

SPONSORED BY: _____
PROPOSED BY: Executive
INTRODUCTION DATE: _____

ORDINANCE NO. _____

GRANTING CELLCO PARTNERSHIP d/b/a Verizon Wireless, A NON-EXCLUSIVE FRANCHISE FOR THE PROVISION OF WIRELESS TELECOMMUNICATIONS SERVICES

WHEREAS, Cellco Partnership d/b/a Verizon Wireless ("Grantee") has applied to Whatcom County ("County") for a non-exclusive franchise for the right of entry, use, and occupation of the public Rights-of-Way within the County for the installation, maintenance, operation, repair, modification, replacement, and/or removal of such Small Wireless Facilities for the provision of telecommunications services; and

WHEREAS, RCW 36.55.010, Whatcom County Charter Section 9.30, and Whatcom County Code Chapter 12.24 address the requirements pertaining to the granting of franchises by the County; and

WHEREAS, said application has come on regularly to be heard by the County Council on the ____ day of _____, 2021, and notice of this hearing has been duly published on the ____ day of _____, 2021, and the ____ day of _____, 2021, in the Bellingham Herald, a daily newspaper published in Whatcom County having county-wide circulation; and

WHEREAS, from information presented at such public hearing, and from facts and circumstances developed or discovered through independent study and investigation, the County Council now deems it appropriate and in the best interest of the County and its inhabitants that a franchise be granted to Grantee.

NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that a non-exclusive franchise set forth in the language herein below, Sections 1 through 24, is hereby granted to Cellco Partnership d/b/a Verizon Wireless for a period of 10 years

Section 1. Grant of Franchise Right to Use Franchise Area.

A. Subject to the terms and conditions stated herein, County hereby grants to Grantee a franchise as set forth in this Ordinance (this "Franchise"), including permission to enter, use, and occupy all Rights-of-Way within unincorporated Whatcom County as now or hereafter constituted (the "Franchise Area") for purposes of deploying Small Cell Facilities (as defined below) for the purpose of providing wireless telecommunications services, in, under, on, across, over, through, along or below the public Rights-of-Way within the County.

B. The County hereby grants to Grantee, its heirs, successors, legal representatives, and assigns, subject to the terms and conditions hereinafter set forth, the right, privilege, and authority to construct, repair, install, operate, maintain, restore, replace, acquire, sell, lease its Small Cell Facilities within the Rights-of-Way of the County.

C. This Franchise does not authorize the use of the Franchise Area for any facilities or services other than Grantee Facilities and Grantee Services as provided herein, and it extends no right or privilege relative to any facilities or services of any type, including Grantee Facilities and Grantee Services, on private property within County.

D. This Franchise does not grant Grantee the right to install and operate wires and facilities to provide wireline broadband transmission services, whether provided by a third-party provider, Grantee, or a corporate affiliate of Grantee. Any entity that provides such wireline broadband transmission services must have an independent franchise to use Whatcom County rights of way outside this Franchise. Further, this Franchise does not grant the right to offer cable internet services or Cable Services as those terms are defined in 47 U.S.C. § 522(6) by wireline transmission.

D. This Franchise is non-exclusive and does not prohibit County from entering into other agreements, including other franchises, impacting the Franchise Area, provided such agreements do not interfere with Grantee's rights set forth herein.

E. Except as explicitly set forth herein, this Franchise does not waive any rights that County has or may hereafter acquire with respect to the Franchise Area or any other County roads, Rights-of-Way, property, or any portions thereof. This Franchise shall be subject to the power of eminent domain, and in any proceeding under eminent domain, Grantee acknowledges its use of the Franchise Area shall have no value.

F. County reserves the right to change, regrade, relocate, abandon, or vacate any Right-of-Way within the Franchise Area, subject to the terms hereunder with regard to relocation of Grantee Facilities. If, at any time during the term of this Franchise, County abandons or vacates any portion of the Franchise Area containing Grantee Facilities, County shall reserve an easement for public utilities within that vacated portion within which Grantee may continue to operate any existing Grantee Facilities under the terms of this Franchise for the remaining period set forth under Section 3.

G. Grantee agrees that its use of Franchise Area shall at all times be subordinate and subject to County's and the public's need for municipal infrastructure, travel, and access to the Franchise Area, except as may be otherwise required by law.

Section 2. Notices.

A. Written notices to the parties shall be personally delivered, sent by certified mail, return receipt requested, or by a nationally recognized overnight courier, to the following addresses, unless a different address shall be designated in writing and delivered to the other party. If such notice, demand or other communication shall be served personally, service shall be conclusively deemed made at the time of such personal service. If such notice, demand or other communication is given by overnight delivery, it shall be conclusively deemed given the day after it was sent to the party to whom such notice, demand or other communication is to be given. If such notice, demand or other communication is given by mail, it shall be conclusively deemed given three (3) days after it was deposited in the United States mail addressed to the party to whom such notice, demand or other communication is to be given.

