

ORDINANCE NO. 1349

AN ORDINANCE GRANTING A FRANCHISE TO NOANET, INC FOR THE
CONSTRUCTION, OPERATION AND MAINTENANCE OF
COMMUNICATIONS AND TELECOMMUNICATIONS FACILITIES WITHIN
THE CITY OF OTHELLO

THE CITY COUNCIL OF THE CITY OF OTHELLO, WASHINGTON ORDAINS AS
FOLLOWS:

Franchise.

Section 1. An ordinance granting a non-exclusive franchise to Northwest Open Access Network (“NoaNet”), (hereinafter referred to as “Grantee”), a non-profit mutual corporation organized under the laws of the State of Washington, to occupy and use the public rights of way, and upon approval, other public places in the City of Othello, (hereinafter referred to as “Grantor” or “City”) for the purpose of constructing and maintaining communication and telecommunication facilities and operating a communications and telecommunication system for a term of ten (10) years, subject to prior termination or amendment under certain conditions subjecting such franchise privilege at all times to regulation by state and local public authority and specifying other limitations, terms, and conditions governing the exercise of said franchise.

A. The purpose of this ordinance is to grant a franchise for the construction, operation, and maintenance of a communication and telecommunication facility and system by Grantee within the City of Othello, Washington. The franchise shall not be construed to extend privileges beyond this grant. It is an additional purpose of this franchise to set forth Grantee’s responsibilities and obligations, accepted and agreed upon by Grantee, as reasonably related to the enjoyment of franchise privileges.

B. The Grantee is hereby granted for a term of ten (10) years from the date this ordinance becomes effective unless sooner abandoned, revoked, terminated, or amended under the provisions of Section 1 .C., a franchise to establish, construct and maintain, extend and operate, over, along, across, and under the streets, avenues, alleys, bridges, and, upon specific approval, other public places and ways, hereafter referred to as “franchised areas,” within the corporate limits of the City of Othello, facilities and equipment used or to be used for the purpose of providing communication and telecommunication service in said areas of the City of Othello, including all poles, towers, underground conduits and lines, wires and cables, vaults and manholes for the installation, operation, and maintenance of fiber optic cable and facilities so used or to be used. This provision shall not be construed to waive any requirement of Grantee to obtain public or private easements.

C. The grant of the franchise under this ordinance is non-exclusive. The City expressly reserves the right to grant similar permission to others and the right of the City itself to engage in such business at any time.

D. The City hereby reserves the right to amend this franchise ordinance to adjust to

conditions created by significant technological innovations or advancements in the fiber optic cable industry, following a determination by the City Council that such innovations or advancements are feasible and cost effective and affect, or may affect Grantee's exercise of the franchise rights granted by this ordinance. Prior to any amendment of the franchise ordinance by the City under the authority of this section, Grantee and the City shall conduct negotiations and discussions on the best manner of making the necessary adjustments to the Grantee's franchise obligations:

Section 2. Grantee's Compliance With Laws: City's Reservation of Powers and Authority

A. A condition of this franchise is Grantee's acceptance of the obligation to comply with all federal, state, or local laws or regulations applicable to the exercise of franchised functions or franchise obligation.

B. By way of limitation of the foregoing and in addition, the City reserves all lawful powers and franchise authority. This franchise is subject to exercise of such power and authority as the City may now or hereafter determine proper, whether by ordinance, resolution, or administrative orders.

C. The authority reserved by the City shall relate, not by way of limitation, to the location of Grantee's facilities or other matters to the extent the same may affect municipal interests. It shall include the right to curtail or exclude on a temporary or permanent basis a specific route or installation of Grantee's facilities because of inadequate space or other reasonable cause.

Section 3. Grantee's General Obligations

A. The Grantee acknowledges that its franchise privileges involve utilization of a scarce public resource: the area above, over, along, and below the public rights of way of the City. This scarcity arises from current or projected space and use limitations on public rights of way and public property in franchised areas and the public and municipal accommodations to Grantee's enjoyment of this franchise. The Public Works Director may determine, in the exercise of reasonable discretion, when and where reasonable accommodation shall be made by Grantee to the City for public needs. For items involving substantial cost or other burdens on the Grantee, the Grantee may request City Council review of the Public Works Director's decision.

