continuity, disaster recovery, and security.



Why Choose AboveNet

Offering you solutions that are data center neutral, AboveNet provides a custom, private fiber optic platform that will best serve your network needs in your markets.

- Can seamlessly extend your network to your customers
- Private metro fiber network enables customers to meet these critical requirements:
 - » Scalability, whether your goal is to scale monthly or on demand, AboveNet will work with you to build a custom network that will grow along with your business needs
 - » Lowest Latency, providing only carrier class electronics to light our state of the art fiber network, resulting in the fastest, lowest latency network available to support your demanding applications, whether deployed across a metro or across the United States
 - » Business continuity, data storage and disaster recovery, with expert knowledge, we deploy and support the most demanding networks in the world
 - » Continuous monitoring, our 24x7/365 Network Management Center (NMC) ensures your service is virtually error free
- Private communications with virtually unlimited capacity
- Cost-effective solutions that bypass the Local Exchange Carrier
- Eliminate vendor finger-pointing: owned and operated dense metro fiber optic network



AboveNet

AboveNet Fact Sheet

AboveNet has the expertise and high bandwidth connectivity solutions to meet your specific business needs.

Here is how our customers use our high bandwidth solutions to enable their mission critical applications

- Financial data distribution/ applications
- Data Center & Server Consolidation
- Centralized applications evolving to distributed networking
- Virtualization and network consolidations
- Extranets/Collaboration
- Business Continuity & Disaster Recovery
- Videoconferencing
- TelePresence
- eLearning

Press Contact

MaryBeth Nance
Executive Director of Business
Development & Marketing
mnance@above.net

571 262 2865

www.above.net

(MAN) Metro Area Network Solutions

Metro WDM

- **WDM Custom Wave:** is an interactive design approach allowing AboveNet to enable complex customer requirements, next generation Wave Division Multiplexing (WDM) technologies, and best of breed equipment platforms to deliver unique private network solutions to AboveNet's most demanding customers
- **WDM Enhanced Wave:** offers dedicated, point to point transport service that connects customer locations, with a starter package system that include an initial circuit and supports either WDM- based or port based growth options. Service is available as unprotected, protected or path protected with various circuit interfaces
- **WDM Basic Wave:** is a dedicated, point to point transport service that connects customer locations with a single circuit. Service is available as unprotected, protected or path protected with various circuit interfaces but no ability for WDM- based service growth. With Multipoint circuit options offer port based growth
- **Handoffs Available:** 1Gbps, 2.5Gbps, 10Gbps, 40Gbps, via OC-12 to OC-768 for all the above

Core Wave / dcXchange

- **Core Wave / dcXchange* (1Gbps, 2.5Gbps, 10Gbps, OC-12 to OC-192):** high capacity circuits between key carrier hotels and data centers in strategic US markets. Service is available as unprotected, protected or path protected with various circuit interfaces but no ability for WDM- based service growth. With Multipoint circuit options, port based growth is possible

*Product availability based on market

Metro Ethernet

Point-to-Point Metro Ethernet

- **Private (100Mbps, 10Gbps, 1Gbps):** Ethernet connectivity across a completely private managed network with dedicated fiber and equipment
- **Dedicated (1Gbps, 10Gbps):** Ethernet connectivity across the AboveNet metro core network with reserved bandwidth availability
- **Standard (100Mbps, 500Mbps, 1Gbps, 2Gbps, 3Gbps, 5Gbps):** Ethernet connectivity across the AboveNet metro core network with guaranteed bandwidth service level

Multipoint Metro Ethernet eHub

- **Multipoint: eHub Dedicated (100Mbps, 1Gbps, 10Gbps):** Hub and spoke, layer 2 Ethernet connectivity with dedicated bandwidth and fiber tails
- **Multipoint: eHub Standard (100Mbps, 500Mbps, 1Gbps, 2Gbps, 3Gbps, 5Gbps):** Hub and spoke, layer 2 Ethernet connectivity utilizing shared bandwidth with dedicated fiber tails and QoS option

Multipoint Metro Ethernet eLAN

- **Multipoint: eLAN Dedicated (100Mbps, 1Gbps, 10Gbps):** Any-to-any, VPLS Ethernet connectivity with dedicated bandwidth and fiber tails
- **Multipoint: eLAN Standard (100Mbps, 500Mbps, 1Gbps, 2Gbps, 3Gbps, 5Gbps):** Any-to-any utilizing shared bandwidth with dedicated fiber tails and QoS option

Fiber Optic Infrastructure

- **Fiber Optic Infrastructure:** Customer managed private fiber connectivity

(WAN) Wide Area Network Solutions

Metro IP

- **Metro IP (1Gbps or 10Gbps connections, with burst capability, IPv6 enabled):** Metro IP service bundles a dedicated fiber connection from the customer premise to an AboveNet IP POP to provide Internet Access.