County: County Executive
Whatcom County Courthouse
311 Grand Ave., Suite 108
Bellingham, WA 98225

Grantee: Cellco Partnership
d/b/a Verizon Wireless
Attn: Network Real Estate
180 Washington Valley Road
Bedminster, New Jersey 07921

With a copy to:
Cellco Partnership
d/b/a Verizon Wireless
Attn: West Area General Counsel
15505 Sand Canyon Ave.
Irvine, CA 92618

B. Any changes to the Grantee’s information shall be sent to County’s Public Works Director referencing the title of this agreement.

C. The Grantee’s voice number, 1-800-264-6620, shall be staffed 24 hours a day, 7 days a week.

Section 3. Term of Franchise.

A. This Franchise shall run for a period of 10 years from the date of execution specified in Section 5.

B. If the parties fail to formally renew this Franchise prior to the expiration of its term or any extension thereof, the obligations and privileges of this Franchise shall nonetheless continue in full force and effect until renewed or otherwise terminated by either party through written notice to that effect.

Section 4. Definitions.

For the purpose of this Franchise:

“Affiliate” means, with respect to any Person, any other Person controlling, controlled by or under common control with such Person. For purposes of this definition, the term “control” (including the correlative meanings of the terms “controlled by” and “under common control with”), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

“Antenna” means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Federal Communication Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under federal law.

“Antenna Equipment” means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an Antenna, located at the same fixed location as the Antenna, and, when collocated on a structure, is mounted or installed at the same time as such Antenna.

“Emergency” means a condition of imminent danger to the health, safety and welfare of persons or property located within County including, without limitation, damage to persons or property from natural consequences, such as storms, earthquakes, riots, acts of terrorism or wars.

“Existing Utility Poles” means any pole(s) that is installed before the Effective Date and is owned and/or leased by the County or a third party.

“Laws” means any and all applicable statutes, constitutions, charters, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, franchises, administrative orders, certificates, orders, or other requirements of the County or other governmental or judicial authority having the force and effect of law that determines the legal standing of a matter relating to the parties and/or this Agreement.

“Maintenance” or “Maintain” means examining, testing, inspecting, repairing, maintaining, upgrading, removing and replacing the existing Grantee Facilities or any part thereof as required and necessary for safe operation.

“Network” means the telecommunication network installed and managed by the Grantee to serve wireless carrier customers.

“Person” means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Washington, and includes any natural person.

“Personal Wireless Service Facility” means an Antenna facility, Antenna Equipment, or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

“Relocation” means permanent movement of Grantee Facilities required by County, and not temporary or incidental movement of such facilities, or other revisions Grantee would accomplish and charge to third parties without regard to municipal request. Any Relocation shall be governed by Section 11 of this Franchise.

“Right-of-Way” (pluralized as “Rights-of-Way”) means the surface and the space above and below streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, easements, rights-of-way and similar public properties and areas now or hereafter held by, or over which, the County exercises any rights of management control, but only to the extent of County’s right, title, interest or authority to grant a license or franchise to occupy and the same for Small Wireless Facilities. Rights of Way for the purpose of this Franchise do not include buildings, other County-owned physical facilities, parks, conduits, fixtures, real property or property rights owned by County, or similar facilities or property owned by or leased to County.

“Small Wireless Facilities” or “Small Cell Facilities” or “Grantee Facilities” as used herein shall mean Personal Wireless Service Facilities (as defined above) that meet each of the following conditions:

(1) The facilities -

(i) Are mounted on structures 50 feet or less in height including their Antennas as defined in § 1.1320(d); or

(ii) Are mounted on structures no more than 10 percent taller than other adjacent structures; or

(iii) Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under federal law;

(5) The facilities are not located on Tribal lands, as defined under federal law; and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 Code of Federal Regulations § 1.1307(b);

“State” means the State of Washington.

Section 5. Acceptance of Franchise.

A. This Franchise, and any rights granted hereunder, shall not become effective for any purpose unless and until Grantee files with the Whatcom County Council the Statement of Acceptance, attached hereto as Exhibit A (the “Franchise Acceptance”). The date that the Franchise Acceptance is filed with the County Council shall be the effective date of this Franchise.

B. Should Grantee fail to file the Franchise Acceptance with the County Council within 30 days after the effective date of this ordinance, then the County shall have the right by ordinance to declare Grantee’s forfeiture of all rights hereunder and to declare this Franchise terminated and of no further force or effect thereafter. The County shall retain this right to terminate the Franchise until such time as Grantee files the Franchise Acceptance pursuant to the terms herein.

Section 6. Construction, Permits, Restoration, Maintenance, and Installation.

A. Prior to doing any work within the Right-of-Way, including initial installation of Facilities under this Franchise Agreement, the Grantee must apply for, and obtain, all appropriate permits from the appropriate jurisdiction(s), including County. Grantee shall submit plans to the County showing the proposed Facilities and existing utilities, including full drawings. Subsequent to installation, Grantee shall submit time and date stamped photographs of the installed Facilities including but not limited to all appliances, utility cabinets, and/or other devices.