B. All of Grantee's property and facilities shall be constructed, operated, and maintained in good order and condition and in accordance with standard engineering practice.

C. The Grantee shall maintain at least the minimum separation required by applicable standards, and the Grantee's construction standards, if applicable, between any city attachments and the Grantee's cable on the poles.

D. Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this franchise, Grantee or Grantee's contractors and subcontractors shall furnish a bond executed by Grantee or its contractors and subcontractors, and a corporate surety authorized to do a surety business in the State of Washington, in a sum to be set and approved by the City Administrator consistent with the City's design and construction standards and other applicable permit requirements. The bond shall be conditioned so that

Grantee or its contractors and subcontractors 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.

E. After construction is complete, and as a condition of this franchise, Grantee shall provide to the City upon request and at no cost, a copy of all as-built plans, maps and records revealing the final location and condition of its facilities within the public rights of way and public places.

F. The cost of publication of this Ordinance shall be borne by Grantee.

G. 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 grander hereunder the Grantee, its agents, representative or employees. Grantee shall provide a copy of a Certificate of Insurance to the City for its inspection prior to the adoption of this franchise ordinance, and such certificate shall evidence a policy of insurance that includes automobile liability insurance with limits no less than \$1,000,000 per occurrence and commercial general liability insurance, 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 and property damage. Coverage shall include blanket contractual, products and completed operations, broad form property damage, explosion, collapse and underground (XCU) and employer's liability.

The insurance required under this section may be through a self-insurance fund under which Grantee is insured. If the insurance required under this section is provided through a utility self-insurance fund, Grantee shall submit, in writing, information on its proposed self-insurance program to Grantor for approval of the program. The submission shall include—

- (1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;
- (2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;
- (3) The terms regarding insurance coverage for any City property;
- (4) Loss history, premiums history, and industry ratios;
- (5) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;
- (6) Claims administration policy, practices, and procedures;
- (7) The method of calculating the projected average loss; and
- (8) A disclosure of all captive insurance company and reinsurance agreements, including methods of computing cost.

Programs of self-insurance covering Grantee's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in the City's interest.

H. Grantee shall, after abandonment under Section 22 herein, or installation, construction, relocation, maintenance or repair of its facilities within the franchise area, restore the

surface of the rights of way to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole cost and expense.

Section 4. Grantee's Obligations Re: Relocation of Facilities

The City reserves the right, as defined by City ordinance or when required to conform to City construction or reconstruction of public projects, to require the relocation, modification, or reconstruction of any vault, poles, lines, and/or other physical facilities installed by the Grantee, its successors, assigns, or permittees, whether under or above the surface of any public right of way, public property, or other franchised area, whenever, in the judgment of the City, such relocation or reconstruction is deemed necessary, at no expense to the City.

Section 5. Under-grounding of Facilities General Requirements.

A. The City may require the Grantee to install its wires underground as defined by city code. Permission to Grantee to place facilities underground, subject to the requirements of this franchise is hereby granted. For the purpose of carrying into effect the privileges granted thereunder, Grantee is authorized at any time to make all necessary excavations in the streets, alleys, roads, rights of way and public grounds within the franchised area, but such excavation shall be carried out with reasonable dispatch and with as little interference with or inconvenience to the rights of the public as may be feasible. Grantee shall restore all streets, alleys, roads, rights of way and public grounds in as good and safe condition in all respects as before the commencement of such work. Once a paved surface in any franchised area has been cut by the Grantee, it shall be properly maintained in good condition and repair by Grantee until such time as the area is resurfaced or reconstructed by the City.

B. In case any obstruction caused by Grantee shall remain longer than seven (7) business days after notice to remove it, or in case of neglect by Grantee to safeguard any dangerous places, Grantor may remove such obstruction or safeguard such dangerous places at the expense of Grantee.

C. Where wires in the franchised area are removed from aboveground and placed underground, the installation shall be so installed underground by the Grantee and the area shall be restored to original condition or such equivalent condition as directed by the Public Works Director.

Section 6. Grantee's Obligations of Non-Obstruction.