IP Transit

- **IP Transit (FastE, 1Gbps, or 10Gbps - fixed or burst capability, IPv6 enabled):** internet access service delivered to customers with a port connection on AboveNet's Tier 1 IP network

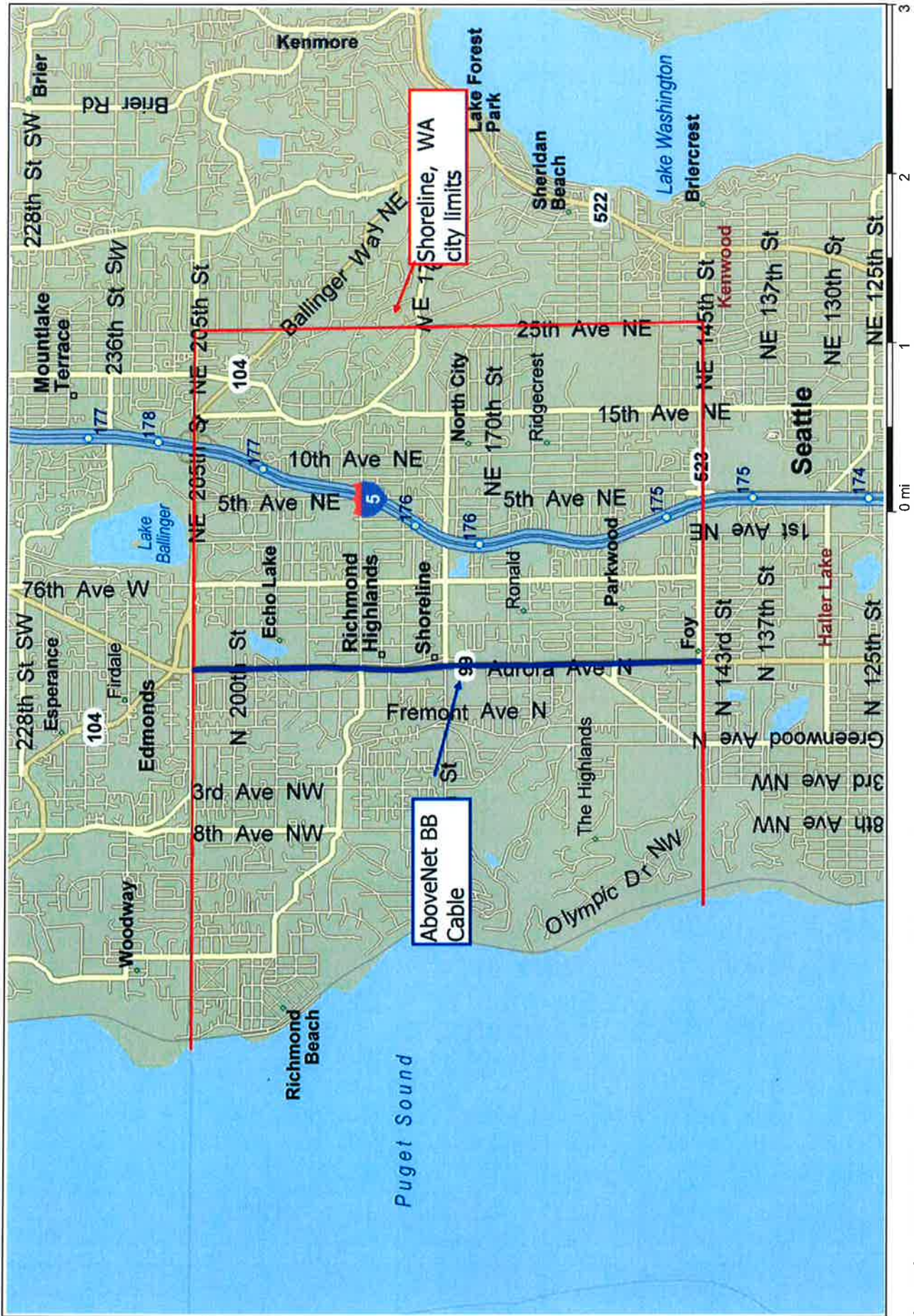
VPN

- **IPMesh (Minimum commitments of 20Mbps, 50Mbps or 100Mbps and up to 10Gbps point-to-point connectivity):** Layer 3 connectivity between three or more customer Locations using private IP routing (RFC 2547) based on customer IP addresses, leveraging a QoS enabled Tier 1 IP/MPLS network to transport data between customer locations in multiple cities
- **eMesh (Minimum commitments of 20Mbps, 50Mbps or 100Mbps and up to 10Gbps point-to-point connectivity):** Layer 2 multipoint connectivity between three or more Locations using Virtual Private LAN Service (VPLS) for traffic forwarding based on Customer MAC addresses
- **eWAN (Minimum commitments of 20Mbps, 50Mbps or 100Mbps and up to 10Gbps point-to-point connectivity):** Layer 2, connectivity between two customer locations using MPLS encapsulation featuring QoS prioritization and IP Transit add-on

eXpressWave™ Long Haul

- **eXpressWave™ Long Haul Optical Transport (1Gbps, 2.5Gbps, or 10Gbps):** point-to-point inter-city connectivity for Enterprise customers

Shoreline WA with backbone cable



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ORDINANCE NO. 604

AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, GRANTING ABOVE NET COMMUNICATIONS, INC. A NON-EXCLUSIVE FRANCHISE FOR TEN YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR AN UNDERGROUND FIBER OPTIC TELECOMMUNICATIONS SYSTEM, IN, ALONG, UNDER, THROUGH AND BELOW PUBLIC RIGHTS-OF-WAY OF THE CITY OF SHORELINE, WASHINGTON

WHEREAS, the City granted a non-exclusive franchise to Metromedia Fiber Network Services, Inc. for a period of ten years by City Ordinance No. 249 on October 9, 2000 for the operation of an underground fiber optic telecommunications system within the City Right-of-Way; and

WHEREAS, Metromedia Fiber Network Services changed their name to AboveNet Communications, Inc. ("AboveNet") in September 2003; and

WHEREAS, AboveNet's current non-exclusive franchise expired in October of 2010; and

WHEREAS, RCW 35A.11.020 grants the City broad authority to regulate the use of the public Right-of-Way; and

WHEREAS, RCW 35A.47.040 grants the City broad authority to grant non-exclusive franchises; and

WHEREAS, AboveNet wishes to maintain their underground fiber optic telecommunications system within the City Right-of-Way; and

WHEREAS, the City Council finds that it is in the best interests of the health, safety and welfare of residents of the Shoreline community to renew a non-exclusive franchise to AboveNet for the operation of an underground fiber optic telecommunications system within the City Right-of-Way.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Definitions.

