

**ORDINANCE NO. 192
CITY OF LIBERTY LAKE
SPOKANE COUNTY, WASHINGTON**

AN ORDINANCE OF THE CITY OF LIBERTY LAKE, WASHINGTON GRANTING THE RIGHT OF FRANCHISE TO XO COMMUNICATIONS SERVICES, INC. FOR THE OPERATION OF A TELECOMMUNICATIONS SYSTEM IN THE CITY OF LIBERTY LAKE.

WHEREAS, XO Communications Services, Inc., is a corporation organized under the laws of the State of Delaware engaged in the business of providing telecommunication services consistent with applicable laws and regulations; and

WHEREAS, XO Communications Services, Inc. ("XO Communications") is a company organized under the laws of the State of Delaware, and which it is a wholly-owned subsidiary of XO Holdings, LLC; and

WHEREAS, XO Communications, has respectfully requested that the City of Liberty Lake, Washington (hereinafter referred to as "City") enter into a franchise agreement to locate, construct, own, maintain, repair, replace, extend, operate, and use such Facilities, and all necessary appurtenances thereto for the use of its telecommunications network as defined herein; and

WHEREAS, the City has determined it is in the best interest of the persons and businesses in the City to grant this franchise agreement to XO Communications,

NOW, THEREFORE, for and in consideration of the mutual benefits and the terms and conditions of the below franchise agreement, the City Council of the City of Liberty Lake, Washington do ordain, as follows:

Section 1. Definitions. For the purposes of this Franchise, and all exhibits attached hereto (if any), the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined shall be given their common and ordinary meaning.

1.1 "City" means the City of Liberty Lake, a code city of the State of Washington, and its successors and assigns.

1.2 "Days" means calendar days.

1.3 "Facilities" means those facilities normally and regularly used in providing telecommunication services, including any and all wires, lines, conduits, cables, vaults, duct runs, and all necessary or convenient facilities and appurtenances thereto, whether the same is located over, above or underground.

1.4 "Franchise" means this Ordinance, which sets forth the terms and conditions of the Franchise.

1.5 "Franchise Area" means the Public Right of Way.

1.6 "Parties" means the City and XO Communications collectively.

1.7 "Party" means the City or XO Communications individually.

1.8 "Public Right of Way" means any, every and all of the roads, streets, avenues, alleys and highways of the City as now laid out, platted, dedicated or improved; and any, every and all roads, streets, avenues, alleys and highways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended.

1.9 "Public Works Director" means the Community Planning and Development Director or his/her designee.

1.10 "State" means the State of Washington.

Section 2. Facilities Within and Outside Franchise Area.

2.1 Subject to the terms and conditions of this Franchise, the City grants to XO Communications the non-exclusive privilege to use the Public Right of Way to provide telecommunication services, and for no other purpose. XO Communications accepts all areas in existing condition(s) and the City makes no express or implied assurances of suitability of any area for XO Communications' needs or purposes, whether now or hereafter.

2.2 The City hereby grants to XO Communications the privilege to set, erect, lay, construct, extend, support, attach, connect and stretch wire cable between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along, across and through the Franchise Area for purposes of maintaining and operating a telecommunication network.

2.3 This Franchise shall not convey any right to XO Communications to provide such services as designated in Section 2.2 on or to otherwise use City-owned or leased properties outside the Franchise Area. Existing Facilities installed or maintained by XO Communications prior to the enactment of this Ordinance on public grounds and places within the City's Franchise Area in accordance with prior franchise agreements (but which such Facilities are not within the Franchise Area as defined by this Franchise) may be maintained, repaired, replaced, operated, and used in like kind by XO Communications at the location where such Facilities exist as of the effective date of this Franchise for the term of this Franchise; provided, however, that 1) no such Facilities may be enlarged, improved, or expanded without the prior review and approval of the City pursuant to applicable ordinances, codes, resolutions, standards, and procedures, 2) the City provides no express or implied assurances of suitability for all existing Facilities outside of the City's Franchise Area, and 3) XO Communications is otherwise bound by all other Franchise obligations.

