

ORDINANCE NO. 4966

AN ORDINANCE OF THE CITY OF ELLENSBURG, WASHINGTON, GRANTING WHOLESAIL NETWORKS, LLC A NON-EXCLUSIVE FRANCHISE FOR TEN YEARS TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF ELLENSBURG, WASHINGTON, AND SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF FRANCHISE.

WHEREAS, the City desires to grant a non-exclusive franchise to Wholesail Networks, LLC ("Franchisee"), for a period of ten years for the operation and maintenance of a telecommunications network within the City Right-of-Way; and

WHEREAS, as a non-charter code city, 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, Wholesail Networks, LLC is the successor in interest to the Franchise issued to Noel Communications through adoption of Ordinance 4704 by the Ellensburg City Council, which shall expire on July 22, 2025, and Wholesail Networks, LLC, has indicated its desire to enter into a new franchise agreement with the City; and

WHEREAS, the City Council has determined that it is in the best interest of and consistent with the convenience and necessity of the City to grant a Franchise within the confines of the City to Wholesail Networks, LLC, and subject to the terms and conditions hereinafter set forth; and

WHEREAS, the City desires to set forth the terms and conditions by which Wholesail Networks, LLC, shall use the public ways of the City,

NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF ELLENSBURG, WASHINGTON DOES ORDAIN AS FOLLOWS:

Section 1. Definitions. Where used in this Franchise the following terms shall be defined as follows:

"City" means the City of Ellensburg, Washington, a municipal corporation of the State of Washington.

"Council" means the Ellensburg City Council acting in its official capacity.

"Facilities" means any and all lines, poles, anchors, wires, cables, conduit, laterals, and other appurtenances, necessary and convenient to Franchisee's provision of telecommunications service over its "System" defined below.

“Franchise Area” means the area within the city limits of the City of Ellensburg, including areas annexed during the term of this Franchise, that the Franchisee is authorized to serve by the terms of its franchise or by operation of law, and shown in Exhibit A attached hereto.

“Franchisee” means Wholesail Networks, LLC, and its respective successors and assigns if consented to by the City of Ellensburg as provided in Section 14 herein.

“Public ways” or “right-of-way” means the public streets, alleys and easements which, under the Ellensburg City Code (“ECC”), ordinances and applicable laws, the city has authority to grant franchises, permits, or licenses for use thereof or over which the city has regulatory authority.

“System” means the lines, poles, anchors, wires, cables, conduit, laterals, and other appurtenances, necessary and convenient to Franchisee’s provision of telecommunications service for the purpose of a wholesale communications business in accordance with applicable law.

“Telecommunications System” means all wires, cables, ducts, conduits, vaults, poles and other necessary Facilities owned or used by Franchisee for the purpose of providing telecommunications services and located in, under and above the City streets and/or rights-of-way, excluding ducts, conduits and vaults leased from another City franchisee, licensee or permittee.

“Utility Poles” means poles, and crossarms, devices, and attachments directly affixed to such poles which are used for the transmission and distribution of electrical energy, signals, or other methods of communication.

Section 2. Grant of Franchise.

2.1. Pursuant to RCW 35A.47.040 and Chapter 11.40 of the Ellensburg City Code (“ECC”), the City of Ellensburg, a Washington municipal corporation (hereinafter the “City”), hereby grants to Franchisee, its heirs successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth. This franchise ordinance grants Franchisee the right, privilege, and authority to construct, operate, maintain, replace, acquire, sell, lease and use all necessary Facilities for its Telecommunications System, in, under, on, across, over, through, along or below the public rights-of-way located in the City of Ellensburg, as approved pursuant to City permits issued pursuant to this franchise. Franchisee shall construct, install, operate, maintain, repair, and remove its facilities at its sole expense.

2.2. Nothing in this Franchise grants authority to Franchisee to enter, occupy, or use City property.

2.3. Nothing in this Franchise excuses Franchisee of its obligation to identify its Facilities and proposed Facilities and their location or proposed location in the public ways and to obtain use and/or development authorization and permits from the City before entering, occupying, or using public ways to construct, install, operate, maintain, repair, or remove such Facilities.

2.4. Nothing in this Franchise grants authority to Franchisee to impair or damage any City property, public way, other ways or other property, whether publicly or privately owned.

2.5. Nothing in this Franchise shall be construed to create a duty upon the City to be responsible for construction of facilities or to modify public ways to accommodate Franchisee's facilities.

2.6. Nothing in this Franchise grants authority to Franchisee to provide or offer cable television service as defined in the Cable Communication Policy Act of 1984, as amended, 47 U.S.C. §§ 521, et. seq.

Section 3. Franchise Term. The term of this Franchise shall be ten (10) years from the date the Acceptance of Franchise is signed by Franchisee as set forth in Section 4 below and unless extended in accordance with the provisions in Section 5 of this Franchise or terminated sooner in accordance with this Franchise. This provision does not affect the City's right to revoke this Franchise for cause, or because of a breach of any promise, condition or stipulation stated herein.

Section 4. Acceptance of Franchise. Within sixty (60) days after the passage and approval of this ordinance, this Franchise may be accepted by Franchisee by its filing with the City Clerk an unconditional written Acceptance of Franchise thereof, signed on the form appended hereto. Failure of Franchisee to so accept this Franchise within said period of time shall be deemed a rejection thereof, and the rights and privileges herein granted shall, after the expiration of the sixty (60) day period, absolutely cease, unless the time is extended by ordinance duly passed for that purpose.

Section 5. Renewal.