The following terms contained herein, unless otherwise indicated, shall be defined as follows:

- 1.1 AboveNet: AboveNet, Inc., a Delaware corporation, and its respective successors and assigns.

- 1.2 City: The City of Shoreline, a municipal corporation of the State of Washington, specifically including all areas incorporated therein as of the effective date of this ordinance and any other areas later added thereto by annexation or other means.
- 1.3 Days: Calendar days.
- 1.4 Facilities: All of the plant, equipment, fixtures, appurtenances, and other facilities necessary to furnish and deliver Telecommunications Services, including but not limited to wires, lines, conduits, cables, communication and signal lines and equipment, fiber optic cable, anchors vaults, and all attachments, appurtenances, and appliances necessary or incidental to distribution and use of Telecommunications Services and all other facilities associated with the Telecommunications System located in the Right-of-Way, utilized by AboveNet in the operation of activities authorized by this Ordinance. The abandonment by AboveNet of any Facilities as defined herein shall not act to remove the same from this definition.
- 1.5 Franchise: This document and any amendments or modifications hereto.
- 1.6 Permitting Authority: The head of the City department authorized to process and grant permits required to perform work in the City's Right-of-Way, or the head of any agency authorized to perform this function on the City's behalf. Unless otherwise indicated, all references to Permitting Authority shall include the designee of the department or agency head.
- 1.7 Person: An entity or natural person.
- 1.8 Public Works Director or Director: The head of the Public Works department of the City, or in the absence thereof, the head of the Planning and Development Services department, or the designee of either of these individuals.
- 1.9 Right-of-Way: As used herein shall refer to the surface of and the space along and below any street, road, highway, freeway, bridge, lane, sidewalk, alley, court, boulevard, sidewalk, parkway, drive, utility easement, and/or road Right-of-Way now or hereafter held or administered by the City of Shoreline.
- 1.10 Telecommunications Service: The transmission of information by wire, optical cable, or other similar means. For the purpose of this subsection, "information" means knowledge or intelligence represented by and form of writing, signs, signals, pictures, sounds, or any other symbols. For the purpose of this ordinance, Telecommunications Service excludes wireless communications, over-the-air transmission of broadcast television or broadcast radio signals.
- 1.11 Telecommunications System: The system of conduit, fiber optic cable, and supporting Facilities in the Rights-of-Way associated with AboveNet's provision of Telecommunications Services.

Section 2. Franchise Granted.

- 2.1 Pursuant to RCW 35A.47.040 and SMC Chapter 12.25, the City hereby grants to AboveNet, its heirs, successors, and assigns, subject to the terms and conditions hereinafter set forth, a Franchise for a period of ten (10) years, beginning on the effective date of this Ordinance.
- 2.2 This Franchise shall grant AboveNet the right, privilege and authority to locate construct, operate, maintain, replace, acquire, sell, lease, and use a Telecommunications System in the Right-of-Way as approved under City permits issued by the Permitting Authority pursuant to this Franchise and City ordinances.

Section 3. Nonexclusive Franchise Grant.

This Franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in any Right-of-Way. This Franchise shall in no way prevent or prohibit the City from using any Right-of-Way or other public property or affect its jurisdiction over them or any part of them, and the City shall retain the authority to make all necessary changes, relocations, repairs, maintenance, establishment, improvement or dedication of the same as the City may deem appropriate.

Section 4. Franchise Subject to Federal, State and Local Law.

Notwithstanding any provision contrary herein, this Franchise is subject to and shall be governed by all applicable provisions now existing or hereafter amended of federal, State and local laws and regulations.

Section 5. No Rights by Implication.

No rights shall pass to AboveNet by implication. Without limiting the foregoing, by way of example and not limitation, this Franchise shall not include or be a substitute for:

- 5.1 Any other permit or authorization required for the privilege of transacting and carrying on a business within the City that may be required by the ordinances and laws of the City;
- 5.2 Any permit, agreement or authorization required by the City for Rights-of-Way users in connection with operations on or in Rights-of-Way or public property; or
- 5.3 Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by this Franchise.

Section 6. Conveyance of Rights.

This Franchise is intended to convey limited rights and interests only as to those Rights-of-Way in which the City has an actual interest. It is not a warranty of title or interest in any Rights-of-Way; it does not provide AboveNet with any interest in any particular location within the Rights-of-Way; and it does not confer rights other than as expressly provided in the grant hereof.

Section 7. No Waiver.

The failure of City on one or more occasions to exercise a right or to require compliance or performance under this Franchise or any other applicable State or federal law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance by the City nor to excuse AboveNet from complying or performing, unless such right or such compliance or performance has been specifically waived in writing.

Section 8. Other Ordinances.

