

**ORDINANCE NO. 249**

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

WHEREAS, 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, the Council finds that it is in the best interests of the health, safety and welfare of residents of the Shoreline community to grant a non-exclusive franchise to Metromedia Fiber Network Services, Inc. ("MFNS"), for the operation of an underground fiber optic telecommunications system within the City Right-of-Way;

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

**Section 1     Definitions.**

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

- 1.1     City: The City of Shoreline, a municipal corporation of the State of Washington, specifically including all areas incorporated therein as of the effective date of this ordinance and any other areas later added thereto by annexation or other means.
- 1.2     Days: Calendar days.
- 1.3     Facilities: All of the plant, equipment, fixtures, appurtenances, and other facilities necessary to furnish and deliver Telecommunications Services, including but not limited to wires, lines, conduits, cables, communication and signal lines and equipment, fiber optic cable, anchors vaults, and all attachments, appurtenances, and appliances necessary or incidental to distribution and use of Telecommunications Services. all other facilities associated with the Telecommunications System located in the Right-of-Way, utilized by MFNS in the operation of activities authorized by this Ordinance. The abandonment by MFNS of any Facilities as defined herein shall not act to remove the same from this definition.
- 1.4     MFNS: Metromedia Fiber Network Services, Inc., a Delaware corporation, and its respective successors and assigns.

- 1.5 **Permitting Authority:** The head of the City department authorized to process and grant permits required to perform work in the City's Right-of-Way, or the head of any agency authorized to perform this function on the City's behalf. Unless otherwise indicated, all references to Permitting Authority shall include the designee of the department or agency head.
- 1.6 **Person:** An entity or natural person.
- 1.7 **Public Works Director or Director:** The head of the Public Works department of the City, or in the absence thereof, the head of the Permitting Authority, or the designee of either of these individuals.
- 1.8 **Right-of-Way:** As used herein shall refer to the surface of and the space along and below any street, road, highway, freeway, lane, sidewalk, alley, court, boulevard, parkway, drive, utility easement, and/or road Right-of-Way now or hereafter held or administered by the City of Shoreline.
- 1.9 **Telecommunications Service:** The transmission of information by wire, optical cable, or other similar means. For the purpose of this subsection, "information" means knowledge or intelligence represented by and form of writing, signs, signals, pictures, sounds, or any other symbols. For the purpose of this ordinance, Telecommunications Service excludes wireless communications, over-the-air transmission of broadcast television or broadcast radio signals.
- 1.10 **Telecommunications System:** The system of conduit, fiber optic cable, and supporting Facilities in the Rights-of-Way associated with MFNS's provision of Telecommunications Services.

## **Section 2      Franchise Granted.**

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

## **Section 3      Nonexclusive Franchise Grant.**

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

**Section 4      Relocation of Facilities.**

- 4.1 MFNS agrees and covenants at its sole cost and expense, to relocate its Facilities when requested to do so by the City for a public project, provided that, MFNS shall in all such cases have the privilege, upon approval by the City, to temporarily bypass, in the authorized portion of the same Right-of-Way any Facilities required to be relocated.
- 4.2 If the City determines that a public project necessitates the relocation of MFNS's existing Facilities, the City shall:
  - 4.2.1 At least sixty (60) days prior to the commencement of such project, provide MFNS with written notice of known Facilities requiring such relocation; and
  - 4.2.2 Provide MFNS with copies of any plans and specifications pertinent to the requested relocation and a proposed temporary or permanent relocation for MFNS's Facilities.
  - 4.2.3 After receipt of such notice and such plans and specifications, MFNS shall complete relocation of its Facilities at no charge or expense to the City at least ten (10) days prior to commencement of the project.
- 4.3 MFNS may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise MFNS in writing as soon as practicable if any of the alternatives is suitable to accommodate the work that otherwise necessitates the relocation of the Facilities. If so requested by the City, MFNS shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by MFNS as full and fair a consideration as the project schedule will allow. In the event the City ultimately determines that there is no other reasonable alternative, MFNS shall relocate its Facilities as directed by the City and in accordance with Section 4.2.3.
- 4.4 The City will notify MFNS as soon as practical of any facilities that are not identified during the design of the public project, but are discovered during the course of construction and need to be relocated. MFNS will work with the City to design and complete a relocation to facilitate the completion of the public project with minimum delay.
- 4.5 Failure to complete a relocation requested by the City in accordance with 4.2 above by the date included in the notice provided for thereby may subject MFNS to liquidated damages in the amount of \$100 per day of actual delay in progress of the public project related to the untimely relocation.
- 4.6 The provisions of this Section shall in no manner preclude or restrict MFNS from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person other than the City, where the improvements to be constructed by said person are not or will not become City-owned, operated or maintained, provided that such arrangements do not unduly delay a City construction project.