B. If the County Engineer reasonably determines that any work done by Grantee is not in compliance with applicable law or then-current installation standards, then County shall provide Grantee thirty (30) days’ notice to cure any such deficiency. If, after such thirty (30) day period, Grantee fails to cure the deficiency, then County reserves the right to remove

and/or repair any work done by Grantee or its contractors and the reasonable cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee.

C. Within ninety (90) days following the surrender or termination of this Agreement, Grantee agrees to remove its Facilities from County's Rights of Way and leave the same in as good of condition as it existed prior to installation of the Facilities. Any Facilities left in the Rights-of-way more than ninety (90) days following such surrender or termination of this Agreement shall be deemed abandoned by Franchisee. The County reserves the right, after providing at least thirty (30) days' prior written notice to Grantee, to remove Equipment abandoned by Grantee or its contractors following such surrender or termination and do whatever work is necessary to return the location to such required surrender condition (and which work has not been completed by or on behalf of Franchisee upon the expiration of such 30-day notice period). The reasonable cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee.

D. The County shall have the authority at all times to control by appropriately-exercised police powers through ordinance or regulation, including that provided for under the Whatcom County Code, as now exist or hereinafter amended, consistent with 47 U.S.C. § 253, 47 U.S.C. § 332(c)(7) and the laws of the State of Washington, the location, elevation, manner of construction, and maintenance of any Small Wireless Facilities by Grantee, and Grantee shall promptly conform with all such requirements, unless compliance would cause Grantee to violate other requirements of law. This Franchise does not prohibit County from exercising its rights under federal, state or local law to deny or give conditional approval to an application for a permit to construct any individual Small Wireless Facility.

E. Upon prior written approval of County and in accordance with County ordinances, Grantee shall have the authority, but not the obligation, to reasonably trim trees upon and overhanging streets, Rights-of-Way and places in the Franchise Area so as to prevent the branches of such trees from coming in physical contact with Grantee Facilities. Grantee shall be responsible for debris removal from such activities. If such debris is not removed within twenty-four (24) hours of completion of the trimming, County may, at its sole discretion, remove such debris and charge Grantee for the cost thereof. This section does not in any instance grant automatic authority to clear vegetation for purposes of providing a clear path for radio signals. Any such general vegetation clearing will require a land clearing permit.

F. Consistent with the Whatcom County Code, in case of any disturbance of any road, pavement, sidewalk, driveway or other surfacing, the Grantee shall, at its own cost and expense and in a manner approved by the County, replace and restore all paving, sidewalk, driveway, landscaping or surface, promptly and in as good condition as before said work was commenced and in accordance with standards for such work set by the County and the County Code. If Grantee fails, neglects or refuses to make restorations as required under this Section, then the County may do such work or cause it to be done, and the cost thereof to the County shall be paid by Grantee.

G. Grantee shall maintain all aboveground improvements that it places on County Rights-of-Way pursuant to this Franchise. In order to avoid interference with the County's ability to maintain its roads and associated Rights-of-Way, Grantee shall provide a clear zone of five feet on all sides of such improvements. For these purposes, "clear zone" means an area that is mowed or otherwise maintained so that the Facilities are readily visible to County maintenance operations. If Grantee fails to comply with this provision, and by its failure property is damaged, then Grantee shall be responsible for all damages caused thereby.

H. Grantee shall maintain a minimum underground horizontal separation of five (5) feet from County water facilities and ten (10) feet from above-ground County water facilities; provided, that for development of new areas, County, together with Grantee and other utility purveyors or authorized users of Rights-of-Way, will develop and follow the Public Works Director's determination of a consensus for guidelines and procedures for determining specific utility locations, subject additionally to this Franchise.

I. Before any work is performed under this Franchise which may affect any existing monuments or markers of any nature relating to subdivisions, plats, roads and all other surveys, the Grantee shall reference all such monuments and markers. The reference points shall be so located that they will not be disturbed during the Grantee's operations under this Franchise. The method of referencing these monuments or other points to be referenced shall be approved by the County Engineer. The replacement of all such monuments or other points to be referenced shall be approved by the County Engineer. The replacement of all such monuments or markers disturbed during construction shall be made as expeditiously as conditions permit, and as directed by the County Engineer. The cost of monuments or other markers lost, destroyed or disturbed, and the expense of replacement by approved monuments shall be borne by the Grantee. A complete set of reference notes for monuments and other ties shall be filed with the County Engineer's Office.

Section 7. Repair and Emergency Work.

In the event of an Emergency, Grantee may commence such repair and Emergency response work as required under the circumstances, provided that Grantee shall notify the County Public Works Director in writing as promptly as possible, before such repair or Emergency work commences, or as soon thereafter as possible, if advance notice is not practical. County may act, at any time, without prior written notice in the case of Emergency, but shall notify Grantee in writing as promptly as possible under the circumstances.

Section 8. Damages to County and Third-Party Property.