AboveNet agrees to comply with the terms of any lawful, generally applicable local ordinance, including but not limited to Chapter 12.25 of the Shoreline Municipal Code in effect upon adoption of this Franchise. In the event of a conflict between any ordinance and a specific provision of this Franchise, the Franchise shall control, provided however that AboveNet agrees that it is subject to the lawful exercise of the police power of the City.

Section 9. Right-of-Way Vacation.

If any Right-of-Way or portion thereof used by AboveNet is vacated by the City during the term of this Franchise, the City shall endeavor to specifically reserve the continued use of the Right – of -Way by AboveNet. Unless the City specifically reserves to AboveNet the right to continue the use of vacated Rights-of-Way, AboveNet shall, without delay or expense to the City, remove its facilities from such Right-of-Way and restore, repair or reconstruct the Right-of-Way where such removal has occurred. In the event of failure, neglect or refusal of AboveNet to restore, repair or reconstruct such Right-of-Way after thirty (30) days written notice from the City, the City may do such work or cause it to be done, and the reasonable cost thereof shall be paid by AboveNet within thirty (30) days of receipt of an invoice and documentation.

Section 10. Relocation of Facilities.

- 10.1 AboveNet agrees and covenants at no cost to the City, to relocate its Facilities when requested to do so by the City for a public project, provided that, AboveNet shall in all such cases have the privilege, upon approval by the City, to temporarily bypass, in the authorized portion of the same Right-of-Way any Facilities required to be relocated.
- 10.2 If the City determines that a public project necessitates the relocation of AboveNet's existing Facilities, the City shall:
 - 10.2.1 At least sixty (60) days prior to the commencement of such project, provide AboveNet with written notice of known Facilities requiring such relocation; and
 - 10.2.2 Provide AboveNet with copies of any plans and specifications pertinent to the requested relocation and a proposed temporary or permanent relocation for AboveNet's Facilities.
 - 10.2.3 After receipt of such notice and such plans and specifications, AboveNet shall complete relocation of its Facilities at no charge or expense to the City at least ten (10) days prior to commencement of the project.

- 10.3 AboveNet may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise AboveNet in writing as soon as practicable if any of the alternatives is suitable to accommodate the work that otherwise necessitates the relocation of the Facilities. If so requested by the City, AboveNet shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by AboveNet as full and fair a consideration as the project schedule will allow. In the event the City ultimately determines that there is no other reasonable alternative, AboveNet shall relocate its Facilities as directed by the City and in accordance with Section 10.2.3 of this Franchise.
- 10.4 The City will notify AboveNet as soon as practical of any facilities that are not identified during the design of the public project, but are discovered during the course of construction and need to be relocated. AboveNet will work with the City to design and complete a relocation to facilitate the completion of the public project with minimum delay.
- 10.5 Failure to complete a relocation requested by the City in accordance with Section 10.2 of this Franchise by the date included in the notice provided for thereby may subject AboveNet to liquidated damages as provided in Section 28 of this Franchise.
- 10.6 The provisions of this Section of this Franchise shall in no manner preclude or restrict AboveNet from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person other than the City, where the improvements to be constructed by said person are not or will not become City-owned, operated or maintained, provided that such arrangements do not unduly delay a City construction project.

Section 11. AboveNet's Maps and Records.

As a condition of this Franchise, and at its sole expense, AboveNet shall provide the City with typicals and as-built plans, maps, and records that show the vertical and horizontal location of its Facilities within the Right-of-Way using a minimum scale of one inch equals one hundred feet (1"=100'), measured from the center line of the Right-of-Way, which maps shall be in hard copy format acceptable to the City and in Geographical Information System (GIS) or other digital electronic format acceptable to the City. If digital route maps are provided, the format of the data for overlaying on the City's GIS mapping system shall utilize NAD 83 as the horizontal datum, and shall be compatible with or can be imported into Arc GIS Version 9.2 or later. This information shall be provided no later than one hundred eighty (180) days after the effective date of this Ordinance and shall be updated within ten (10) business days of a reasonable request of the City.

Section 12. Undergrounding.

This Franchise is subject to the undergrounding requirements in Shoreline Municipal Code (SMC) Section 13.20. Consistent with that Section, AboveNet shall install all of its Facilities underground in accordance with relevant road and construction standards. AboveNet will also share information necessary to facilitate joint-trenching and other undergrounding projects, and

will otherwise cooperate with the City and other utility providers to serve the objectives of SMC Section 13.20.

Section 13. Excavation and Notice of Entry.