5.1. This Franchise shall automatically be renewed for another five (5) year period unless either party, at least 120 days prior to the expiration of this Franchise, gives the other party: (a) notice of its desire to renegotiate the terms of this Franchise; or (b) notice of termination of this Franchise. During any such renegotiation period, the parties shall use best faith efforts to renegotiate a replacement Franchise and Franchisee shall have the continued right to use the public rights-of-way of the City as set forth herein through the date of the Franchise's expiration.

5.2. If the City gives notice of its intent to cancel this franchise the City Administration shall make a written recommendation to the Ellensburg City Council to cancel the franchise in whole or in part no later than 60 days before the end of the then current term. The City Administration's recommendation shall be provided to the Franchisee at the time it is provided to the City Council. No later than thirty (30) days before the end of the then current term the City Council shall conduct a public hearing and make a decision. If the City Council decides to cancel the franchise, a written determination shall include the reason(s) for cancellation. The City Council may continue consideration of the request for a period not to exceed thirty (30) days. The decision to cancel the franchise shall be based upon the following standards:

- 5.2.1. The continuing capacity of the public ways to accommodate the Franchisee's existing Facilities;
- 5.2.2. Franchisee's compliance with the requirements of this Franchise Agreement;
- 5.2.3. Applicable federal, state and local telecommunications laws, rules and policies, and Franchisee's compliance with same; and
- 5.2.4. Such other factors as may demonstrate that the continued grant to use the public ways will serve the community interest.

Section 6. Franchise Non-Exclusive. This Franchise shall not be construed as any limitation upon the right of the City to grant to other persons rights, privileges, or authorities similar to the rights, privileges, and authorities herein set forth, in the same or other public rights-of-way, public ways or public places. The City specifically reserves the right to use the public rights-of-way for itself or grant at any time during the term of this Franchise or renewal thereof, if any, such additional franchises as it deems appropriate.

Section 7. City Regulatory Authority.

7.1. In addition to the provisions herein contained, the City reserves the right to adopt such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties, and to exercise any other rights, powers, or duties required or authorized, under the Constitution of the State of Washington, the laws of Washington or City ordinance.

7.2. The right of Franchisee to operate and maintain its Facilities is subject to the terms, conditions and requirements of the City's franchise ordinance, ECC Ch. 11.40, and this Franchise; the right of Franchisee to construct, erect, install or modify its Facilities is specifically subject to the requirement that Franchisee obtain all necessary permits as set forth in this Franchise and required by the City ordinances.

Section 8. Location of Facilities.

8.1. **Use of Streets.** Franchisee may, subject to terms of this Franchise, erect, install, construct, repair, replace, reconstruct and retain in, on, over, under, upon, across and along the City streets and rights-of-way such lines, cables, conductors, ducts, conduits, vaults, utility access covers, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of a Telecommunications System within the City. All installation, construction, alteration and/or maintenance of any and all Telecommunications System Facilities within City streets and rights-of-way incident to provision of Telecommunications Services by Franchisee shall, regardless of who performs installation, construction, alteration and/or maintenance, be and remain the responsibility of Franchisee.

8.2. Construction or Alteration.

8.2.1. Permits. Franchisee shall in all cases comply with all lawful City ordinances and regulations regarding the acquisition of permits and other such items as may be reasonably required in order to install, construct, alter and maintain the Telecommunications

System. Franchisee shall apply for and obtain all permits necessary for installation, construction, alteration and/or maintenance of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City streets and rights-of-way. Franchisee shall pay all applicable fees due for any such permits. Permits issued by the City that may be required, include but are not limited to, SEPA, Critical Areas Permit, Site Development Permit and a Public Works Permit. In addition, Franchisee may be required to work with any other state or federal agency that may require a permit, such as the Department of Fish and Wildlife, Department of Ecology, and/or the Army Corps of Engineers.

8.2.2. Schedule, Maps, and Engineering Plans. Prior to beginning installation, construction, alteration or maintenance of the Telecommunications System, Franchisee shall, as part of Franchisee's application for any City permit required to work in City rights-of-way, provide the City with engineering/civil plans for review. These plans shall comply with the City of Ellensburg's Development Standards and shall include right-of-way and easement locations, location of all existing utilities, street, curb, sidewalks, trees, fences, walls, any critical areas, and include the proposed location of the Franchisee's altered or new infrastructure. Upon approval of the plans and associated permits, the Franchisee shall also submit an initial work schedule for work to be conducted in City streets and rights-of-way and the estimated total cost of such work. Franchisee shall, upon request, provide information to the City regarding its progress in completing or altering the Telecommunications System.

8.2.3. Good Engineering.

8.2.3.1. Franchisee promises all of its property and Facilities shall be constructed, operated and maintained in good order and condition in accordance with good engineering practice. In connection with the civil works of the Franchisee's Telecommunications System, such as, but not limited to, trenching, paving, compaction and locations. Franchisee will comply with the current editions of the City of Ellensburg's Development Standards and the Franchisee will comply with the current editions of the City of Ellensburg's Development Standards, and the Washington State Department of Transportation (WSDOT) Standard Specifications, all as now existing or hereafter amended.

8.2.3.2. Franchisee's Telecommunications System shall comply with the applicable federal, state and local laws, the National Electric Safety Code and the Washington Electrical Construction Code, where applicable.