**Section 5 MFNS's Maps and Records.**

As a condition of this franchise, and at its sole expense, MFNS shall provide the City with typicals and as-built plans, maps, and records that show the vertical and horizontal location of its Facilities within the Right-of-Way using a minimum scale of one inch equals one hundred feet (1"=100'), measured from the center line of the Right-of-Way, which maps shall be in hard copy format acceptable to the City and in Geographical Information System (GIS) or other digital electronic format acceptable to the City. This information shall be provided no later than one hundred eighty (180) days after the effective date of this Ordinance and shall be updated within ten (10) business days of a reasonable request of the City.

**Section 6 Incorporation By Reference and Guarantor.**

SMC Chapter 12.25, Establishing Minimum Requirements, Procedures, And Application Information For Franchises Within Shoreline (as amended), is hereby incorporated herein by this reference. In the event of a conflict between that Chapter and this Ordinance, this Ordinance shall control. In addition, the following limitations to the requirements of that Chapter shall apply:

- 6.1 MFNS is a wholly owned subsidiary of Metromedia Fiber Network Inc., a publicly traded corporation. MFNS, as a condition of this franchise, shall secure and deliver to the City prior to the effective date of this Ordinance, an irrevocable commitment from Metromedia Fiber Network to act as MFNS's guarantor for all its obligations hereunder. For this reason, the reporting requirements stated in SMC 12.25.100 subsections (A)(2) and (A)(6) shall be satisfied for all purposes under this Ordinance by Metromedia Fiber Networks Inc.'s annual report filed with the Securities Exchange Commission;

**Section 7 Undergrounding.**

The franchise granted herein is subject to Shoreline City Ordinance No. 82, Establishing Minimum Requirements And Procedures For The Underground Installation Of Electric And Communication Facilities Within Shoreline. Consistent with that Ordinance, MFNS shall install all of its Facilities underground in accordance with relevant road and construction standards. MFNS will also share information necessary to facilitate joint-trenching and other undergrounding projects, and will otherwise cooperate with the City and other utility providers to serve the objectives of Ordinance No. 82.

**Section 8 Excavation And Notice Of Entry.**

- 8.1 During any period of relocation or maintenance, all surface structures, if any, shall be erected and used in such places and positions within the Right-of-Way so as to minimize interference with the passage of traffic and the use of adjoining property. MFNS shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or state law, including RCW 39.04.180, for the construction of trench safety systems.