Section 3. Compliance with Laws

In carrying out any authorized activities under the Franchise granted herein, XO Communications shall meet accepted industry standards and regulatory requirements of state and federal agencies and comply with all applicable laws of any governmental entity with jurisdiction over the Facilities and their operation. This shall include all applicable laws, rules and regulations existing at the Effective Date of this Franchise or that may be subsequently enacted by any governmental entity with jurisdiction over XO Communications and/or the Facilities. These requirements also include applicable requirements of the City's Municipal Code.

Section 4. Noninterference of Facilities.

4.1 XO Communications' Facilities shall be located, constructed, installed, maintained and repaired within the Franchise Area in accordance with applicable safety standards, and so as not to unreasonably interfere with the free and safe passage of pedestrian and/or vehicle traffic therein or with the reasonable ingress or egress to properties abutting thereto and in accordance with the laws of the State of Washington. XO Communications shall exercise its rights within the Franchise Area in accordance with applicable City codes and ordinances governing use and occupancy of the Franchise Area, including but not limited to those contained in Section 3; provided, however, in the event of any conflict or inconsistency of such codes and ordinances with the terms and conditions of this Franchise, the codes and ordinances, as now or hereafter amended, shall govern and control; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded XO Communications by such City codes and ordinances.

4.2 In the event that the City reasonably determines, after providing, consistent with applicable City Code(s), written notice to XO Communications and a reasonable opportunity for XO Communications to respond to its concerns, that any one or more of its Facilities within the Franchise Area interferes with the free and safe passage of pedestrian and/or vehicular traffic therein or with the reasonable ingress or egress to properties abutting thereto, then XO Communications shall promptly take such action as is reasonably necessary to eliminate such interference. In so doing, the City shall, within reason, fully cooperate with XO Communications. In the event such interference requires relocation of XO Communications' Facilities within the Franchise Area, such relocation shall be accomplished in accordance with Section 10 below. Any such interference, resulting from new development, with ingress or egress to properties abutting the Franchise Area in proximity to XO Communications' Facilities existing within the Franchise Area prior to the development shall be subject to Section 10.5.

4.3 All location, construction, installation, repair, replacement, relocation, or operation of Facilities and appurtenances performed by XO Communications in the Franchise Area shall be done in such a manner as to not interfere with existing facilities of other utilities, public or private, including drains, drainage ditches and structures, irrigation ditches and structures located therein, nor with the grading or improvement of the Franchise Area.

4.4 During the term of this Franchise and with respect to poles, if any, which are Facilities and which are wholly owned by XO Communications and which are within the

Franchise Area, the City may, subject to XO Communications' prior written consent, which consent shall not be unreasonably withheld, install and maintain City-owned overhead wires upon such poles for traffic signal communications and to provide for communications to various City buildings such as City Hall, Public Safety Building, Public Works operation building(s), and other public buildings as they presently exist or may exist in the future. The foregoing rights of the City to install and maintain such wires are further subject to the following:

4.4.1 Such installation and maintenance shall be done by the City at its sole risk and expense in accordance with all applicable laws (including, but not limited to, RCW 70.54.090), and subject to such reasonable requirements as XO Communications may specify from time to time (including without limitation, requirements accommodating XO Communications' Facilities or the facilities of other parties having the right to use XO Communications' Facilities); and

4.4.2 XO Communications shall have no obligation under Section 12 (or arising under the purview of Section 12) in connection with any City-owned wires so installed or maintained except for the negligence of XO Communications employees, agents, servants, or representatives.

4.4.3 XO Communications shall not charge the City a fee for the use of such poles as a means of deriving revenue therefrom; provided however, nothing herein shall require XO Communications to bear any cost or expense in connection with such installation and maintenance by the City including XO Communications' administrative review of and consent to City's request to make use of such poles or any relocation required of City-owned wires under Section 10 hereof.

4.4.4 All installation of City-owned wires shall be done by a qualified contractor with approval by the State electrical inspector and in accordance with all applicable regulations including but not limited to the National Electric Safety Code.

4.4.5 If any work by City contractors or the City involving the installation and maintenance of City-owned wires shall cause XO Communications to replace a utility pole, the City shall reimburse XO Communications for the cost of such pole.

Section 5. Dangerous Conditions, Authority for the City to Abate

5.1 In the event that XO Communications' Facilities or operations cause or contribute to a condition that appears to endanger any person or substantially impair the lateral support of any portion of the Franchise Area, or other public or private property or create other risk of loss or liability to the City, the City may direct XO Communications, at no charge or expense to the City, to promptly take such action as may be reasonably necessary to resolve such condition or to eliminate such endangerment. Such directive may include compliance within a prescribed period of time.