8.2.4. Facilities Placement.

8.2.4.1. General Standards. The Telecommunications System shall be constructed and maintained in such manner as not to obstruct, hinder, damage or otherwise interfere with all modes of transportation, the City's sewer system, the City's water system, the City's natural gas system, the City's electrical system, the City's stormwater system, the City's telecommunications system, other utility fixtures or any other property of the City, or any other pipes, wires, conduits or other Facilities that may have been installed in City streets or rights-of-way by or under the City's authority. Franchisee shall maintain a minimum underground horizontal separation of three (3) feet from water mains, three (3) feet from sewer mains, and two (2) feet from gas mains. Minimum underground vertical separation of one (1) foot from water, sewer, and gas mains; PROVIDED, that for development in new areas, the City, together with Franchisee and other utility purveyors or authorized users of City streets or rights-of-way, will develop and follow the City's determination of a consensus for guidelines and procedures

for determining specific utility locations, subject additionally to this Franchise.

8.2.4.2. Limited Access. Consistent with applicable law, the City reserves the right to limit or exclude access by Franchisee to a specific route, right-of-way or other location when there is inadequate space, a pavement cutting moratorium, potential for unnecessary damage to public property, public expense, inconvenience, interference with City utilities, or for any other lawful reason determined by the City. In addition, any work that impacts vehicular or pedestrian traffic will require a traffic control plan to be submitted to the City for review and approval prior to the commencement of any work by the Franchisee the City's rights-of-way. The traffic control plan shall meet the requirements of the Manual of Uniform Traffic Control Devices (MUTCD).

8.2.4.3. Consistency with Designated Use. Notwithstanding the grant to use City streets and rights-of-way contained in this Franchise, no street, or rights-of-way shall be used by Franchisee if the City, in its sole opinion, determines that such use is inconsistent with the terms, conditions or provisions by which such street or rights-of-way were created or dedicated or presently used under state and local laws.

8.2.4.4. Non-Interference and Notice. Franchisee shall exert its best efforts to construct and maintain the Telecommunications System so as not to interfere with other uses of City streets or rights-of-way and shall minimize impacts to adjacent parcels. Franchisee shall, where possible in the case of aboveground lines, make use of existing poles and other facilities available to Franchisee. Franchisee shall individually notify all residents affected by any proposed installation, construction, alteration or maintenance of the Telecommunications System of such work where and when such notification is reasonably possible. Franchisee shall provide a minimum of 48 hours' advance notice to residents prior to working, and a minimum of five (5) business days' advance notice for work that may impact driveways, sidewalks and/or landscaping maintained by the residents. Such notice shall be physically posted by door hanger. In addition, agreement of landscaping and driveway restoration shall be communicated with the affected resident and shall be restored to its existing condition or better.

8.2.4.5. Undergrounding. The City finds that overhead lines and aboveground wire facilities and installations in the streets or rights-of-way and other franchised areas adversely impact upon the public use and enjoyment of property in the City. Therefore, Franchisee shall place underground all of its transmission lines that are located or are to be located above or within City streets or rights-of-way in the following cases where:

- 8.2.4.5.1. All existing utilities are located underground;
- 8.2.4.5.2. Transmission or distribution facilities of the local exchange carrier and/or the electric utility are underground or hereafter placed underground;
- 8.2.4.5.3. Statute, ordinance, policy or other regulation of the City requires all utilities to be placed underground;
- 8.2.4.5.4. Franchisee is unable to obtain pole clearance;
- 8.2.4.5.5. Underground easements are obtained from developers of new residential areas; or
- 8.2.4.5.6. Utilities are overhead but residents prefer same to be located underground (such undergrounding to be provided at residents' expense).

8.2.4.6. The Franchisee shall be responsible for obtaining permission from subscribers to install overhead and underground fiber optic facilities on private property. New fiber optic facilities:

8.2.4.6.1. May be installed on existing overhead facilities within the communication worker safety zone; however, no fiber optic facilities may be installed by the Franchisee in the supply space of City-owned utility poles.

8.2.4.6.2. Shall not be installed on existing metal street lighting standards or traffic signal standards.

8.2.4.6.3. Shall comply with all National Electric Safety Code (NESC) clearance requirements and NESC requirements for overcurrent protection. All new aerial fiber cable shall meet the minimum ground clearance requirements of the Washington State Department of Transportation. Where excavation is necessary, the Franchisee shall be responsible for obtaining all locates as required in Chapter 19.122 RCW, Washington State's "Underground Utilities" statute, and will also comply with local procedures, custom and practice relating to the one-number locator service program. Any damage to other underground facilities shall be reported without delay. The Director of Energy Services may waive any of the above guidelines, other than clearance requirements, on a case-by-case basis if the cost to comply is clearly excessive in comparison to the estimated cost of overhead installation.

8.3. Coordination with Other Users. Franchisee shall coordinate its activities with other utilities and users of City streets and rights-of-way to avoid unnecessary cutting, damage or disturbance of such streets and rights-of-way and shall conduct its planning, design, installation, construction, alteration and maintenance of the Telecommunications System at all times so as to maximize the life and usefulness of the paving and municipal infrastructure. In addition, the City may determine with respect to franchised uses, in the exercise of reasonable discretion, when and where reasonable accommodation shall be made by Franchisee to the City for public needs or, where requested, other third party needs, how such accommodation should be made and a reasonable apportionment of any expenses of same; PROVIDED, that this Franchise creates no third party beneficial interests or accommodation. Notwithstanding the foregoing, it remains the responsibility of Franchisee to anticipate and avoid conflicts with other City streets or rights-of-way occupants or users, other utilities, franchisees or permittees. The City assumes no responsibility for such conflicts. Further, Franchisee shall give appropriate notices to any other City streets or rights-of-way occupants or users, other utilities, franchisees, permittees, divisions of the City or other units of government owning or maintaining facilities which may be affected by the planning, design, installation, construction, alteration or maintenance of Franchisee's Telecommunications System.