Grantee agrees that should any of its actions under this Franchise materially impair or damage any County property, survey monument, or property owned by a third-party, Grantee will restore, at its own cost and expense, said property to a safe condition. Such repair work shall be performed and completed to the reasonable satisfaction of the County Engineer.

Section 9. Location Preference.

Any structure, equipment, appurtenance or tangible property of a utility, other than Grantee's, which was installed, constructed, completed or in place prior in time to Grantee's application for a permit to construct Grantee Facilities under this Franchise shall have preference as to positioning and location with respect to Grantee Facilities. However, to the extent that Grantee Facilities are completed and installed prior to another utility's submittal of a permit for new or additional structures, equipment, appurtenances or tangible property, then Grantee Facilities shall have priority. These rules governing preference shall continue in the event of the necessity of relocating or changing the grade of any County road or Right-of-Way. A relocating utility shall not necessitate the Relocation of another utility that otherwise would not require Relocation. This Section shall not apply to any County facilities or utilities that may in the future require the Relocation of Grantee Facilities. Such Relocations shall be governed by Section 11.

Section 10. Grantee Information.

A. Grantee agrees to supply, at no cost to County, any information reasonably requested by the Director of Public Works to coordinate municipal functions with Grantee's activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum, as-built drawings of Grantee Facilities, installation inventory, and maps and plans showing the location of existing or planned facilities within County. Said information may be requested either in hard copy and/or electronic format, if reasonably possible in a format compatible with County's database system, as now or hereinafter existing, including County's Geographic Information Service (GIS) data base. Grantee shall use its commercially reasonable efforts to keep the Public Works Director informed of its long-range plans for coordination with County's long-range plans, to the extent that Grantee has knowledge of any long-range plans that have been finalized.

B. The parties understand that Washington law limits the ability of County to shield from public disclosure any information given to County. Accordingly, the County will endeavor in good faith to provide Grantee reasonable notice of any request for public disclosure of information of Grantee to allow Grantee to take such actions as Grantee may determine and at Grantee's sole cost and expense to prevent or limit such disclosure. Grantee shall indemnify and hold harmless County for any loss or liability for costs and for attorneys' fees because of non-disclosures requested by Grantee under Washington's open public records law, provided reasonable notice and opportunity to defend was given to Grantee or Grantee is made aware of a pending request or claim.

Section 11. Relocation of Grantee Facilities.

A. The County shall have the right to require Grantee to alter, adjust, Relocate, re-attach, secure, or protect in place its Facilities within the public right-of-way when reasonably necessary for construction, alteration, repair, or improvement of any portion of the public Rights-of-Way for purposes of public welfare, health, or safety (“Public Improvements”). Such Public Improvements include, but are not limited to: public rights-of-way construction; public rights-of-way repair (including resurfacing or widening); change of public rights-of-way grade; construction, installation of or repair of sewers, drains, water pipes, power lines, signal lines, communication lines, or any other type of government owned communications, utility or public transportation systems, public work, public facility, or improvement of any government-owned utility; public rights-of-way vacation, and the construction of any public improvement or structure by any government agency acting in a governmental capacity. In the event the County requires Grantee to Relocate its Facilities, the County shall provide Grantee with written notice requesting such Relocation, along with plans for the public improvement that are sufficiently complete to for the initial evaluation, coordination, and the development of a Relocation plan. The County and Grantee shall meet at a time and location determined by the County to discuss the project requirements including critical timelines, schedules, construction standards, utility conflicts, as-built requirements, and other pertinent Relocation plan details. The County shall notify Grantee as soon as practicable of the need for Relocation and shall specify the date by which the Relocation shall be committed. Except in case of emergency such notice shall be no less than 90-days.

B. To ensure timely execution of Relocation requirements, Grantee shall upon written requests from the County, provide at Grantee’s expense, base maps, current as-built information, detailed relocation plan (including detailed schedule of Relocation activities, identification of critical path, identification of Facilities, and Relocation procedures), and other design, technical or operational requirements within the time frame specified by the County.

C. Grantee may, after receipt of written notice requesting a Relocation of its Facilities, submit to the County written alternatives to such Relocation within the time specified by the County, but no shorter than 30-days. Such alternatives shall include the use and operation of temporary Facilities in adjacent rights-of-way. The County shall evaluate such alternatives and advise Grantee in writing if one of more of the alternatives are suitable to accommodate the work, which would otherwise necessitate Relocation of the Facilities. If requested by the County, Grantee shall submit additional information to assist the County in making such evaluation. The County shall give each alternative proposed by Grantee full and fair consideration. In the event the County, in its sole discretion, decides not to accept the alternatives suggested by Grantee, Grantee shall Relocate its Facilities as otherwise specified in Section 11.