5.2 In the event XO Communications fails to promptly take action as directed by the City pursuant to Section 5.1, or fails to fully comply with such direction, or if emergency conditions exist which require immediate action to prevent imminent injury or damages to persons or property, the City may take action(s) as it reasonably believes are necessary to protect

persons or property and in such event XO Communications shall be responsible to reimburse the City for its reasonable costs incurred in so doing.

Section 6. Permit Required

6.1 Whenever XO Communications works in the Franchise Area for purposes of installation, construction, repair, maintenance, excavation, or relocation of its Facilities, it shall apply to the City for a permit to do so in accordance with all ordinances and regulations of the City. In no case shall any such work commence within the Franchise Area without a permit, except as otherwise provided in this Franchise. XO Communications also acknowledges that such work required in arterial streets, especially during peak hours of operation, or during special civic events requires substantial coordination with the City prior to issuance of a permit. XO Communications agrees to coordinate such activity prior to commencing such work as necessary to minimize impacts to the public as required by the City.

6.2 XO Communications shall at all times post and maintain proper barricades and comply with all applicable safety regulations during any period of construction or maintenance activities within the right-of-way as required by City or state regulations, including RCW 39.04.180, for the construction of trench safety systems. Additionally, such work identified in this Section shall be performed with reasonable dispatch, in a workmanlike manner, and with as little interference or inconvenience to the rights of the public as may be reasonable.

6.3 In the event of any emergency where any Facilities located in the Franchise Area are broken or damaged, or if XO Communications' work area within the Franchise Area is in such a condition as to endanger any person or property, XO Communications shall immediately take any and all necessary emergency measures to repair or remove its Facilities or otherwise make its work area safe without first applying for and obtaining a permit as required by Section 6.1. This provision shall not relieve XO Communications from later obtaining any necessary permit for the emergency work. XO Communications shall apply for the required permit the next business day following the emergency work or, in the case of an extended state of emergency, as soon thereafter as practical and comply with any mitigation requirements or other conditions in the after-the-fact permit. The City shall not be responsible for any costs associated with such emergency action.

Section 7. Restoration

7.1 XO Communications shall, after any installation, construction, excavation, relocation, maintenance, or repair of Facilities within the Franchise Area, promptly restore the Franchise Area to at least the same condition as existed immediately prior to any such installation, construction, excavation, relocation, maintenance or repair in accordance with City standards, as now or hereafter amended, and at its sole cost and expense. All survey monuments which are to be disturbed or displaced by such work shall be referenced and restored per WAC 332-120, as the same now exists or may hereafter be amended, and all pertinent federal, state and City standards and specifications. The Public Works Director shall have final approval of the condition of the Franchise Area after restoration.

The City reserves the right to not allow open trenching for five (5) years following a street overlay or improvement project. XO Communications shall be given written notice at least ninety (90) days prior to the commencement of the project. Required trenching due to an emergency, or in the case that no commercially viable alternative route exists, will not be subject to the five (5) year street trenching moratorium, however the respective pavement restoration in such instances shall include a trench patch meeting with the City, as well as City approval of asphalt over lay of the street itself. For trenches which cross the street pavement or portions thereof, the limits of the overlay shall extend one hundred (100) linear feet along said street as measured in both directions from the centerline of the trench patch. Further, prior to installing the overlay the existing pavement within the area to be overlaid shall first be ground down to the thickness of the anticipated overlay, including along any curbs if such curbs are present, such that the final driving surface with respect to ride and appearance shall be almost indistinguishable as reasonably determined by the City from the before condition. For trenches which parallel the roadway the overlay shall encompass the full roadway width and like crossings. The existing roadway pavement shall first be ground down to the thickness of the anticipated overlay including along any curbs, if such curbs area present, such that the final roadway driving surface with respect to ride and appearance shall be almost indistinguishable as reasonably determined by the City from the before condition. The limits of the full roadway width overlay shall extend one hundred (100) linear feet beyond the end or ends of the trench cut. Where the paralleling trench cut is limited to one side or the other of the road center line then subject to the approval of the City the grinding and asphalt overlay restoration work can be limited to the affected half street portion.