8.4. Relocation.

8.4.1. The City shall have the right during the term of this Franchise, as it may be extended, renewed or otherwise altered in accordance with this Franchise, to require Franchisee to change the location of its Telecommunications System within City streets and rights-of-way when the public convenience requires such change, in accordance with RCW 35.99.060. If the City or any government entity elects or requires a third party to alter, repair, realign, abandon, improve, vacate, reroute or change the grade of any street, public way or other public property; or to construct, maintain or repair any public improvement; or to replace, repair, install, maintain or otherwise alter any cable, wire, wire conduit, towers, antenna, pipe, line, pole, wireholding structure, structure or other facility, including a facility used for the provision of utility or other services or transportation of drainage, sewage or other liquids, Consistent with state and federal law, Franchisee shall, upon request, except as otherwise hereinafter provided,

at no expense to the City, remove or relocate as necessary its poles, wires, cables, underground conduits, vaults, pedestals, utility access covers and any other Facilities which it has installed.

8.4.2. If the City requires Franchisee to remove or relocate its Facilities located within City streets or rights-of-way, the City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities within City streets or rights-of-way. If reasonable alternate locations are not available, the Franchisee will be required to acquire the necessary easement.

8.4.3. The City shall provide Franchisee with the standard notice given under the circumstances to other franchisees, licensees or permittees.

8.4.4. The City reserves the right to require Franchisee to relocate its Facilities within the public rights-of-way in the interest of public convenience, necessity, health, safety or welfare at no cost to the City, in accordance with RCW 35.99.060. Franchisee shall promptly commence the relocation of its Facilities within a reasonable period of time after written notice to do so from the City. Before requiring a relocation of Facilities, the City shall, with the assistance and consent of Franchisee, which consent shall not be unreasonably withheld, conditioned or delayed, identify a reasonable alignment for the relocated Facilities within the public rights-of-way of the City. If reasonable alternate locations are not available, the Franchisee will be required to acquire the necessary easement.

8.4.5. In an instance in which Franchisee had paid the cost of relocation of its Facilities at the request of the City within the previous five (5) years, the share of the cost of relocation of Franchisee will be paid by the City if relocation of the same Facilities is subsequently requested by the City in the event of an unforeseen emergency that creates an immediate threat to the public safety, health, or welfare. If during the term of this Franchise, as it may be extended, renewed or otherwise altered in accordance with this Franchise, another entity which holds a franchise or any utility requests Franchisee to remove or relocate its Telecommunications System Facilities to accommodate the construction, maintenance or repair of the requesting party's facilities, or the more efficient use of such facilities, or to "make ready" the requesting party's facilities for use by others, or because Franchisee is using a facility which the requesting party has a right or duty to remove, and the City has determined that such removal or relocation serves the best interests of the City in the management of its rights-of-way, then Franchisee shall remove or relocate its Telecommunications System Facilities at the requesting party's sole expense. Franchisee may request payment in advance from such third party prior to any preparation for any removal or relocation. The City shall not be liable for any such cost(s).

8.4.6. If the City requests Franchisee to remove or relocate its facilities it shall give Franchisee no less than one hundred eighty (180) days advance written notice advising Franchisee of the date or dates removal or relocation is to be undertaken, when practical.

8.4.7. If Franchisee fails, neglects or refuses to remove or relocate its Facilities as directed by the City, the City may do such work or cause it to be done and the cost, including all direct, indirect and/or consequential costs and expenses incurred by the City due to the failure, neglect or refusal by Franchisee thereof, shall be paid solely by Franchisee.

8.4.8. If Franchisee causes any damage to private property or public property in the process of removing or relocating its Facilities, Franchisee shall pay the owner of the property for such damage.

8.4.9. Franchisee does hereby promise to protect and save harmless the City, its officers, agents and employees from any customer or third party claims for service interruption or other losses in connection with any removal or relocation of Telecommunications System Facilities performed in connection with Section 8.4.7 above.

8.5. **Movement of Buildings.** Franchisee shall, upon request by any person holding a building permit, franchise or other approval issued by the City, temporarily remove, raise or lower its transmission or other wires appurtenant to the Telecommunications System to permit the movement of buildings. The expense for such removal, raising or lowering shall be paid by the person requesting the same and Franchisee shall be authorized to require such payment in advance. The City shall require all building movers to provide not less than thirty (30) business days' notice to Franchisee for such temporary wire changes.

8.6. **Tree Trimming.** Franchisee, with twenty-four (24) hour notice to the property owner, shall have the authority to trim or cause to have trimmed trees upon and overhanging streets, alleys, sidewalks and rights-of-way so as to prevent the branches of such trees from coming in contact or otherwise interfering with the Telecommunications System; PROVIDED, that the cost for such trimming of trees shall be paid solely by Franchisee.

8.7. **Restoration.**

8.7.1. Whenever Franchisee damages or disturbs any area in or near City streets, rights-of-way, Franchisee shall, at its sole cost, expense and liability, restore all areas to meet existing condition or better. Permanent restoration shall be completed promptly and not later than within thirty (30) working days of completion of excavation activities.

8.7.2. Excavations within the vehicular or pedestrian travel ways shall be immediately backfilled to finish grade with crushed gravel to temporarily reopen said travel ways to the public. The permanent asphalt and/or concrete restoration shall then be completed within thirty (30) working days of completion of excavation activities.

8.7.3. The City hereby reserves the right, after providing reasonable notice to Franchisee, to remove and/or repair any work done by Franchisee which, in the determination of the City, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid solely by Franchisee as a part of the required Public Works Permit for each project.