- 8.2 Whenever MFNS excavates in any Right-of-Way for the purpose of installation, construction, repair, maintenance or relocation of its Facilities, it shall apply to the City for a permit to do so in accordance with the ordinances and regulations of the City requiring permits to operate in the Right-of-Way. In no case shall any work commence within any Right-of-Way without a permit, except as otherwise provided in this Ordinance. During the progress of the work, MFNS shall not unnecessarily obstruct the passage or use of the Right-of-Way, and shall provide the City with plans, maps, and information showing the proposed and final location of any Facilities in accordance with Section 5 of this Ordinance.
- 8.3 At least five (5) days prior to construction of Facilities consisting of digging, trenching, cutting, or other activities that may impact the utilization of the Right-of-Way for more than a four (4) hour period, MFNS shall take reasonable steps to inform all apparent owners or occupiers of property within fifty (50) feet of said activities, that a construction project will commence. The notice shall include, at a minimum, the dates and nature of the project and a toll-free or local telephone number that the resident may call for further information. A pre-printed door hanger may be used to satisfy MFNS's obligations under this Section.
- 8.4 At least twenty-four (24) hours prior to entering Right-of-Way within ten (10) feet of private property to perform other than Minor Activities or Blanket Activities that will not impact the private property owner for greater than one (1) hour or result in a permanent alteration in the appearance of the Right-of-Way, MFNS shall post a written notice describing the nature and location of the work to be performed adjacent to the affected private property as well as the information listed in Section 8.3. MFNS shall make a good faith effort to comply with the property owner/resident's preferences, if any, regarding the location or placement of Facilities that protrude above the prior ground surface level, if any, consistent with sound engineering practices.

**Section 9 Blanket Permit.**

The terms "Minor Activities" and "Blanket Activities" shall be defined in a specifically negotiated "Blanket Permit Definitions", a copy of which has been filed with the City Clerk and identified by Clerk's Receiving Number \_\_\_\_\_. MFNS shall be authorized to perform Minor Activities without a City permit of any kind and Blanket Activities under the terms and conditions of this Section. All other activities will require a separate permit in accordance with City ordinances.

- 9.1 MFNS shall pay the City a permit inspection/processing fee in the amount set out in Blanket Permit Definitions.
- 9.2 MFNS shall provide a monthly list of permit construction activity by the 10<sup>th</sup> of the following month listing the previous month's activity authorized under this Section.
- 9.3 MFNS shall provide payment of inspection fees for the monthly activity on a monthly basis. No statement will be provided by the City.

- 9.4 For each separate use of the Right-of-Way for Blanket Activities under this Section, and prior to commencing any work on the Right-of-Way, MFNS shall:
- 9.4.1 Fax or otherwise deliver to the Permitting Authority, at least twenty-four (24) hours in advance of entering the Right-of-Way, a City Inspection Request Form, as provided by the Permitting Authority, which shall include at a minimum the following information: franchise ordinance number, street address nearest to the proposed work site; parcel number and description of work to be performed.
- 9.4.2 Fax or deliver to the Permitting Authority a notice of completion in the form provided by the Permitting Authority within twenty-four (24) hours after completing work.
- 9.5 In the event MFNS fails to comply with any of the material conditions set forth in this Section, the City is authorized to terminate MFNS's authority to operate under this Section by providing MFNS ten (10) day advance written notice of such termination and the basis therefore. The standards for revocation of Utility in Good Standing (UGS) as established by City ordinance shall inform this termination decision.
- 9.6 The City reserves the right to alter the terms and conditions of Section 9 and of Blanket Permit Definitions by providing thirty (30) days written notice to MFNS. Any change made pursuant to this Paragraph, including any change in the inspection fee stated in Blanket Permit Definitions, shall thereafter apply to all subsequent work performed pursuant to this Section. Further, the City may terminate MFNS's authority to work in the City's Right-of-Way under the terms of this Section at any time without cause by providing thirty (30) days written notice to MFNS. Notwithstanding any termination, MFNS will not be relieved of any liability to the City unless otherwise provided in this franchise.

**Section 10 Emergency Work, Permit Waiver.**

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

**Section 11 Recovery of Costs.**

MFNS shall be subject to all permit fees associated with activities undertaken pursuant to the franchise granted herein or other ordinances of the City. If the City incurs any costs and/or expenses for review, inspection or supervision of activities undertaken pursuant to the franchise granted herein or any ordinances relating to a subject for which a permit fee is not established, MFNS shall pay the City's reasonable costs and reasonable expenses. In addition, MFNS shall promptly reimburse the City for any costs the City reasonably

incurs in responding to any emergency involving MFNS's Facilities. If the emergency involves the facilities of other utilities operating in the Right-of-Way, then the City will allocate costs among parties involved in good faith. Said costs and expenses shall be paid by MFNS after submittal by the City of an itemized billing by project of such costs.