7.2 If it is determined by the City that XO Communications has failed to restore the Franchise Area in accordance with Section 7, the City shall provide XO Communications with written notice including a description of actions the City reasonably believes necessary to restore the Franchise Area. If the Franchise Area is not restored in accordance with the City's notice within thirty (30) days of that notice, the City, or its authorized agent, or contractor, may restore the Franchise Area. XO Communications shall be responsible for all costs and expenses incurred by the City in restoring the Franchise Area in accordance with this Section. The remedy granted to the City under this Section shall be in addition to those otherwise provided by this Franchise.

7.3 All work by XO Communications pursuant to this Section 7 shall be performed in accordance with the permit issued by the City, together with the laws of the State of Washington, City Municipal Code and applicable regulations and standards of the City as the same now exists or as may be hereafter amended or superseded.

Section 8. Bonding Requirement

8.1 Before undertaking any of the work authorized by this Franchise, XO Communications shall furnish an ongoing performance bond executed by XO Communications and a corporate surety authorized to do surety business in the State of Washington, in a sum to be set and approved by the Public Works Director as reasonably sufficient to ensure performance of XO Communications' obligations under this Franchise. The bond shall be conditioned so that XO Communications shall observe all the covenants, terms and conditions and faithfully perform all of the obligations of this Franchise, and to restore or replace any defective work or materials

discovered in the restoration of the Franchise Area within a period of two (2) years from the final City inspection date of any such restoration. XO Communications may meet the obligations of this section with one (1) or more bonds issued by a surety with an A VII Best's rating or better. In the event that a bond furnished pursuant to this Section is canceled by the surety, after proper notice and pursuant to the terms of said bond, XO Communications shall, prior to the expiration of said bond, procure a replacement bond which complies with the terms of this Section.

8.2 With respect to undertaking any of the work authorized by this Franchise, in the event XO Communications fails to perform its obligations under this Franchise and further fails to cure any deficiency within a reasonable period of time after receipt of written notice of such deficiency by the City, then the City may use any bond(s) furnished by XO Communications pursuant to Section 8.1 to cure such deficiency. Neither the amount of such bond(s) nor the City's use thereof shall limit the City's full recovery from XO Communications of costs incurred by the City to cure such deficiency.

8.3 In the event the City makes use of such bond(s) furnished by XO Communications pursuant to Section 8.2, the City shall promptly provide written notice of same to XO Communications. Within thirty (30) days of receipt of such notice, XO Communications shall replenish or replace such bond(s) as provided in Section 8.1.

8.4 The rights reserved to the City by this Section 8 are in addition to other rights of the City whether reserved by this Franchise or authorized by law, and no action, proceeding, or exercise of right under this Section 8 shall constitute an election or waiver of any rights or other remedies the City may have.

Section 9. Underground Installation of Facilities

9.1 This Section 9 shall govern all matters related to underground installation of XO Communications' Facilities within the Franchise Area subject to the required permit(s) set forth in Section 6 and restoration of the Franchise Area set forth in Section 7.

9.2 XO Communications acknowledges that the City desires to promote a policy of underground installation of Facilities within the Franchise Area.

9.3 New extensions of Facilities constructed by XO Communications within the Franchise Area during the term of this Franchise shall be located underground unless existing above-ground installations are in place and City consents to placement above ground.

9.4 If, during the term of this Franchise, the City shall direct XO Communications to replace (convert) its overhead Facilities then existing within the Franchise Area or portion thereof with underground Facilities, XO Communications will cooperate and participate with the City and underground its Facilities within the Franchise Area including paying all costs thereof.

9.4.1 Public Works Improvements. If the City undertakes any Public Works improvement which would otherwise require relocation of XO Communications' above-ground facilities in accordance with subsection 10.1 below, or if subsection 10.5 below applies, the City may, by written notice to XO Communications, direct that XO

Communications convert any such Facilities to underground Facilities. All costs for such conversion shall be paid by XO Communications.

9.4.2 Location of Equipment. All equipment to be installed within the Franchise Area shall be installed underground; provided, however, that such equipment or Facilities may be installed above ground if so authorized by the City, such as splice boxes, which authorization shall not be unreasonably withheld or delayed, consistent with the provision of the City's Municipal Code and applicable development standards.