8.7.4. Should Franchisee fail, neglect, refuse or delay in performing any obligation here or elsewhere stated, or where the City deems necessary to protect public rights-of-way or to avoid liability, risk or injury to the public or the City, after reasonable notice to Franchisee, the City may proceed to perform or cause to have performed such obligation, including any remedial or preventative action deemed necessary, at the sole expense of Franchisee. Prior to undertaking corrective effort, the City shall make a reasonable effort to notify Franchisee, except no notice is needed if the City declares an emergency or determines a need for expedient action. City will notify Franchisee as soon as practicable if an emergency is declared, or if the City determines expedient action is necessary. This remedy is supplemental and not alternative to any other municipal right.

8.7.5. Whenever Franchisee damages or disturbs any area in or near City streets, rights-of-way, paved area or public improvement, Franchisee stipulates that the City may, without limitation:

8.7.5.1. Require Franchisee to repave an entire lane or greater affected area within any cut or disturbed location if the integrity of such area has been severely compromised by Franchisee, and to ensure there is not an asphalt joint within a vehicle wheel path; and/or

8.7.5.2. Require Franchisee to common trench with any other underground installation in City streets or rights-of-way, with cost sharing to be negotiated between the

parties involved, or in the absence of agreement, as directed by the City.

8.7.6. All work performed by Franchisee under this Section shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

8.7.7. All restoration work is subject to inspection and final approval by the City. If restoration is not made to the satisfaction of the City within the established timeframe, the City may make the restoration itself at the cost of Franchisee or have them made at the cost of Franchisee.

8.8. City Right to Require Removal of Property.

8.8.1. At the expiration of the term for which this Franchise is granted, providing no extension or renewal is granted by the City, or upon the forfeiture or revocation of this Franchise, as provided for in this Franchise, the City shall have the right to require Franchisee to remove, at the sole expense of Franchisee, all or any part of the Telecommunications System from all City streets and rights-of-way within the Franchise Service Area, where the abandoned Facilities interfere with reasonable uses of City streets and rights-of-way. If Franchisee fails to do so, the City may perform the work or cause such work to be performed and collect the cost thereof from Franchisee. The actual cost thereof, including direct administrative costs, shall be a lien upon all Telecommunications Facilities and property of Franchisee effective upon filing of the lien with the Kittitas County Auditor.

8.8.2. Any order by the City Council to remove any of the Franchisee Telecommunications System Facilities shall be mailed to Franchisee not later than thirty (30) calendar days following the date of expiration of this Franchise. Franchisee shall file written notice with the Clerk of the City Council not later than thirty (30) calendar days following the date of expiration or termination of this Franchise of its intention to remove any Telecommunications System Facilities intended to be removed and a schedule for removal by location. The schedule and timing of removal shall be subject to approval and regulation by the City. Removal shall be completed by not later than twelve (12) months following the date of expiration of this Franchise.

8.8.3. Franchisee shall not remove any underground facilities which require trenching or other opening of City streets or rights-of-way along the extension of the facilities to be removed, except as hereinafter provided. Franchisee may voluntarily remove any underground facilities from City streets and rights-of-way which have been installed in such a manner that they can be removed without trenching or other opening of City streets and rights-of-way along the extension of the facilities to be removed.

8.8.4. Subject to applicable law, Franchisee shall remove, at its sole cost and expense, any underground facilities by trenching or opening City streets and rights-of-way along the extension thereof or otherwise which is ordered to be removed by the City Council based upon a determination, in the sole discretion of said Council, that removal is required in order to eliminate or prevent a hazardous condition. Underground facilities in City streets and rights-of-way that are not removed shall be deemed abandoned and title thereto shall be vested in the City. All abandoned underground conduits shall have all cable removed and be left empty.

8.9. **Emergency Repairs.** In the event that emergency repairs to the Telecommunications System are necessary, Franchisee shall notify the City of the need for such repairs. Franchisee may immediately notify the City, initiate such emergency repairs and shall apply for appropriate permits within three business days following discovery of the emergency.

8.10. **City Right of Inspection.** The City shall have the right to inspect and approve all installation, construction, alteration or maintenance work performed by Franchisee within the Franchise Service Area and to make such tests as it deems necessary to ensure compliance with the terms and conditions of this Franchise and other pertinent provisions of law, the cost thereof to be paid solely by Franchisee, but no action or inaction by the City shall create any duty or obligation by the City to inspect, test or approve any installation, construction, alteration or maintenance work performed by Franchisee.

8.11. **After-Acquired Facilities.** Franchisee expressly acknowledges and agrees, by acceptance of this Franchise, that any Telecommunications System Facilities located within City streets or rights-of-way which are subsequently acquired by Franchisee or upon addition or annexation to the City of any area in which Franchisee retains or acquires any such Facilities (if acquired prior to this original Franchise grant) and which would have been subject to this Franchise and the permitting authority related thereto shall immediately be subject to the provisions of this Franchise and all permits related thereto.

8.12. **Information.** Franchisee hereby promises to maintain and supply to the City, at the sole expense of Franchisee, any information requested by the City to coordinate municipal functions with the activities of Franchisee within City streets and rights-of-way. Franchisee shall provide such information, upon request, either in hard copy and/or electronic format compatible with the City's data base system, as now or hereafter existing, including the City's geographic information service (GIS) data base. Franchisee shall keep the City informed of its long-range plans so as to allow coordination with the City's long-range plans.

8.13. The installation of new utility poles by Franchisee is not permitted to establish service. Franchisee must place its Facilities underground in accordance with ECC 11.60.030(C) except as otherwise expressly provided herein. Subject to the terms and conditions of this Franchise, Franchisee may place optical cable, optical cable housing, and splicing connections on existing City-owned utility poles as overhead facilities if approved by City pursuant to a separate agreement for such use, or by the owner of the non-City utility poles. All other facilities, including, without limitation, facilities required for operating or maintaining such optical cable and optical cable housing, and splicing connections, must be underground facilities if they are located in a public way.