**Section 12 Dangerous Conditions, Authority for City to Abate.**

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

**Section 13 Safety.**

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

**Section 14 Authorized Activities.**

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

**Section 15     Franchise Fee & Utility Tax.**

The City has adopted SMC 12.25.090 (Franchise Fee) & 3.32.010 (Utility Tax) in order to support City efforts to manage the Right-of-Way and to provide additional resources to support municipal services to the extent allowed by law.

- 15.1 In accordance with SMC 12.25.090, MFNS shall make a quarterly payment to the City. Said payment shall be based upon MFNS's use of the Right-of-Way calculated in accordance with the Schedule of Right-of-Way Use Charges filed with the City Clerk under Clerk's Receiving Number 1294. Said payment shall be offset by a franchise fee of 6% on any revenue generated by MFNS within the City and shall be due by the 15<sup>th</sup> day of the months of April, July, October, and January for the previous quarter's activity. Provided, however, that:

15.1.1 The payment required by Paragraph 15.1 may be offset for a period of time based upon the value of specific improvements constructed by MFNS in the Right-of-Way at the request of the City and agreement of MFNS. All terms of this offset must be specifically articulated in writing.

15.1.2 MFNS will be exempted from the payment required by Paragraph 15.1 at such time as it becomes subject to and actually pays the City Utility Tax in accordance with SMC 3.32.010.

**Section 16     Indefeasible Rights of Use.**

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

**Section 17     Indemnification.**

- 17.1 MFNS hereby releases and agrees to indemnify, defend and hold harmless the City, its elected officials, employees, and agents from any and all claims, costs, judgments, awards or liability to any person, including claims by MFNS's own employees to which MFNS might otherwise be immune under Title 51 RCW, for injury, sickness, or death of any person or damage to property arising from the negligent acts or omissions of MFNS, its agents, servants, officers or employees in performing activities authorized by this

franchise except to the extent that such arise from the grossly negligent or intentional acts or omissions of the City. MFNS further releases and agrees to indemnify, defend and hold harmless the City, its elected officials, employees, and agents from any and all claims, costs, judgments, awards or liability to any person (including claims by MFNS's own employees, including those claims to which MFNS might otherwise have immunity under Title 51 RCW) arising against the City solely by virtue of the City's ownership or control of the Right-of-Ways or other public properties, by virtue of MFNS's exercise of the rights granted herein, or by virtue of the City's permitting MFNS's use of the Right-of-Way or other public property based upon the inspection or lack of inspection of work performed by MFNS, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise except to the extent that such arise from the grossly negligent or intentional acts or omissions of the City. This covenant of indemnification shall include, but not be limited by this reference to, claims against the City arising as a result of the negligent acts or omissions of MFNS, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work in any Right-of-Way or other public place in performance of work or services permitted under this franchise. If final judgment is rendered against the City, its elected officials, employees, and agents, or any of them in connection with a type of claim referenced in this Section, MFNS shall satisfy the same pursuant to this Section.

- 17.2 Inspection or acceptance by the City of any work performed by MFNS at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be compromised prior to the culmination of any litigation or the institution of any litigation provided that MFNS consents to such compromise.
- 17.3 In the event MFNS refuses to undertake the defense of any suit or any claim, after the City's request for defense and indemnification has been made pursuant to the indemnification clauses contained herein, and MFNS's refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of MFNS, then MFNS shall pay all of the City's reasonable costs and reasonable expenses for defense of the action, including reasonable attorneys' fees of recovering under this indemnification clause, as well as any judgment against the City.
- 17.4 Should a court of competent jurisdiction or such other tribunal as the parties agree shall decide the matter determine that this franchise is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of MFNS and the City, its officers, employees and agents, MFNS's liability hereunder shall be only to the extent of MFNS's negligence. It is further specifically and expressly understood that the indemnification provided in Section 17 constitutes MFNS's waiver of immunity under