Section 10 Relocation of Facilities.

10.1 Whenever the City undertakes (or causes to be undertaken at City expense) the construction of any public works improvement within the Franchise Area, or the Public Works Director reasonably determines that XO Communications' Facilities interfere with the free and safe passage of pedestrian and/or vehicular traffic pursuant to Section 4 above, and such public works improvement or interference necessitates the relocation of XO Communications' Facilities then existing within the Franchise Area, the City shall:

10.1.1 provide XO Communications, within a reasonable time prior to the City's commencement of activities requiring such public works improvement, written notice requesting such relocation; and

10.1.2 provide XO Communications with copies of relevant portions of the City's plans and specifications for such public works improvement.

After receipt of such notice and such plans and specifications, XO Communications shall relocate such Facilities within the Franchise Area at no charge to the City. If, during the construction of any such public works improvement, an emergency posing a threat to public safety or welfare, or a substantial risk of severe economic consequences to the City, arises requiring the relocation of XO Communications' Facilities within the Franchise Area, the City shall give XO Communications notice of the emergency as soon as reasonably practicable. Upon receipt of such notice from the City, XO Communications shall endeavor to respond as soon as reasonably practicable to relocate the affected Facilities at no charge to the City.

10.2 The City shall act in good faith and shall use its best efforts to provide sufficient space within the Franchise Area for the safe and efficient installation, operation, repair and maintenance of the relocated and/or underground converted Facilities. XO Communications shall act in good faith and shall use its best efforts to install relocated and/or underground converted Facilities in such space within the Franchise Area, consistent with prudent utility practice. If the City and XO Communications agree that there is not sufficient space for the relocated and/or underground converted Facilities in the existing Franchise Area, then, unless otherwise mutually agreed by the City and XO Communications, the City shall as is reasonably practicable provide sufficient space for the relocated and/or underground converted Facilities by obtaining additional right-of-way or other equivalent rights mutually agreeable to the City and XO Communications, which shall be Franchise Area, title of which shall be in the City's name.

10.3 XO Communications may install relocated and/or underground converted Facilities on property outside of the Franchise Area, the rights for which shall be obtained by XO Communications at no expense to the City. Notwithstanding the use of best efforts by the City and XO Communications as outlined above, if the City and XO Communications do not agree whether there is or will be sufficient space within the Franchise Area for the relocated and/or underground converted Facilities, or if the City and XO Communications disagree whether underground converted Facilities within such space within the Franchise Area would be inconsistent with prudent utility practice, the City and XO Communications shall each act in good faith and use their respective best efforts to mutually agree on the location of such relocated and/or underground converted Facilities outside of the Franchise Area. Absent such mutual agreement, nothing in this Section 10 shall limit the rights of the City or XO Communications with respect to acquisition or use of property rights outside of the Franchise Area.

10.4 XO Communications shall have the right as a condition of any relocation described in this Section 10.4 to require such person or entity other than the City to make payment to XO Communications, at a time and upon terms acceptable to XO Communications, for any and all costs and expenses incurred by XO Communications in the relocation of XO Communications' Facilities, but without expense or liability to the City, whenever:

10.4.1 any person or entity, other than the City, requires the relocation of XO Communications' Facilities to accommodate the work of such person or entity within the Franchise Area, including but not limited to, activities relating to development, roadway frontage improvements or mitigation of impacts; or

10.4.2 the City requires any person or entity to undertake work (other than work undertaken at the City's cost and expense) within the Franchise Area and such work requires the relocation of XO Communications' Facilities within the Franchise Area.

Unless agreed to specifically in writing between the City and XO Communications, work funded by the creation of a local improvement district (LID) shall be considered the work of the City and XO Communications shall not be entitled to recover costs and expenses incurred by XO Communications in the relocation of XO Communications' Facilities as necessary to facilitate construction of improvements funded through an LID.