A. The Grantee, in the exercise of the rights herein granted, shall erect poles, string wires, and build conduits in such a manner as to not unreasonably interfere with other uses of franchised areas. This obligation shall not permit unreasonable interference with Grantee's installations by other City permittees or franchisees. City installed utilities and support of their utilities shall have first priority in the allocation of space and routes.

B. It remains the responsibility of the Grantee to anticipate and avoid duplicating service, facilities, installation, or conflicts with other franchisees or permittees. The City assumes

no responsibility for such conflicts or errors.

C. All construction, installation, repair or relocation of lines and appurtenances performed by Grantee along or under the roads, rights of way or properties subject to this franchise, shall be done in such a manner as not to interfere with the construction and maintenance of other utilities, public or private, drains, drainage ditches and structures, irrigation ditches and structures located therein, nor with the grading or improvement of such roads, rights of way or other public property subject to this franchise.

Section 7. Necessary Construction Maintenance By Grantor.

The laying, construction, operation and maintenance of Grantee's lines and appurtenances authorized by this franchise shall not preclude the Grantor, its agents or its contractors, from blasting, grading, excavating, or doing other necessary road work contiguous to the said lines and facilities of Grantee, provided that Grantee shall be given not less than ten (10) days notice of said blasting or other work, and provided further that the Grantor, its agents and contractors shall be liable for any damages, including any consequential damages to third parties, caused by said work to any installations belonging to Grantee, if as a result of the negligence of the Grantor or Grantor's agent.

Section 8. Emergency Removal By Grantor.

The Grantor reserves the right to remove any such wires, poles, or apparatus ("Grantee's facilities") herein provided for, in case of general conflagration or in other cases of extreme emergency where there is neither the time nor the opportunity for Grantee to perform such work. Grantor shall use reasonable care in the exercise of such emergency powers. Grantor shall indemnify and hold harmless the Grantee, its successors and assigns, against any and all property damage, personal injury, death, or other liability to third parties sustained as a result of the negligent exercise of such reserved emergency powers, and shall, at its expense, restore Grantee's facilities removed as a result of such exercise.

Section 9. Additional Specific Grants of Authority.

A. The grant of this franchise specifically includes the permission by the City and acceptance of a reciprocal obligation by the Grantee to trim or otherwise remove any overhanging or interfering tree, shrub, bush, or other obstruction interfering with the Grantee's facilities. Grantee shall obtain necessary City permits for activities subject to its authority and conduct such tree trimming activities in a prudent manner. Grantee shall be fully responsible for any property damage or bodily injury claims arising from this section as provided in Section 20.

B. Grantee further agrees to temporarily raise or lower its wiring on poles owned by Grantee for purposes of building moving or other temporary purposes approved by the City. Where this request is made by or for the benefit of an entity other than the City, Grantee may assess a reasonable charge therefor, including demand for payment or deposit in advance.

Section 10. Grantee's Obligations Regarding Taxation and Fees.

This section and any franchise fee or tax, which might now or thereafter be assessed, shall

not be deemed to be assessed or charged in lieu of any other lawful charge or actual administrative expense or any source of municipal authority to receive payments in contract or law. The parties understand that, pursuant to RCW Section 35.21.860, the City is precluded from imposing a fee on a "Telecommunication service" as defined in RCW Section 82.04.065, as now enacted or hereafter amended. This Franchise is premised upon the Grantor's and Grantee's understanding that the activities proposed by the Grantee constitute a "Telecommunication service" as defined by RCW Section 82.04.065 as now enacted or hereafter amended. As such, the rights granted under this Franchise are not conditioned upon payment of a franchise fee or other compensation for use of the Public Ways.

Section 11. Vacation Of Properties by Grantor.

If, at any time, the Grantor shall vacate any road, right of way or other public property which is subject to rights granted by this franchise, such vacation shall be subject to the granting of a perpetual easement in favor of Grantee, its successors and assigns, for overhead and underground installations in place at the time of vacation and for the purpose of operating and maintaining such facilities (except that all rights and privileges of the Grantor as defined in this agreement, shall remain in force). Such vacation shall, by its terms, expressly prohibit any use of the vacated properties which will interfere with Grantee's full enjoyment of rights under said easement.