- 13.1 During any period of relocation or maintenance, all surface structures, if any, shall be erected and used in such places and positions within the Right-of-Way so as to minimize interference with the passage of traffic and the use of adjoining property. AboveNet shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or State law, including RCW 39.04.180, for the construction of trench safety systems.
- 13.2 Whenever AboveNet excavates in any Right-of-Way for the purpose of installation, construction, repair, maintenance or relocation of its Facilities, it shall apply to the City for a permit to do so in accordance with the ordinances and regulations of the City requiring permits to operate in the Right-of-Way. In no case shall any work commence within any Right-of-Way without a permit. During the progress of the work, AboveNet shall not unnecessarily obstruct the passage or use of the Right-of-Way, and shall provide the City with plans, maps, and information showing the proposed and final location of any Facilities in accordance with Section 11 of this Franchise.
- 13.3 At least five (5) days prior to construction of Facilities consisting of digging, trenching, cutting, or other activities that may impact the utilization of the Right-of-Way for more than a four (4) hour period, AboveNet shall take reasonable steps to inform all apparent owners or occupiers of property within fifty (50) feet of said activities, that a construction project will commence. The notice shall include, at a minimum, the dates and nature of the project and a toll-free or local telephone number that the resident may call for further information. A pre-printed door hanger may be used to satisfy AboveNet's obligations under this Section of this Franchise.
- 13.4 At least twenty-four (24) hours prior to entering Right-of-Way within ten (10) feet of private property to construct Facilities consisting of digging, trenching, cutting, or other activities that may impact the utilization of the Right-of-Way, AboveNet shall post a written notice describing the nature and location of the work to be performed adjacent to the affected private property as well as the information listed in Section 13.3 of this Franchise. AboveNet shall make a good faith effort to comply with the property owner/resident's preferences, if any, regarding the location or placement of Facilities that protrude above the prior ground surface level, if any, consistent with sound engineering practices.

Section 14. Stop Work.

On notice from the City that any work is being conducted contrary to the provisions of this Franchise, or in an unsafe or dangerous manner as determined by the City, or in violation of the terms of any applicable permit, laws, regulations, ordinances or standards, the work may immediately be stopped by the City. The stop work order shall:

- 14.1 Be in writing;
- 14.2 Be given to the Person doing the work and be posted on the work site;
- 14.3 Be sent to AboveNet by overnight delivery at the address given herein;
- 14.4 Indicate the nature of the alleged violation or unsafe condition; and
- 14.5 Establish conditions under which work may be resumed.

Section 15. Emergency Work, Permit Waiver.

In the event of any emergency where any Facilities located in the Right-of-Way are broken or damaged, or if AboveNet's construction area for their Facilities is in such a condition as to place the health or safety of any person or property in imminent danger, AboveNet shall immediately take any necessary emergency measures to repair or remove its Facilities without first applying for and obtaining a permit as required by this Franchise. However, this emergency provision shall not relieve AboveNet from later obtaining any necessary permits for the emergency work. AboveNet shall apply for the required permits not later than the next business day following the emergency work.

Section 16. Recovery of Costs.

AboveNet shall be subject to all permit fees associated with activities undertaken pursuant to this Franchise or other ordinances of the City. If the City incurs any costs and/or expenses for review, inspection or supervision of activities undertaken pursuant to this Franchise or any ordinances relating to a subject for which a permit fee is not established, AboveNet shall pay the City's reasonable costs and reasonable expenses. In addition, AboveNet shall promptly reimburse the City for any costs the City reasonably incurs in responding to any emergency involving AboveNet's Facilities. If the emergency involves the facilities of other utilities operating in the Right-of-Way, then the City will allocate costs among parties involved in good faith. Said costs and expenses shall be paid by AboveNet after submittal by the City of an itemized billing by project of such costs.

Section 17. Dangerous Conditions, Authority for City to Abate.

- 17.1 Whenever installation, maintenance or excavation of Facilities authorized by this Franchise causes or contributes to a condition that appears to substantially impair the lateral support of the adjoining Right-of-Way, public or private property, or endangers any person, the City may direct AboveNet, at AboveNet's expense, to take actions to resolve the condition or remove the endangerment. Such directive may include compliance within a prescribed time period.
- 17.2 In the event AboveNet fails or refuses to promptly take the directed action, or fails to fully comply with such direction, or if emergency conditions exist which require immediate action to prevent injury or damages to persons or property, the City may take such actions as it believes are necessary to protect persons or property and AboveNet shall reimburse the City for all costs incurred.

Section 18. Safety.

- 18.1 AboveNet, in accordance with applicable federal, State, and local safety rules and regulations shall, at all times, employ ordinary care in the installation, maintenance, and repair of its Facilities utilizing methods and devices commonly accepted in their industry of operation to prevent failures and accidents that are likely to cause damage, injury, or nuisance to persons or property.
- 18.2 All of AboveNet's Facilities in the Right-of-Way shall be constructed and maintained in a safe and operational condition, in accordance with applicable federal, State, and local safety rules and regulations.
- 18.3 The City reserves the right to ensure that AboveNet's Facilities are constructed and maintained in a safe condition. If a violation of any applicable safety regulation is found to exist, the City will notify AboveNet in writing of said violation and establish a reasonable time for AboveNet to take the necessary action to correct the violation. If the correction is not made within the established time frame, the City, or its authorized agent, may make the correction. AboveNet shall reimburse the City for all reasonable costs incurred by the City in correcting the violation.

Section 19. Authorized Activities.

This Franchise is solely for the location, construction, installation, ownership, operation, replacement, repair, maintenance, acquisition, sale, lease, and use of the Telecommunications System and associated Facilities for providing Wholesale and Retail Telecommunications Services. AboveNet shall obtain a separate franchise for any operations or services other than these authorized activities.

Section 20. Administrative Fee and Utility Tax.