D. Upon final approval of the Relocation plan by the County, Grantee shall, at its own expense, unless otherwise prohibited by statute, and at the time frame specified by the County, which in no event shall be less 30 days from receipt of final approval from the County,

temporarily or permanently remove, Relocate, place underground, change or alter the position of any Facilities or structures within the right-of-way whenever the County has determined that such removal, Relocation, undergrounding, change or alteration is reasonably necessary for the construction, repair, maintenance, installation, public safety, or operation of any public improvement in or upon the rights-of-way. In the event Relocation is required by reason of construction by a third party, non-governmental entity, then Grantee's Relocation costs shall be borne by the third party.

E. If during construction, repair, or maintenance of the County's public improvement project an unexpected conflict occurs from Grantee's Facilities, Grantee shall, upon notification from the County, respond within 24 hours to resolve the conflict.

F. Grantee acknowledges and understands that any delay by Grantee in performing the work to alter, adjust, Relocate, or protect in place its Facilities within the public rights-of-way may delay, hinder, or interfere with the work performed by the County and its contractors and subcontractors in furtherance of construction, alteration, repair, or improvement of the public rights-of-way, and result in damage to the County, including but not limited to, delay claims. Grantee shall cooperate with the County and its contractors and subcontractors to coordinate such relocation work to accommodate the public improvement project and project schedules to avoid delay, hindrance of, or interference with such project. Should Grantee fail to alter, adjust, protect in place or Relocate any Facilities ordered by the County to be altered, adjusted, protected in place, or Relocated, within the time prescribed by the County, which in no event shall be less than 30 days from the receipt of final approval from the County, given the nature and extent of the work, or if it is not done to the County's reasonable satisfaction, the County may, to the extent the County may lawfully do so, cause such work to be done and bill the reasonable cost of the work to Grantee, including all reasonable costs and expenses incurred by the County due to Grantee's delay. In such event, the County shall not be liable for any damage to any portion of Grantee's system. In addition to any other indemnity set forth in this Franchise, Grantee will indemnify, hold harmless, and pay the costs of defending the County from and against any and all claims, suits, actions, damages, or liabilities for delays on public improvement construction projects caused by or arising out of the failure of Grantee to adjust, modify, protect in place, or relocate its Facilities in a timely manner; provided that, Grantee shall not be responsible for damages due to delays caused by the County.

Section 12. Abandonment and or Removal of Grantee Facilities.

A. Within one hundred and eighty (180) days of Grantee's permanent cessation of use of Grantee Facilities, or any portion thereof, Grantee shall, at County's discretion, either abandon in place or remove the affected Facilities.

B. The parties expressly agree that this Section shall survive the expiration, revocation or termination of this Franchise.

Section 13. Undergrounding.

A. The parties agree that this Franchise does not limit County's authority under federal law, State law, or local ordinance, to require the undergrounding of Facilities, provided however, this requirement shall not apply to the Facilities that are required to remain above ground in order to be functional.

B. Whenever County requires the undergrounding of Grantee's Facilities in the Franchise Area, Grantee shall underground Grantee Facilities in the manner specified by the County Engineer, with payment therefor consistent with the provisions of RCW 36.88.410 et al. Where other utilities or franchise grantees are present and involved in the undergrounding project, Grantee shall be required to pay only its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Grantee Facilities. Common costs shall include necessary costs for common trenching and utility or facility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded.

C. Grantee and the County acknowledge and commit to fully comply with their respective obligations, as the same may arise from time to time, under Chapter 19.122 RCW (Underground Utilities Locator Statute) or any other law applicable to determining the location of utility facilities. Thus, before commencing any work within the Franchise Area, Grantee shall comply with the One Number Locator provisions of RCW Chapter 19.122 to identify existing utility infrastructure.

D. Design locate marks will be placed in the same three (3) day time frame as construction locate marks.

Section 14. Indemnification.

A. Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the County, its officers, officials, employees and agents from any and all claims, costs, judgments, awards or liability to any person arising from injury, sickness, or death of any person or damage to property:

1. For the alleged or actual negligent acts or omissions of Grantee, its agents, servants, officers or employees;

2. By virtue of Grantee's exercise of the rights granted by this Franchise;

3. By virtue of the County's permitting Grantee's use of the County's Public Way or other public property;

4. Based upon the County's inspection or lack of inspection of work performed by Grantee, its agents and servants, officers or employees in connection with work authorized on

the Facilities or property over which the County has control, pursuant to this Franchise or pursuant to any other permit or approval issued in connection with this Franchise;

B. Grantee's indemnification obligations pursuant to Section 14.A shall include indemnifying the County for actions brought by Grantee's own employees and the employees of Grantee's agents, representatives, contractors, and subcontractors even though Grantee might be immune under Title 51 RCW from direct suit brought by such an employee. It is expressly agreed and understood that this indemnification for actions brought by the aforementioned employees is limited solely to claims against the County arising by virtue of Grantee's exercise of the rights set forth in this Franchise. The obligations of Grantee under this Section 14.B have been mutually negotiated by the parties hereto, and Grantee acknowledges that the County would not enter into this Franchise without Grantee's waiver thereof. To the extent required to provide this indemnification and this indemnification only, Grantee waives its immunity under Title 51 RCW as provided in RCW 4.24.115.