Section 9. Pole, Structures and Property Owned by Others. Franchisee must obtain written approval from the owners of utility poles, structures and property not owned by Franchisee prior to attaching to or otherwise using such poles, structures or property, and provide proof of such approval to the City. In the cases where the City owns the utility poles or structures the Franchisee shall comply with ECC Ch. 11.40 and ECC Title 15 as preparation for a specific project plan and permit submittal, and enter into a separate pole contact agreement with the City. The City makes no representation and assumes no responsibility for the availability of utility poles, structures, and property owned by third parties for the installation of Franchisee's Facilities. The City shall not be liable for the unavailability of utility poles, structures, and property owned by the City or third parties for any reason whatsoever. The installation of Facilities by Franchisee on or in the poles, structures, or property owned by others shall be subject to and limited by the owner's authority to enter, occupy, and use public ways. In the event that the authority of the owner of poles, structures, or property to enter, occupy, and

use the public ways either expires, terminates, or is cancelled, the authority of Franchisee to construct, install, operate, maintain, and repair Franchisee's Facilities at such locations may be immediately cancelled at the sole option of the City. The City shall not be liable for the costs for removal of Facilities arising from expiration, termination, or cancellation of any pole owner's authority to enter, occupy, or use public ways for any reason whatsoever.

Section 10. Franchisee's Maps and Records.

10.1. As a condition of this Franchise, and at its sole expense, Franchise shall provide the City with typical and as-built plans, maps, and records that show the vertical and horizontal location of its Facilities within the public rights-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 10 or later. This information shall be provided no later than one hundred and 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. Franchisee shall provide locates and field verify its facilities at no cost to the City.

10.2. Franchisee shall at all times keep up-to date maps and records showing the location and sizes of all Franchisee's facilities installed by it in the Franchise Area. Such maps and records shall be kept in Franchisee's office and shall be subject to inspection at all reasonable times by proper officials or agents of said City or provided in digital format upon request by the City. Franchisee shall provide at the City's request a copy of facilities maps for the City's use.

Section 11. Interference with Persons and Improvements. The Franchisee's Facilities shall be located, erected and maintained so that none of its Facilities shall endanger or interfere with the lives of persons, or interfere with any improvements the City may deem proper to make, or unnecessarily hinder or obstruct the free use of public rights-of-way or other public property. The City shall have power at any time to order and require Franchisee to remove and abate any pole, wire, equipment, cable, or other structure that is dangerous to life or property, and in case Franchisee, after notice, fails or refuses to act within a reasonable time, the City shall have the power to remove or abate the same at the expense of the Franchisee.

Section 12. Insurance.

12.1. Types of Insurance and Coverage. The Franchisee shall obtain insurance of the types and coverage described below:

12.1.1. Commercial General Liability Insurance shall be at least as broad as ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, stop gap liability, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract. There shall be no exclusion for liability arising from explosion, collapse or underground property damage. The City shall be named as an additional insured under the Franchisee Commercial General Liability insurance

policy with respect this Franchise Agreement using ISO endorsement CG 20 12 05 09 if the franchise agreement is considered a master permit, or CG 20 26 07 04 if it is not, or substitute endorsement providing at least as broad coverage.

12.1.2. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01.

12.1.3. Excess or Umbrella Liability insurance shall be excess over and at least as broad in coverage as the Franchisee's Commercial General Liability and Automobile Liability insurance. The City shall be named as an additional insured on the Franchisee's Excess or Umbrella Liability insurance policy.

12.1.4. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

12.2. Minimum Amounts of Insurance. The Franchisee shall maintain the following insurance limits:

12.2.1. Commercial General Liability insurance shall be written with limits no less than \$5,000,000 each occurrence, \$5,000,000 general aggregate.

12.2.2. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$5,000,000 per accident.

12.2.3. Excess or Umbrella Liability insurance shall be written with limits of not less than \$5,000,000 per occurrence and annual aggregate. The Excess or Umbrella Liability requirement and limits may be satisfied instead through Franchisee's Commercial General Liability and Automobile Liability insurance, or any combination thereof that achieves the overall required limits.

12.3. Verification of Coverage. The Franchisee shall furnish the City with original certificates and a copy of the amendatory endorsements annually, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Agreement. Upon request by the City, the Franchisee shall furnish certified copies of all required insurance policies, including endorsements, required in this Agreement. Such policy or policies shall be non-cancelable except upon thirty (30) days prior written notice to the City. Failure on the part of the Franchisee to maintain the insurance as required shall constitute a material breach of Agreement, upon which the City may, after giving five (5) business days' notice to the Franchisee to correct the breach, terminate the Agreement or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the City on demand.

12.4. Other Insurance Provisions. The Franchisee's Commercial General Liability, Automobile Liability, Excess or Umbrella Liability insurance policies are to contain, or be endorsed to contain, that they shall be primary insurance as respect to the City. Any insurance, self-insurance, or self-insured pool coverage maintained by the City shall be excess of the Franchisee's insurance and shall not contribute with it.

12.5. Subcontractors. The Franchisee shall cause each and every Subcontractor to provide insurance coverage that complies with all applicable requirements of the Franchisee-provided insurance as set forth herein, except the Franchisee shall have sole responsibility for determining the limits of coverage required to be obtained by Subcontractors. The Franchisee shall ensure that the City is an additional insured on each and every Subcontractor's

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Commercial General liability insurance policy using an endorsement as least as broad as ISO CG 20 26.

Section 13. Indemnification/Hold Harmless.