- 20.1 Pursuant to RCW 35.21.860, the City is precluded from imposing franchise fees upon a telephone business, as defined in RCW 82.16.010, or a Service Provider for use of the Right-of-Way, as defined in RCW 35.99.010, except a utility tax or actual administrative expenses related to the franchise incurred by the City. AboveNet does hereby warrant that its operations, as authorized under this Franchise, are those of a Service Provider as defined in RCW 35.99.010.
- 20.2 AboveNet shall be subject to a \$5,000 administrative fee for reimbursement of costs associated with the preparation, processing and approval of this Franchise Agreement, including wages, benefits, overhead expenses, meetings, negotiations and other functions related to the approval. The administrative fee excludes normal permit fees required for work in the Right-of-Way. Payment of the one-time administrative fee is due 30 days after Franchise approval.
- 20.3 If AboveNet provides services to customers within the City, AboveNet shall become subject to the City's utility tax set forth in Chapter 3.32 of the Shoreline Municipal Code.
- 20.4 If RCW 35.21.860 is amended to allow collection of a franchise fee, this Franchise Agreement shall be amended to require franchise fee payments.

Section 21. Indefeasible Rights of Use.

- 21.1 An Indefeasible Right of Use ("IRU") is an interest in AboveNet's Facilities which gives AboveNet's customer the right to use certain Facilities for the purpose of providing Telecommunication Services; an IRU does not provide the customer with any right to control the Facilities, or any right of physical access to the Facilities to locate, construct, replace, repair or maintain the Facilities, or any right to perform work within the Right-of-Way.
- 21.2 A lease or grant of an IRU regarding AboveNet's Facilities shall not require that the holder of the lease or IRU to obtain its own franchise or pay any fee to the City, PROVIDED THAT, under such lease or grant of an IRU, AboveNet: (i) retains exclusive control over such Telecommunications System and Facilities, (ii) remains responsible for the location, relocation, construction, replacement, repair and maintenance of the Telecommunications and Facilities pursuant to the terms and conditions of this Franchise, and (iii) remains responsible for all other obligations imposed by this Franchise.

Section 22. Indemnification.

- 22.1 AboveNet agrees to indemnify, save and hold harmless, and defend the City, its elected officials, officers, authorized agents, boards and employees, acting in official capacity, from and against any liability, damages or claims, costs, expenses, settlements or judgments arising out of, or resulting from the granting of this Franchise or AboveNet's activities, or any casualty or accident to Person or property that occurs as a result of any construction, excavation, operation, maintenance, reconstruction or any other act done pursuant to the terms of this Franchise, provided that the City shall give AboveNet timely written notice of its obligation to indemnify the City. AboveNet shall not indemnify the City for any damages, liability or claims resulting from the City's sole negligence, willful misconduct, or breach of obligation of the City, its officers, authorized agents, employees, attorneys, consultants, or independent contractors for which the City is legally responsible, or for any activity or function conducted by any Person other than AboveNet.
- 22.2 In the event AboveNet refuses to undertake the defense of any suit or any claim, after the City's request for defense and indemnification has been made pursuant to the indemnification clauses contained herein, and AboveNet's refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of AboveNet, then AboveNet shall pay all of the City's reasonable costs and reasonable expenses for defense of the action, including reasonable attorneys' fees of recovering under this indemnification clause, as well as any judgment against the City.

Should a court of competent jurisdiction or such other tribunal as the parties agree shall decide the matter determine that this Franchise is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of AboveNet and the City, its officers, employees and agents, AboveNet's liability hereunder shall be only to the extent of AboveNet's negligence. It is further specifically and expressly understood that the indemnification provided in Section 22 of this Franchise constitutes AboveNet's waiver of

immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

Section 23. Insurance.

- 23.1 AboveNet shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to AboveNet, its agents or employees. AboveNet shall provide to the City an insurance certificate naming the City as additional insured, for its inspection prior to the commencement of any work or installation of any Facilities pursuant to this Franchise, and such insurance shall evidence:
- 23.1.1 Automobile Liability insurance for owned, non-owned and hired vehicles with limits no less than \$1,000,000 Combined Single Limit per accident for bodily injury and property damage; and
- 23.1.2 Commercial General Liability insurance policy, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include blanket contractual liability and employer's liability.
- 23.2 Payment of deductible or self-insured retention shall be the sole responsibility of AboveNet.
- 23.3 The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, or employees. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. AboveNet's insurance shall be primary insurance for the City. Any insurance maintained by the City shall be excess of AboveNet's insurance and shall not contribute with it. Coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice has been given to the City.

Section 24. Abandonment of AboveNet's Facilities.

No portion of the Facilities laid, installed, or constructed in the Right-of-Way by AboveNet may be abandoned by AboveNet without the express written consent of the City. Any plan for abandonment or removal of AboveNet's Facilities must be first approved by the Public Works Director, which shall not be unreasonably withheld or delayed, and all necessary permits must be obtained prior to such work.

Section 25. Restoration After Construction.

- 25.1 AboveNet shall, after any abandonment approved under Section 24 of this Franchise, or any installation, construction, relocation, maintenance, or repair of Facilities within the Franchise area, restore the Right-of-Way to at least the condition the same was in immediately prior to any such abandonment, installation, construction, relocation,

maintenance or repair pursuant to City standards. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. AboveNet agrees to promptly complete all restoration work and to promptly repair any damage caused by such work at its sole cost and expense.

- 25.2 If it is determined that AboveNet has failed to restore the Right-of-Way in accordance with this Section of this Franchise, the City shall provide AboveNet with written notice including a description of actions the City believes necessary to restore the Right-of-Way. If the Right-of-Way is not restored in accordance with the City's notice within fifteen (15) Days of that notice, the City, or its authorized agent, may restore the Right-of-Way. AboveNet is responsible for all reasonable costs and expenses incurred by the City in restoring the Right-of-Way in accordance with this Section of this Franchise. The rights granted to the City under this paragraph shall be in addition to those otherwise provided herein.