C. Except to the extent that damage or injury arises from the negligence or willful misconduct of the County, its officers, officials and employees, the obligations of Grantee under the indemnification provisions of this Section 14 and any other indemnification provision herein shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the concurrent negligence of the County, its officers, officials and employees and the Grantee. Notwithstanding the proceeding sentence, to the extent the provisions of RCW 4.24.115 are applicable, the parties agree that the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein. This waiver has been mutually negotiated by the parties.

D. Inspection or acceptance by the County of any work performed by Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Provided that Grantee has been given prompt written notice by the County of any such claim, said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation. The County has the right to defend or participate in the defense of any such claim, and has the right to approve any settlement or other compromise of any such claim, provided that Grantee shall not be liable for such settlement or other compromise unless it has consented thereto.

E. The County shall promptly notify Grantee of any claim or suit and request in writing that Grantee indemnify the County. Grantee may choose counsel to defend the County subject to this Section 14E. County's failure to so notify and request indemnification shall not relieve Grantee of any liability that Grantee might have, except to the extent that such failure prejudices Grantee's ability to defend such claim or suit. In the event that Grantee refuses the tender of defense in any suit or any claim, as required pursuant to the indemnification provisions within this Franchise, and said 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 Grantee, Grantee shall pay all of the County's reasonable costs for defense of the action, including all expert witness fees, costs, and attorney's fees, and including costs and fees incurred in recovering under this indemnification provision. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the County and the counsel selected by Grantee to represent the County, then upon the prior written approval and consent of Grantee, which shall not be unreasonably withheld, the County shall have the right to employ separate counsel, as approved by Grantee, which approval will not be unreasonably withheld, delayed, or conditioned, in any action or proceeding and to participate in the investigation and defense thereof, and Grantee shall pay the reasonable fees and expenses of such separate counsel, except that Grantee shall not be required to pay the fees and expenses of separate counsel on behalf of the County for the County to bring or pursue any counterclaims or interpleader action, equitable relief, restraining order or injunction. The County's fees and expenses shall include all out-of-pocket expenses, such as consultants and expert witness fees, and shall also include the reasonable value of any services rendered by the counsel retained by the County but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the County by Grantee. Each party agrees to cooperate and to cause its employees and agents to cooperate with the other party in the defense of any such claim and the relevant records of each party shall be available to the other party with respect to any such defense.

F. In the event that Grantee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to this Section, and said refusal is subsequently determined by a court having competent jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Grantee, then if Grantee does not promptly accept the tender of defense, Grantee shall pay all of the County's reasonable costs for defense of the action, including, if incurred, all reasonable expert witness fees, and reasonable attorneys' fees, and the reasonable costs of the County, and reasonable attorneys' fees of recovering under this Subsection.

G. Notwithstanding any other provisions of this Section, Grantee assumes the risk of damage to its Facilities located in the Right of Way and upon County-owned property from activities conducted by the County, its officers, officials, agents, employees, volunteers, and contractors, except to the extent any such damage or destruction is caused by or arises from any willful misconduct or criminal actions on the part of the County, officers, elected officials, and employees. In no event shall either party be liable to the other for any indirect, incidental, special, consequential, exemplary, or punitive damages, including by way of example and not limitation lost profits, lost revenue, loss of goodwill, or loss of business opportunity in connection with its performance or failure to perform under this Franchise. Grantee releases and waives any and all such claims against the County, its officers, officials, agents, employees, volunteers, and contractors. Grantee further agrees to indemnify, hold harmless and defend the County against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of Grantee's Facilities as the result of any interruption of service due to damage or destruction of Grantee's Facilities caused by or arising

out of activities conducted by the County, its officers, officials, employees, and agents except to the extent any such damage or destruction is caused by or arises from the negligence or any willful misconduct, or criminal actions on the part of the County, its officers, officials, employees and agents.

H. The provisions of this Section 14 shall survive the expiration, revocation, or termination of this Franchise.

Section 15. Insurance.

A. Grantee shall procure and maintain for the duration of the 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 Grantee, or its employees. Grantee shall provide an insurance certificate including the County, its officers, elected officials, and employees, as additional insureds as their interest may appear under this Franchise, to the County at the time of execution of this agreement, and such insurance certificate shall evidence:

1. Commercial Automobile Liability insurance covering all owned, non-owned, hired, and leased vehicles with a combined single limit for bodily injury and property damage of \$3,000,000 each accident.

2. Commercial General Liability insurance with limits of \$3,000,000 per occurrence for bodily injury and property damage and \$3,000,000 general aggregate including premises-operations, independent contractors, personal and advertising injury, contractual liability and \$3,000,000 products-completed operations aggregate limit. County shall be included as an additional insured as their interest may appear under this Franchise under Grantee's Commercial General Liability insurance policy with respect to the work performed under this Franchise.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington and Employer's Liability with a limit of \$1,000,000 each accident/disease/policy limit.