13.1. The Franchisee shall defend, indemnify and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the granting of this Franchise, except for injuries and damages caused by the sole negligence, gross negligence or willful misconduct of the City. This requirement extends to any work performed or conducted under the authority of this Franchise by the Franchisee or its contractors or subcontractors.

13.2. Should a court of competent jurisdiction 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 the Franchisee and the City, its officers, officials, employees, and volunteers, the Franchisee's liability hereunder shall be only to the extent of the Franchisee's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Franchisee's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

13.3. The City reserves the right, but not the obligation, to participate in the defense of any claim, damages, losses or expenses and such participation shall not constitute a waiver of Franchisee's indemnity obligations under this Agreement.

Section 14. Transfer of Ownership/Assignment.

14.1. 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 and compliance with ECC Ch. 11.40. Franchisee, however, shall have the right to assign its rights, benefits and privileges in and under this Franchise, provided that Franchisee shall provide the City with prior written notice of the proposed transaction. The City shall then have the option, within thirty (30) days of the receipt of the notice, to notify Franchisee of a public hearing to approve or deny the assignment, such approval not to be unreasonably withheld or delayed. The assignment shall be deemed operative if the City does not respond within such thirty (30) day period.

14.2. The City hereby approves the transfer, assignment or change of control in the event Franchisee is acquired in 2025 by BCE Inc. or one of its subsidiaries or affiliates. The City further approves the transfer, assignment or change of control to Network FiberCo, or such other substantially similar joint venture, in the event that such transfer, assignment or change of control occurs within twelve (12) months of the Effective Date, and there is a transfer or cumulative transfer of substantial voting interest (20% or more). Franchisee must provide the City (i) with notice of such transfer within thirty (30) days following the close effectuating the transfer; and (ii) with certificates of insurance and an additional insured endorsement, consistent with Section 12, if the insurance documents change as a result of the transfer. All other terms, conditions, and obligations of this Agreement will remain in full force and effect and will transfer to the new Franchisee, and any subsequent transfers, assignments, or changes of control will still be subject to the provisions of Section 14.1.

Section 15. Administrative Fee and Utility Tax.

15.1. 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 public 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. Franchisee does hereby warrant that its operations, as authorized under this Franchise, are those of a Service Provider as defined in RCW 35.99.010. Franchisee agrees to pay the City \$5,000.00 as an administrative fee to cover the cost to the City of preparing this Franchise, as provided in ECC 11.40.060(C).

15.2. If Franchisee provides services to customers within the City, Franchisee shall become subject to the City's utility tax set forth in ECC Chapter 6.52. If RCW 35.21.860 is amended to allow collection of a franchise fee, the parties shall negotiate a fair and reasonable franchise fee. Nothing in this Section shall preclude the City from collecting from Franchisee fees lawfully imposed by the City (related to this Franchise or otherwise), including fees for permits and inspections.

Section 16. No Waiver.

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

16.2. No waiver by the City of any breach or violation of any provision of this Franchise or any ordinance shall be deemed to be a waiver or a continuing waiver by the City of any subsequent breach or violation of the same or any other provision. Neither the granting of the Franchise, nor any provision herein, nor any action by the City hereunder shall constitute a waiver of or a bar to the exercise of any governmental right or power of the City, as provided for under state and federal law, including without limitation the right of eminent domain.

16.3. No waiver of any provisions of this Franchise by the City shall be effective unless authorized in writing by the City.

Section 17. Violations. Noncompliance. and Other Grounds for Termination or Cancellation.

17.1. This Franchise, and any right, privilege or authority of Franchisee to enter, occupy or use public ways may be terminated or cancelled by the City for the following reasons:

17.1.1. Violation of or noncompliance with any material term or condition of this Franchise by Franchisee;

17.1.2. Violation of or noncompliance with the material terms of any use and/or development authorization or required permit by Franchisee;

17.1.3. Construction, installation, operation, maintenance, or repair of Facilities on, in, under, over, across, or within any public way without Franchisee first obtaining use

and/or development authorization and required permits from the City and all other appropriate regulatory authorities;

17.1.4. Unauthorized construction, installation, operation, maintenance, or repair of Facilities on City property;

17.1.5. Misrepresentation or lack of candor by or on behalf of Franchisee in any application or written or oral statement upon which the City relies in making the decision to grant, review or amend any right, privilege or authority to Franchisee;

17.1.6. Abandonment of Facilities;

17.1.7. Failure of Franchisee to pay applicable taxes, fees, charges or costs when and as due; or

17.1.8. Insolvency or bankruptcy of Franchisee.

17.2. In the event that the City believes that grounds exist for termination or cancellation of this Franchise or any right, privilege or authority of Franchisee to enter, occupy or use public ways, Franchisee shall be given written notice, and providing Franchisee a reasonable period of time not exceeding thirty (30) days to furnish evidence:

17.2.1. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation, noncompliance, or other grounds for termination or cancellation;

17.2.2. That rebuts the alleged violation, noncompliance, or other grounds for termination or cancellation; or

17.2.3. That it would be in the public interest to impose some penalty or sanction less than termination or cancellation.

17.3. In the event that Franchisee fails to provide evidence reasonably satisfactory to the City as provided in Section 17.2, the City shall refer the apparent violation, noncompliance, or other grounds for termination or cancellation to the City Council. The City Council shall provide the Franchisee with notice and a reasonable opportunity to be heard concerning the matter.