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

**Section 18     Insurance.**

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

**Section 19     Abandonment of MFNS's Facilities.**

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

**Section 20     Restoration after Construction.**

- 20.1 MFNS shall, after any abandonment approved under Section 19, or any installation, construction, relocation, maintenance, or repair of Facilities within the franchise area, restore the Right-of-Way to at least the condition the same was in immediately prior to any such abandonment, installation, construction, relocation, maintenance or repair pursuant to City standards. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. MFNS agrees to promptly complete all restoration work and to promptly repair any damage caused by such work at its sole cost and expense.
- 20.2 If it is determined that MFNS has failed to restore the Right-of-Way in accordance with this Section, the City shall provide MFNS with written notice including a description of actions the City believes necessary to restore the Right-of-Way. If the Right-of-Way is not restored in accordance with the City's notice within fifteen (15) Days of that notice, the City, or its authorized agent, may restore the Right-of-Way. MFNS is responsible for all reasonable costs and expenses incurred by the City in restoring the Right-of-Way in accordance with this Section. The rights granted to the City under this paragraph shall be in addition to those otherwise provided herein.

**Section 21     Bond.**

Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this franchise, MFNS shall furnish a bond executed by MFNS 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 Director of Public Works as sufficient to ensure performance of MFNS's obligations under this franchise. The bond shall be conditioned so that MFNS 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. MFNS may meet the obligations of this Section with one or more bonds acceptable to the City. In the event that a bond issued pursuant to this Section is canceled by the surety, after proper notice and pursuant to the terms of said bond, MFNS shall, prior to the expiration of said bond, procure a replacement bond which complies with the terms of this Section.

**Section 22     Recourse Against Bonds and Other Security.**

So long as the bond is in place, it may be utilized by the City as provided herein for reimbursement of the City by reason of MFNS's failure to pay the City for actual costs and expenses incurred by the City to make emergency corrections under Section 12 of this Ordinance, to correct franchise violations not corrected by MFNS after notice, and to compensate the City for monetary remedies or damages reasonably assessed against MFNS due to material default or violations of the requirements of City ordinances.

- 22.1 In the event MFNS has been declared to be in default of a material provision of this franchise by the City and if MFNS fails, within thirty (30) days of mailing of the City's default notice, to pay the City any penalties, or monetary amounts, or fails to perform any of the conditions of the franchise granted herein, or fails to begin to perform any condition that may take more than 30 days to complete, the City may thereafter obtain from the bond, after a proper claim is made to the surety, an amount sufficient to compensate the City for its damages. Upon such withdrawal from the bond, the City shall notify MFNS in writing, by First Class Mail, postage prepaid, of the amount withdrawn and date thereof.
- 22.2 Thirty (30) days after the City's mailing of notice of the bond forfeiture or withdrawal authorized herein, MFNS shall deposit such further bond, or other security, as the City may require, which is sufficient to meet the requirements of this Ordinance.
- 22.3 The rights reserved to the City with respect to any bond are in addition to all other rights of the City whether reserved by this Ordinance or authorized by law, and no action, proceeding, or exercise of a right with respect to any bond shall constitute an election or waiver of any rights or other remedies the City may have.

**Section 23 Modification.**

The City and MFNS hereby reserve the right to alter, amend or modify the terms and conditions of the franchise granted herein upon written agreement of both parties to such amendment.

**Section 24 Remedies to Enforce Compliance.**

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

**Section 25 Force Majeure.**

The franchise provided herein shall not be revoked due to any violation or breach that occurs without fault of MFNS or occurs as a result of circumstances beyond MFNS's reasonable control.

**Section 26 City Ordinances and Regulations.**

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

Section shall require MFNS to relocate Facilities installed in compliance with then existing City regulations.