Section 12. Preservation of Grantor's Rights to Control.

The Grantor, in granting this franchise, does not waive any rights which it may now have or may hereafter acquire with respect to road rights of way or other property of Grantor under this franchise, and this franchise shall not be construed to deprive the Grantor of any such powers, rights or privileges which it now has or may hereafter acquire to regulate the use of and to control the Grantor's roads, rights of way and other public property covered by this franchise.

Section 13. Franchise Administration.

A. Except where otherwise specified, the general administration of this franchise for the City is under the authority of the City Administrator. The City Administrator may promulgate reasonable administrative rules consistent herewith, interpret provisions, resolve conflicts, and develop procedures needed to implement and enforce the franchise provisions. The City Administrator may grant exceptions or impose additional requirements in particular circumstances in the exercise of reasonable discretion. He may issue compliance orders with a compliance schedule and terms thereof, with or without notice, and failure to adhere to the terms thereof shall be a violation of this franchise. The City Administrator must give reasonable notice to Grantee and provide an opportunity for the Grantee to respond to any order or requirements, except in case of emergency or danger to the public health and safety. Grantee reserves the right to request the City council to review or clarify any action taken by the City Administrator in the administration of this franchise. For the performance of all franchise obligations, time is of the essence.

B. All City acts undertaken pursuant to this franchise shall be deemed discretionary, guided by the purpose and considerations of the public health, safety, esthetics, and convenience.

C. Any waiver by the City of any specific provision of this franchise in any particular circumstance must be in writing and signed by the City Administrator. Such waiver shall not

comprise a franchise amendment and shall be effective only for such time or circumstances specified and until rescinded or modified. No action, inaction, or interpretation of the requirements of the franchise by the City shall otherwise waive or estop municipal power or authority, whether or not specifically reserved herein.

Section 14. City's Authority Regarding Revocation Of Franchise.

A. The franchise hereby granted may be revoked by the City Council by duly enacted ordinance in the event the Grantee or any lessee or other user shall fail after reasonable notice of demand to comply with any of the terms, conditions, or obligations imposed upon the Grantee hereunder, but the City shall have no obligation to do so. No forbearance by the City shall comprise a waiver of the City's right to enforce any provision of this franchise.

B. Upon lawful revocation or expiration of the terms of this franchise and if no renewal or extension thereof is granted, Grantee may, at the discretion of the City Council, be required, in part or entirely, to remove all its wires, poles, fixtures, conduits, and other facilities or equipment installed or used in the enjoyment of the franchise or the removal, sale, or use of such facilities and equipment may be directed, limited, or conditioned by the City by agreement or through means of any other lawful municipal power or right. The City may continue to invoke any or all provisions of this franchise against Grantee or any successor entity enjoying *de facto* franchise privileges after revocation or expiration. The City may take all other actions deemed necessary and proper by the City to accommodate the transition to any successor as may be in the best interests of the City and its residents.

Section 15. Expansion of Grantee's Facilities.

Any facilities and appurtenances in streets, alleys, rights of way and public places, incidental to the franchise system, that have been, or are at any future time acquired, leased, or utilized in any manner by Grantee are thereupon to be deemed authorized by and shall be subject to all provisions of this franchise.

Section 16. Change of Boundaries of Grantor.

Any subsequent additions or modifications of the boundaries of the Grantor, whether by annexation, consolidation or otherwise, shall be subject to the provisions of this franchise as to all such areas. Grantor shall notify Grantee of any change in boundaries as soon as the change in boundaries has been approved by the Council.

Section 17. Prohibition on Transfer of Franchise Rights.