4. Pollution liability shall be in effect throughout the entire Franchise term, with a limit of one million dollars (\$1,000,000) per occurrence, and two million dollars (\$2,000,000) in the aggregate.

5. Excess Umbrella liability policy with limits of \$5,000,000 per occurrence and in the aggregate.

B. The liability insurance policies required by this Section shall be maintained by Grantee throughout the term of this Franchise, and such other period of time during which Grantee is operating without a franchise or is engaged in the removal of its Facilities. Payment

of deductibles or self-insured retentions shall be the sole responsibility of Grantee. The insurance certificate required by this Section 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. Grantee's insurance shall be primary insurance with respect to the County, its officers, elected officials, and employees. Any insurance, self-insurance, or insurance pool coverage maintained by the County, its officers, elected officials, and employees shall be in excess of Grantee's insurance and shall not contribute with it.

C. Grantee's contractors and subcontractors performing Work in the Public Rights - of -Way shall comply with such bond, indemnity, and insurance requirements as may be required by County code or regulations, or other applicable Law. Any contractors or subcontractors performing Work within the Public Rights -of -Way on behalf of Grantee shall be subject to the same restrictions, limitations, and conditions as if the Work were performed by Grantee. Grantee shall ensure that all such Work performed by Grantee's contractors and subcontractors is in compliance with this Franchise Agreement. It is Grantee's responsibility to ensure that contractors, subcontractors, or other Persons performing Work on Grantee's behalf are familiar with the requirements of this Franchise Agreement and other applicable Laws governing the Work performed by them.

D. Grantee shall furnish County with certificates of the foregoing insurance coverage and blanket additional insured endorsements.

E. As of the Effective Date of this Franchise, Grantee is not self-insured. Should Grantee wish to become self-insured at the levels outlined in this Franchise at a later date, Grantee must provide the County with thirty (30) days advanced written notice of its intent to self-insure. Grantee shall comply with the following: (i) provide the County, upon request, a copy of Grantee's or its parent company's most recent audited financial statements; (ii) Grantee is responsible for all payments within the self-insured retention; and (iii) Grantee assumes all defense and indemnity obligations as outlined in the indemnification section of this Franchise.

F. Grantee's maintenance of insurance as required by this Franchise shall not be construed to limit the liability of Grantee to the coverage provided by such insurance.

Section 16. Performance Security.

Grantee shall provide County with one surety bond in the amount of Fifty Thousand Dollars (\$50,000) for all of Facilities in the County's rights-of-way running or renewable for the term of this Franchise, in a form and substance reasonably acceptable to County. In the event Grantee shall fail to substantially comply with any one or more of the provisions of this Franchise following notice and a reasonable opportunity to cure, then there shall be recovered jointly and severally from the principal and any surety of such surety bond any damages suffered by County as a result thereof, including but not limited to staff time, material and equipment costs, compensation or indemnification of third parties, and the cost of removal or

abandonment of facilities hereinabove described. Grantee specifically agrees that its failure to comply with the terms of Section 19 shall constitute damage to County in the monetary amount set forth therein. Such a financial guarantee shall not be construed to limit Grantee's liability to the guarantee amount, or otherwise limit County's recourse to any remedy to which County is otherwise entitled at law or in equity.

Section 17. Successors and Assignees.

A. All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors, assigns of, and independent contractors of Grantee, and all rights and privileges, as well as all obligations and liabilities of Grantee shall inure to its successors, assignees and contractors equally as if they were specifically mentioned herein wherever Grantee is mentioned.

B. This Franchise shall not be leased, assigned or otherwise alienated, except to an Affiliate of Grantee, without the express consent of County by ordinance, which approval shall not be unreasonably withheld. Approval shall not be required for mortgaging purposes or if a transfer of interest is from Grantee to another person or entity controlling, controlled by, or under common control with Grantee, or in the event of a transfer of all or a majority of all of Grantee's assets in the market defined by the Federal Communications System in which the Facilities are located.

C. For assignments needing County's approval, Grantee and any proposed assignee or transferee shall provide and certify the following to County not less than thirty (30) days prior to the proposed date of transfer: (a) complete information setting forth the nature, term and conditions of the proposed assignment or transfer; (b) all information required by County of an applicant for a Franchise with respect to the proposed assignee or transferee; and, (c) an application fee which shall be set by County, plus any other costs actually and reasonably incurred by County in processing and investigating the proposed assignment or transfer.

D. Prior to County's consideration of a request by Grantee to consent to a Franchise assignment or transfer, the proposed assignee or transferee shall file with County a written promise to unconditionally accept all terms of this Franchise, effective upon such transfer or assignment of this Franchise. After the date of such written promise, Grantee shall have no further obligation under this Franchise. County is under no obligation to undertake any investigation of the transferor's state of compliance and failure of County to insist on full compliance prior to transfer does not waive any right to insist on full compliance thereafter.

Section 18. Dispute Resolution.