**Section 27 Acceptance/Liaison.**

MFNS's written acceptance shall include the identification of an official liaison who will act as the City's contact for all issues regarding this franchise. MFNS shall notify the City of any change in the identity of its liaison. MFNS shall accept this franchise in the manner hereinafter provided in Section 35.

**Section 28 Survival.**

All of the provisions, conditions and requirements of Sections 4, Relocation of Facilities; 8, Excavation And Notice Of Entry; 12, Dangerous Conditions; 17, Indemnification; 19, Abandonment of MFNS's Facilities; and 20, Restoration After Construction, of this franchise shall be in addition to any and all other obligations and liabilities MFNS may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to MFNS 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 29 Severability.**

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

**Section 30 WUTC Tariff Filings, Notice Thereof.**

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

**Section 31 Assignment.**

The franchise granted herein shall not be sold, transferred, assigned, or disposed of in whole or in part either by sale or otherwise, without the written approval of the City. The City's approval shall not be unreasonably withheld or delayed. Any reasonable costs

associated with the City's review of any transfer proposed by MFNS shall be reimbursed to the City by the new prospective franchisee, if the City approves the transfer, or by MFNS if said transfer is not approved by the City.

- 31.1 The City shall receive notice and approve any proposed change in control of MFNS or assignment of the Franchise Agreement to a subsidiary or affiliate of MFNS, which causes a change in control of the Franchisee. The City shall be notified but need not approve changes or assignments that do not result in a change in control of the Franchisee. Neither approval nor notification shall be required for mortgaging purposes.
- 31.2 A change in control shall be deemed to occur if there is an actual change in control or where ownership of fifty percent (50%) or more of the beneficial interests, singly or collectively, are obtained by other parties. The word "control" as used herein is not limited to majority stock ownership only, but includes actual working control in whatever manner exercised, or changes in business form that act to materially reduce the resources available to MFNS to perform its obligations under the Franchise granted herein.
- 31.3 A lease or grant of an Indefeasible Right of Use ("IRU") in the Telecommunications System, the associated Facilities, or any portion thereof, to another Person, or an offer or provision of capacity or bandwidth from the Telecommunications System or associated Facilities shall not be considered an assignment for purposes of this Section, PROVIDED THAT, under such lease, IRU, or offer, MFNS: (i) retains exclusive control over the Telecommunications System, (ii) remains responsible for the location, construction, replacement, repair and maintenance of the Telecommunications System pursuant to the terms and conditions of the franchise granted herein, and (iii) remains responsible for all other obligations imposed hereunder.

**Section 32    Notice.**

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

<u>Metromedia Fiber Network Services, Inc.</u>	<u>City of Shoreline</u>
V.P. Legal Affairs	Director of Public Works
360 Hamilton Avenue	17544 Midvale Ave. NE
White Plains, NY 10601	Shoreline, WA 98133

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

**Section 33    Alternate Dispute Resolution.**

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

**Section 34    Entire Agreement.**

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

**Section 35    Directions to City Clerk.**

The City Clerk is hereby directed to publish this Ordinance in full and forward certified copies of this ordinance to MFNS. MFNS shall have thirty (30) days from receipt of the certified copy of this ordinance to execute the "Acceptance Agreement", a copy of which has been filed with the City Clerk and identified by Clerk's Receiving Number 1311. If MFNS fails to accept this franchise in accordance with the above provisions, this Franchise shall be null and void.

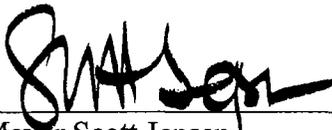
**Section 36    Publication Costs.**

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

**Section 37    Effective Date.**

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

**PASSED BY THE CITY COUNCIL ON OCTOBER 9, 2000.**

  
\_\_\_\_\_  
Mayor Scott Jepsen

**ATTEST:**

  
\_\_\_\_\_  
Sharon Mattioli, CMC  
City Clerk

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Ian Sievers  
City Attorney

Date of Publication:    October 13, 2000  
Effective Date:        October 18, 2000