The franchise hereby granted shall not be sold, leased, assigned, or otherwise alienated without the express consent of the City, expressed by ordinance or resolution of the City Council passed for that purpose, and no rule of estoppel shall be invoked against the City in case it shall assert the invalidity of any attempted transfer in violation of this section. Such consent shall not be unreasonably withheld. The consent of the City is hereby expressly given to the mortgaging of the property and facilities of the Grantee within the City, under any presently outstanding or future mortgage or mortgages given to secure any bonds or other bona fide indebtedness of the Grantee. The City understands that Grantee will be using funds under a Federal Grant under the Broadband

Technology Opportunities Program (“BTOP”) to finance acquisition of this franchise and/or the construction, purchase and/or installation of broadband facilities and equipment to be located in the City right of way. Pursuant to BTOP, Grantee holds its interest in the franchise and the broadband facilities and equipment located in the City right of way as trustee for the Federal Agency administering that program, specifically the National Telecommunications and Information Administration (“NTIA”), and Grantee may record a public notice of such federal interest. The consent of the City is hereby expressly given for Grantee to assign its interest in the franchise to NTIA if required to do so under the rules and regulations of BTOP provided that the City receives satisfactory written confirmation of such requirement.

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

Section 18. Effect of Invalidity.

The franchise is granted pursuant to the laws of the state of Washington relating to the granting of such rights and privileges by Grantor. If any article, section, sentence, clause, or phrase of this Ordinance is for any reason held illegal, invalid, or unconstitutional, such invalidity shall not affect the validity of the Ordinance or any of the remaining portions. The invalidity of any portion of this Ordinance shall not abate, reduce, or otherwise affect any obligation required of Grantee by the remaining valid portions of the ordinance.

Section 19. Franchise Ordinance as Contract.

This Ordinance shall have the effect of and shall be a contract between Grantor and Grantee and shall be the measure of the rights and liabilities of the Grantor as well as of Grantee.

Section 20. Hold Harmless.

A. The Grantee shall at all times fully defend, indemnify, and hold the City, its agencies, boards, officers, agents, and employees harmless from any and all claims, accidents, losses, or liabilities (including those relating to the placement of Grantee’s facilities insofar as the same may affect the surrounding environment), arising from or by reason of any intentional or negligent act, occurrence, or omission of the Grantee, singularly or jointly with others, its representatives, permittees, or employees in the construction, operation, use, or maintenance of any of the Grantee’s facilities and/or enjoyment of any privileges granted by this franchise or because of Grantee’s performance of franchise obligations. Such indemnity shall include costs of negotiation or defense, any other costs incurred and reasonable attorney’s fees.

B. Grantee shall not be responsible for damages determined to arise out of the City’s sole negligence or willful misconduct or, in the case where damages are determined to arise out of concurrent negligence of the parties, the damages shall be borne by the parties in the proportion that their respective negligence bears to the total negligence giving rise to the damages.

C. It is not the intent of this franchise to acknowledge, create, imply or expand any duty or liability of the City with respect to its role as franchising authority in the exercise of its

police power or for any other purpose. Any City duty, nonetheless deemed created, shall be a duty to the general public and not to any specific party, group, or entity.

Section 21. Abandonment of Franchise.

Grantee may at any time abandon the rights and authorities granted hereunder, provided that twelve (12) months written notice of intention to abandon is given to Grantor.

Section 22. Acceptance of Franchise.

Grantee shall notify Grantor in writing of its acceptance of this franchise within sixty (60) days of the approval of this franchise by Grantor. Grantee accepts the responsibility to pay the publication cost applicable through passage of this ordinance.

Section 23. Venue.

Any action concerning a dispute arising under this franchise agreement shall be convened in Adams County, Washington.

Section 24. Time Limits Strictly Construed.

Whenever this franchise sets forth a time for any act be performed by the Grantee, such time shall be deemed to be of the essence, and any failure of the Grantee to perform within the allotted time may be considered a material violation of this franchise and sufficient grounds for the City to invoke any relevant remedy.

Effective Date. This ordinance shall be in full force and effect five days after its passage and publication of its summary as provided by law following its acceptance by Northwest Open Access Network ("NoaNet").

PASSED by the City Council of Othello, Washington this 13th day of September 2011.

By: Tim Wilson
Tim Wilson, Mayor

ATTEST:

By: Debbie Kudrna
Debbie Kudrna, City Clerk

APPROVED AS TO FORM:

By: Katherine L. Kenison
Katherine L. Kenison, City Attorney

PASSED the 13th day of September 2011
APPROVED the 13th day of September 2011
PUBLISHED the 16th day of September 2011