10.5 Any condition or requirement imposed by the City upon any other person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits obtained pursuant to any zoning, land use, construction or other development regulation) which requires the relocation of XO Communications' Facilities within the Franchise Area shall be a condition or requirement causing relocation of XO Communications' Facilities to occur subject to the provisions of Section 10.4 above; provided, however:

10.5.1 in the event the City reasonably determines and notifies XO Communications that the primary purpose of imposing such condition or requirement upon such person or entity is to cause the construction of a public works improvement within a segment of the Franchise Area on the City's behalf, and

10.5.2 such public works improvement is otherwise reflected in the City's adopted Six-Year Transportation Improvement Program or Capital Facilities Program;

then only those costs and expenses incurred by XO Communications in connecting such relocated Facilities with XO Communications' other Facilities shall be paid to XO Communications by such person or entity, and XO Communications shall otherwise relocate its Facilities within such segment of the Franchise Area in accordance with Sections 10.1-10.3.

10.6 As to any relocation of XO Communications' Facilities whereby any part of the cost and expense thereof is to be borne by XO Communications in accordance with Sections 10.1-10.3, XO Communications may, after receipt of written notice requesting such relocation, submit in writing to the City alternatives to relocation of its Facilities. Upon the City's receipt from XO Communications of such written alternatives, the City shall evaluate such alternatives and shall advise XO Communications in writing if one or more of such alternatives are suitable to accommodate the work which would otherwise necessitate relocation of XO Communications' Facilities. In evaluating such alternatives, the City shall give each alternative proposed by XO Communications full and fair consideration with due regard to all facts and circumstances which bear upon the practicality of relocation and alternatives to relocation. No alternatives proposed by XO Communications shall be evaluated by the City in an arbitrary or capricious manner. In the event the City determines that such alternatives are not appropriate, XO Communications shall relocate its Facilities as otherwise provided in Sections 10.1-10.3.

10.7 Nothing in this Section 10 shall require XO Communications to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other prior rights not derived from this Franchise.

Section 11. Records of Installation and Planning

11.1 Upon the City's reasonable request, XO Communications shall provide to the City copies of available plans for improvements, relocations and conversions to its Facilities within the Franchise Area; provided, however, any such plans so submitted shall be for informational purposes only and shall not obligate XO Communications to undertake any specific improvements within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

11.2 Upon the City's reasonable request, XO Communications shall provide to the City copies of available drawings in use by XO Communications showing the approximate location of XO Communications' Facilities at specified locations within the Franchise Area. XO Communications shall further provide, upon the City's reasonable request in connection with the City's design of new streets, intersections and/or other municipally funded public works projects and major renovations of existing streets and intersections, field marking of XO Communications' underground Facilities within the Franchise Area, if such Facilities can be so field marked with reasonable accuracy using devices designed and accepted as the industry standard, to respond to the presence of XO Communications' underground Facilities. Notwithstanding the foregoing, however, XO Communications does not warrant the accuracy or sufficiency of any such drawings or field markings or other information provided by XO

Communications, and XO Communications shall not be liable to the City or others for any errors or defects in the same.

11.3 In addition, whenever in the City's reasonable and prudent judgment that it is beneficial to both parties in connection with the design of new streets, intersections and/or municipally funded public works projects and major renovations of existing streets and intersections, XO Communications shall verify the actual location of its underground Facilities within the Franchise Area by excavating, including pot holing. The cost of such work shall be at XO Communications' expense.

11.4 Notwithstanding the foregoing, nothing in this Section 11 is intended (nor shall be construed) to relieve either Party of their respective obligations arising under applicable law with respect to determining the location of utility facilities.

Section 12. Indemnification

12.1 XO Communications shall indemnify, defend, and hold the City, its officers, elected officials, agents, representatives, engineers, consultants, employees, and volunteers ("Indemnitees") harmless from and against any and all claims demands, liability, loss, cost, damage, or expense of any nature whatsoever including all costs and attorneys' fees, made against the Indemnitees on account of injury or damage to the person or property of another, to the extent such injury or damage is caused by the negligence of XO Communications, its agents, servants or employees in exercising the rights granted to XO Communications in this Franchise.

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

12.2 In the event any matter is presented to or filed with the City, the City shall promptly notify XO Communications thereof, and XO Communications shall have the right, at its election and at its sole cost and expense, to settle and compromise such matter provided XO Communications supplies the City with written acceptance of its indemnification obligations as contained in this Section. In the event any suit or action is commenced against the City based upon any such matter, the City shall likewise promptly notify XO Communications thereof, and XO Communications shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election provided XO Communications has agreed in writing to the full indemnification and defense of the City and its officers, elected officials, agents, representatives,

engineers, consultants, employees and volunteers. In the event of a less than full written agreement to indemnify and defend, the City may select attorneys and bill the costs of the same to XO Communications and XO Communications shall pay the same.