Section 26. Bond or Letter of Credit.

Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this Franchise, AboveNet shall cause to be furnished a bond or Letter of Credit executed by a corporate surety or financial institution authorized to do business in the State of Washington, in a sum to be set and approved by the Director of Public Works as sufficient to ensure performance of AboveNet's obligations under this Franchise. The bond shall be conditioned so that AboveNet shall observe all the covenants, terms and conditions and faithfully perform all of the obligations of this Franchise, and to erect or replace any defective work or materials discovered in the replacement of the City's streets or property within a period of two years from the date of the replacement and acceptance of such repaired streets by the City. AboveNet may meet the obligations of this Section of this Franchise with one or more bonds acceptable to the City. In the event that a bond issued pursuant to this Section of this Franchise is canceled by the surety, after proper notice and pursuant to the terms of said bond, AboveNet shall, prior to the expiration of said bond, procure a replacement bond which complies with the terms of this Section of this Franchise.

Section 27. Recourse Against Bonds and Other Security.

So long as the bond is in place, it may be utilized by the City as provided herein for reimbursement of the City by reason of AboveNet's failure to pay the City for actual costs and expenses incurred by the City to make emergency corrections under Section 17 of this Franchise, to correct Franchise violations not corrected by AboveNet after notice, and to compensate the City for monetary remedies or damages reasonably assessed against AboveNet due to material default or violations of the requirements of City ordinances.

- 27.1 In the event AboveNet has been declared to be in default of a material provision of this Franchise by the City and if AboveNet fails, within thirty (30) days of mailing of the City's default notice, to pay the City any penalties, or monetary amounts, or fails to perform any of the conditions of this Franchise, or fails to begin to perform any condition that may take more than 30 days to complete, the City may thereafter obtain from the bond, after a proper

claim is made to the surety, an amount sufficient to compensate the City for its damages. Upon such withdrawal from the bond, the City shall notify AboveNet in writing, by First Class Mail, postage prepaid, of the amount withdrawn and date thereof.

- 27.2 Thirty (30) days after the City's mailing of notice of the bond forfeiture or withdrawal authorized herein, AboveNet shall deposit such further bond, or other security, as the City may require, which is sufficient to meet the requirements of this Ordinance.
- 27.3 The rights reserved to the City with respect to any bond are in addition to all other rights of the City whether reserved by this Ordinance or authorized by law, and no action, proceeding, or exercise of a right with respect to any bond shall constitute an election or waiver of any rights or other remedies the City may have.

Section 28. Liquidated Damages.

- 28.1 The City and AboveNet recognize the delays, expense and unique difficulties involved in proving in a legal proceeding the actual loss suffered by the City as a result of AboveNet's breach of certain provisions of this Franchise. Accordingly, instead of requiring such proof, the City and AboveNet agree that AboveNet shall pay to the City, the sum set forth below for each day or part thereof that AboveNet shall be in breach of specific provisions of this Franchise. Such amount is agreed to by both parties as a reasonable estimate of the actual damages the City would suffer in the event of AboveNet's breach of such provisions of this Franchise.
- 28.1.1 Subject to the provision of written notice to AboveNet and a thirty (30) day right to cure period, the City may assess against AboveNet liquidated damages as follows: two hundred dollars (\$200.00) per day for any material breaches of the Franchise.
- 28.1.2 The City shall provide AboveNet a reasonable extension of the thirty (30) day right to cure period described in Section 28.1.1 of this Franchise if AboveNet has commenced work on curing the violation, is diligently and continuously pursuing the cure to completion and requested such an extension, provided that any such cure is completed within one hundred and twenty (120) days from the written notice of default.
- 28.1.3 If liquidated damages are assessed by the City, AboveNet shall pay any liquidated damages within forty-five (45) days after they are assessed.
- 28.1.4 In the event AboveNet fails to cure within the specified cure period, or any agreed upon extensions thereof, liquidated damages accrue from the date the City notifies AboveNet that there has been a violation.
- 28.2 The recovery of amounts under Section 28.1.1 of this Franchise shall not be construed as a limit on the liability of AboveNet under the Franchise or an excuse of unfaithful performance of any obligation of AboveNet. Similarly, the imposition of liquidated damages are not intended to be punitive, but rather, for City cost recovery purposes.

Section 29. Remedies to Enforce Compliance.

In addition to any other remedy provided herein, the City and AboveNet each reserve the right to pursue any remedy to compel the other to comply with the terms of this Franchise, and the pursuit of any right or remedy by a party shall not prevent such party from thereafter declaring a breach or revocation of the Franchise.

Section 30. Modification.

The City and AboveNet hereby reserve the right to alter, amend or modify the terms and conditions of this Franchise upon written agreement of both parties to such amendment.

Section 31. Force Majeure.

This Franchise shall not be revoked due to any violation or breach that occurs without fault of AboveNet or occurs as a result of circumstances beyond AboveNet's reasonable control.

Section 32. City Ordinances and Regulations.

Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate lawful ordinances regulating the performance of the conditions of this Franchise, including any reasonable lawful ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control, by appropriate lawful regulations, the location, elevation, and manner of construction and maintenance of any fiber optic cable or of other Facilities by AboveNet. AboveNet shall promptly conform to all such regulations, unless compliance would cause AboveNet to violate other requirements of law.

Section 33. Acceptance/Liaison.