A. In the event of a dispute between County and Grantee arising by reason of this Franchise, the dispute shall first be referred to the operational officers or representatives designated by County and Grantee to have oversight over the administration of this Franchise. The officers or representatives shall meet within thirty (30) calendar days of either party's

request for a meeting, whichever request is first, and the parties shall make a good faith effort to achieve a resolution of the dispute.

B. If the parties fail to achieve a resolution of the dispute in this manner, either party may then pursue any available judicial remedies. This Franchise shall be governed by and construed in accordance with the Laws of the State of Washington. In the event any suit, arbitration, or other proceeding is instituted to enforce any term of this Franchise, the parties specifically understand and agree that venue shall be exclusively in Whatcom County, Washington.

Section 19. Enforcement and Remedies.

A. If Grantee shall violate, or fail to comply with any of the provisions of this Franchise, or should it fail to heed or comply with any notice given to Grantee under the provisions of this Franchise, County shall provide Grantee with written notice specifying with reasonable particularity of the nature of any such breach and Grantee shall undertake all commercially reasonable efforts to cure such breach within thirty (30) days of receipt of notification. If County reasonably determines the breach cannot be cured within (30) thirty days, County may specify a longer cure period, and condition the extension of time on Grantee's submittal of a plan to cure the breach within the specified period, commencement of work within the original thirty (30) day cure period, and diligent prosecution of the work to completion. If the breach is not cured within the specified time, or Grantee does not comply with the specified conditions, County may, at its discretion, either (1) revoke this Franchise with no further notification, or (2) claim damages of Five Hundred Dollars (\$500.00) or actual damages if demonstrably greater, against the financial guarantee set forth in Section 16.

B. Should County determine that Grantee is acting beyond the scope of permission granted herein for Grantee Facilities and Grantee Services, County reserves the right to cancel this Franchise and require Grantee to apply for, obtain, and comply with all applicable County permits, franchises, or other County permissions for such actions, and if Grantee's actions are not allowed under applicable federal and state or County Laws, to compel Grantee to cease such actions.

Section 20. Compliance with Laws and Regulations.

A. Grantee agrees to comply with all present and future federal and state laws, ordinances, rules and regulations. Nothing herein shall be deemed to restrict the County's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The County shall have the authority at all times to reasonably control by appropriate regulations the location, elevation, manner of construction and maintenance of Facilities by Grantee, and Grantee shall promptly conform with all such regulations, unless acknowledges that following the approval of this Franchise, the County may modify its Codes to address small

wireless deployment and such Code modifications shall apply to Grantee's Facilities, except to the extent of a vested right pertaining to an existing Facility. In the event of a conflict between the provisions of this Franchise and any other generally applicable ordinance(s) enacted under the County's police power authority, such other ordinances(s) shall take precedence over the provisions set forth herein.

Section 21. Consideration.

A. As consideration for this Franchise, Grantee commits to pay County an annual usage fee equal to Two Hundred Seventy and 00/100 Dollars (\$270.00) for each Small Wireless Facility located within the Right of Way. Ancillary facilities or services that are not defined herein as Small Wireless Facilities shall not be covered by this usage fee and are subject to independent usage or franchise fees.

B. Grantee's franchise fee payments shall be due the first of the month following the commencement of construction of a particular Facility ("Commencement Date"), and shall be due on each January 1 thereafter for as long as the Facility is in place. For any partial year beginning from the Commencement Date until the following January 1, the annual franchise fee will be prorated. County shall provide Grantee a completed, current Internal Revenue Service Form W-9 and state and local withholding forms, if required. Grantee shall include with payment a complete written inventory of all Small Cell Facilities situated in County's Rights-of-Way as of two weeks prior to the payment due date. Payments shall be made to the Whatcom County Treasurer, Whatcom County Courthouse, Suite 104, 311 Grand Avenue, Bellingham, WA 98225, unless otherwise specified by the County in writing.

C. In the event any payment is not received within forty-five (45) days from the due date, Grantee shall pay, in addition to the payment or sum due, interest on the amount due at the maximum allowed rate as provided under State law from the date the payment was due until the date the County receives the payment.

Section 22. Consequential Damages Limitation.

Notwithstanding any other provision of this Franchise, in no event shall either party be liable for any special, incidental, indirect, punitive, reliance, consequential or similar damages.

Section 23. Severability.

If any portion of this Franchise is deemed invalid, the remainder portions shall remain in effect.

Section 24. Titles.

The section titles used herein are for reference only and should not be used for the purpose of interpreting this Franchise.

ADOPTED this _____ day of _____ 2021.

ATTEST

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

Dana Brown Davis, Clerk of the Council

Barry Buchanan, Council Chair

APPROVED AS TO FORM:

WHATCOM COUNTY EXECUTIVE
WHATCOM COUNTY, WASHINGTON

Christopher Quinn
Civil Deputy Prosecutor
(approved electronically 4/14/2021)

Satpal Singh Sidhu, County Executive
()Approved ()Denied

Date Signed: _____