17.4. If the City Council determines that the violation, noncompliance, or other grounds for termination or cancellation arose from willful misconduct or gross negligence by Franchisee, then, Franchisee shall, at the election of the City Council, forfeit all rights, privileges and authority conferred under this Franchise or any use and/or development authorization or permit granted by the City, and this Franchise and any such use and/or development authorization or permit may be terminated or cancelled by the City Council. The City Council may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to pursue other remedies, including obtaining an order compelling Franchisee into compliance or to take corrective action, or to recover damages and costs incurred by the City by reason of Franchisee's actions or omissions. The City Council shall utilize the following factors in analyzing the nature, circumstances, extent, and gravity of the actions or omissions of Franchisee:

17.4.1. Whether the misconduct was egregious;

17.4.2. Whether substantial harm resulted;

17.4.3. Whether the violation was intentional;

- 17.4.4. Whether there is a history of prior violations of the same or other requirements;
- 17.4.5. Whether there is a history of overall compliance; and
- 17.4.6. Whether the violation was voluntarily disclosed, admitted or cured.

17.5. The City Council's choice of remedy shall not excuse Franchisee from compliance with any term or condition of this Franchise or the material terms of any use and/or development authorization or required permit by Franchisee. Franchisee shall have a continuing duty to remedy any violation, noncompliance, or other grounds for termination or cancellation. Further, nothing herein shall be construed as limiting any remedies that the City may have, at law or in equity, for enforcement of this Franchise and any use and/or development authorization or permit granted to Franchisee.

Section 18. Notices. Unless otherwise specified herein, all notices from Franchisee to the City pursuant to or concerning this Franchise shall be delivered to the City Clerk's Office, 501 N. Anderson St., Ellensburg, WA 98926 and such other office as the City may advise Franchisee of by written notice. Unless otherwise specified herein, all notices from the City to Franchisee pursuant to or concerning this Franchise shall be delivered to Ziply Fiber, 135 Lake St. South, Suite 155, Kirkland, WA 98033.

Section 19. No Third-Party Beneficiary. Nothing in this Franchise shall be construed to create any right in or duties to any third party, or any liability to a standard of care with reference to any third party. This Franchise shall not confer any right or remedy upon any person other than the City or Franchisee. No action may be commenced or prosecuted against either the City or Franchisee by any third-party beneficiary of this Franchise. This Franchise shall not release or discharge any obligation or liability of any third party to either the City or Franchisee.

Section 20. Governing Law/Venue. This franchise shall be governed by and construed in accordance with the laws of the state of Washington. The venue and jurisdiction over any dispute related to this Franchise shall be with the Kittitas County Superior Court or in the United States District Court for the Eastern District of Washington.

Section 21. Attorney Fees and Costs. Except as provided in Section 13, Indemnification/Hold Harmless, each party shall pay for its own attorneys' fees and costs incurred in any action arising out of the existence of this Franchise.

Section 22. Survival. All of the provisions, conditions and requirements of Section 8.4, Relocation of Facilities and Section 13, Indemnification/Hold Harmless, shall be in addition to any and all other obligations and liabilities Franchisee may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to Franchisee 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 23. Entire Agreement/Modification. This Franchise and all attachments represent the entire understanding and agreement between the parties hereto with respect to the Ordinance 4966-Franchise Agreement with Wholesail Networks (Second Reading) 07/21/25
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subject matter hereof and supersede all prior oral and written negotiations between the parties. This Franchise can be amended, supplemented, modified, or changed only by an agreement in writing which makes specific reference to this Franchise or to the appropriate attachment and which is signed on behalf of both parties.

Section 24. Severability. If any portion of this ordinance is declared invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect the validity of the remaining portions(s) of this ordinance.

Section 25. Effective Date. This ordinance shall take effect and be in force five (5) days after its passage, approval and publication. The Franchise will be effective upon the date the Acceptance of Franchise attached to this Ordinance is signed.

Section 26. Corrections. Upon review and approval by the City Attorney, the City Clerk and the codifiers of this ordinance are authorized to make necessary corrections to this ordinance including, but not limited to, the correction of scrivener's/clerical errors, references, ordinance numbering, section/subsection numbers and any references thereto.

The foregoing ordinance was passed and adopted at a regular meeting of the City Council on the 21st day of July, 2025.



MAYOR

ATTEST:



CITY CLERK

Approved as to form:



CITY ATTORNEY

Publish: 7-24-25

I, Beth Leader, City Clerk of said City, do hereby certify that Ordinance No. 4966 is a true and correct copy of said Ordinance of like number of said City as the same was passed by said Council, that Ordinance No. 4966 was published as required by law.



BETH LEADER

ACCEPTANCE OF FRANCHISE

In the matter of the agreement between the City of Ellensburg, Washington and Wholesail Networks LLC ("Wholesail"), for a franchise to construct, operate and maintain facilities in, upon, over under, along, across and through the franchise area of the City of Ellensburg, Washington, Ordinance No. 4966.

WHEREAS, the City Council of the City of Ellensburg, Washington, has granted a franchise to Wholesail, its successors and assigns, by enacting Ordinance No. 4966 bearing the date of July 21, 2025; and

WHEREAS, a copy of said Ordinance granting said franchise was received by Wholesail on July 23, 2025, from said City of Ellensburg, Kittitas County, Washington.

NOW, THEREFORE, Wholesail for itself, its successors and assigns, hereby accepts said Ordinance and all the terms and conditions thereof, and files this, its written acceptance, with the City of Ellensburg, Kittitas County, Washington.

IN TESTIMONY WHEREOF said Wholesail has caused this written Acceptance to be executed in its name by its undersigned VP - Regulatory & External Affairs (title) thereunto duly authorized on this 23rd day of July, 2025.

Wholesail Networks, LLC

By: [Signature]
Printed Name: Jessica Epley

Copy received by City of Ellensburg on July 23, 2025.

By: [Signature]
City Clerk