AboveNet's written acceptance shall include the identification of an official liaison who will act as the City's contact for all issues regarding this Franchise. AboveNet shall notify the City of any change in the identity of its liaison. AboveNet shall accept this Franchise in the manner hereinafter provided in Section 43 of this Franchise.

Section 34. Survival.

All of the provisions, conditions and requirements of Sections 10, Relocation of Facilities; 13, Excavation And Notice Of Entry; 17, Dangerous Conditions; 22, Indemnification; 24, Abandonment of AboveNet's Facilities; and 25, Restoration After Construction, of this Franchise shall be in addition to any and all other obligations and liabilities AboveNet may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to AboveNet and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the parties and all privileges, as well as all obligations and liabilities of each party shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever such party is named herein.

Section 35. Severability.

If any section, sentence, clause or phrase of this Franchise Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Franchise Ordinance. In the event that any of the provisions of this Franchise Ordinance or of this Franchise are held to be invalid by a court of competent jurisdiction, the City reserves the right to reconsider the grant of this Franchise and may amend, repeal, add, replace or modify any other provision of this Franchise Ordinance or of the Franchise granted herein, or may terminate this Franchise.

Section 36. WUTC Tariff Filings, Notice Thereof.

If AboveNet intends to file, pursuant to Chapter 80.28 RCW, with the Washington Utilities and Transportation Commission (WUTC), or its successor, any tariff affecting the City's rights arising under this Franchise, AboveNet shall provide the City with fourteen (14) days written notice.

Section 37. Binding Acceptance.

This Franchise shall bind and benefit the parties hereto and their respective successors and assigns.

Section 38. Assignment.

This Franchise shall not be sold, transferred, assigned, or disposed of in whole or in part either by sale or otherwise, without the written approval of the City. The City's approval shall not be unreasonably withheld or delayed. Any reasonable costs associated with the City's review of any transfer proposed by AboveNet shall be reimbursed to the City by the new prospective Franchisee, if the City approves the transfer, or by AboveNet if said transfer is not approved by the City.

38.1 The City shall receive notice and approve any proposed change in control of AboveNet or assignment of this Franchise to a subsidiary or affiliate of AboveNet, which causes a change in control of the Franchisee. The City shall be notified but need not approve changes or assignments that do not result in a change in control of the Franchisee. Neither approval nor notification shall be required for mortgaging purposes.

38.2 A change in control shall be deemed to occur if there is an actual change in control or where ownership of fifty percent (50%) or more of the beneficial interests, singly or collectively, are obtained by other parties. The word "control" as used herein is not limited to majority stock ownership only, but includes actual working control in whatever manner exercised or changes in business form that act to materially reduce the resources available to AboveNet to perform its obligations under the Franchise granted herein.

38.3 A lease or grant of an Indefeasible Right of Use ("IRU") in the Telecommunications System, the associated Facilities, or any portion thereof, to another Person, or an offer or provision of capacity or bandwidth from the Telecommunications System or associated Facilities shall not be considered an assignment for purposes of this Section of this

Franchise, PROVIDED THAT, under such lease, IRU, or offer, AboveNet: (i) retains exclusive control over the Telecommunications System, (ii) remains responsible for the location, construction, replacement, repair and maintenance of the Telecommunications System pursuant to the terms and conditions of this Franchise, and (iii) remains responsible for all other obligations imposed hereunder.

Section 39. Alternate Dispute Resolution.

If the City and AboveNet are unable to resolve disputes arising from the terms of the Franchise granted herein, prior to resorting to a court of competent jurisdiction, the parties shall submit the dispute to an alternate dispute resolution process in King County agreed to by the parties. Unless otherwise agreed between the parties or determined herein, the cost of that process shall be shared equally.

Section 40. Venue.

If alternate dispute resolution is not successful, the venue for any dispute related to this Franchise shall be the United States District Court for the Western District of Washington, or King County Superior Court.

Section 41. Entire Agreement.

This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution and acceptance hereof.

Section 42. Notice.

Any notice or information required or permitted to be given to the City or to AboveNet under this Franchise may be sent to the following addresses unless otherwise specified:

AboveNet Communications, Inc.
360 Hamilton Avenue
White Plains, NY 10601
Attn: General Counsel

City of Shoreline
City Manager
17500 Midvale Avenue N
Shoreline, WA 98133

Either party can alter their official address for notifications provided in this Section of this Franchise by providing the other party written notice thereof.

Section 43. Directions to City Clerk.

The City Clerk is hereby directed to publish this Ordinance in full and forward certified copies of this ordinance to AboveNet. AboveNet shall have thirty (30) days from receipt of the certified copy of this ordinance to execute the "Acceptance Agreement", a copy of which has been filed with the City Clerk and identified by Clerk's Receiving Number _____. If AboveNet fails to accept this Franchise in accordance with the above provisions, this Franchise shall be null and void.

Section 44. Publication Costs.

AboveNet shall reimburse the City for the cost of publishing this Franchise ordinance within thirty (30) Days of receipt of the City's invoice.

Section 45. Effective Date.

This ordinance shall take effect and be in full force five (5) Days after the date of publication.

PASSED BY THE CITY COUNCIL ON AUGUST 8, 2011.

Mayor Keith A. McGlashan

ATTEST:

APPROVED AS TO FORM:

Scott Passey
City Clerk

Ian Sievers
City Attorney

Date of Publication: August 10, 2011
Effective Date: August 15, 2011