Section 13. Insurance

13.1 XO Communications shall procure and maintain for the duration of the Franchise, insurance, against all claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the Franchise granted hereunder to XO Communications, its officers, directors, agents, representatives, servants, volunteers, or employees. XO Communications shall provide certificate(s) of insurance and all applicable policy endorsements naming the City, its officers, elected officials, agents, employees, representatives, consultants and volunteers as additional insureds, and to the City for its inspection and approval prior to the commencement of any work or installation of any Facilities pursuant to this Franchise. Such certificate(s) of insurance shall evidence the following minimum coverages:

(i) Commercial general liability insurance or excess or umbrella liability insurance, including coverage for premises operations, explosions and collapse hazard, underground hazard and products completed hazard, written on an occurrence basis, with limits not less than:

- A. \$2,000,000 for bodily injury or death to each person; and
- B. \$2,000,000 for property damage resulting from any one accident.

(ii) Automobile liability for owned, non-owned and hired vehicles with a limit of \$2,000,000 for each person and \$2,000,000 for each accident.

(iii) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$2,000,000.

13.2 XO Communications shall maintain the liability insurance policies required by this Section 13 throughout the term of this Franchise. Payment of deductibles and self-insured retentions shall be the sole responsibility of XO Communications. Such coverage shall continue to apply after termination, cancellation, or expiration of the Franchise as to all claims accruing during any hold-over period for a minimum of three (3) years, or longer if the Facilities remain in the ground.

13.3 XO Communications' insurance shall be primary insurance with respect to the City, its officers, elected officials, agents, employees, representatives, consultants and volunteers. Any insurance maintained by the City, its officers, elected officials, agents, employees, representatives, consultants and volunteers shall be in excess of XO Communications' insurance and shall not contribute with it.

13.4 If any insurance policy required by this Section, or Franchise, may be cancelled, for whatever reason, XO Communications shall provide at least thirty (30) days written notice thereof to the City of such cancellation.

13.5 In the event any of the insurance required by this Section 13 is canceled or otherwise not renewed during the term of this Franchise, XO Communications shall promptly acquire replacement insurance to restore and maintain the amount of coverage required by this Section 13 and shall promptly provide to the City certificate(s) of insurance and all applicable policy endorsements as provided in this Section 13 as may be applicable.

13.6 On or before thirty (30) days of the anniversary Effective Date of the Franchise, XO Communications shall file with the City Clerk proof of continued insurance coverage, at least in the amounts required in this Section, through a Certificate of Insurance, indicating the coverage required herein.

Section 14. Administrative fees and Reimbursement of Costs.

14.1 As specifically provided by RCW 35.21.860, the City may not impose a franchise fee or any other fee or charge of whatever nature or description upon XO Communications. However, as provided in RCW 35.21.860, the City may recover from XO Communications actual administrative expenses incurred by the City that are directly related to: (i) receiving and approving a permit, license or this Franchise, (ii) inspecting plans and construction, or (iii) preparing a detailed statement pursuant to Chapter 43.21C RCW. XO Communications agrees to pay the City \$2,500.00 as an administrative fee to cover the cost to the City of preparing this Franchise.

14.2 If, at some time, the restrictions of RCW 35.21.860, or related statute, should be removed, XO Communications and the City shall negotiate a fair and reasonable franchise fee. Nothing in this Section shall preclude the City from collecting from XO Communications fees lawfully imposed by the City (related to this Franchise or otherwise) including fees for permits and inspections.

Section 15. Moving Buildings within the Franchise Area.

If any person or entity obtains permission from the City to use the Franchise Area for the moving or removal of any building or other object, the City shall, prior to granting such permission, require such person or entity to make any necessary arrangements with XO Communications for the temporary adjustment of XO Communications' wires and/or cable to accommodate the moving or removal of said building or other object. Such necessary arrangements with XO Communications shall be made, to XO Communications' satisfaction, not less than thirty (30) days prior to the moving or removal of said building or other object. In such event XO Communications shall at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its wires and/or cables which may obstruct the moving or removal of such building or other object, provided that:

- (i) The moving or removal of such building or other object which necessitates the adjustment of wires and/or cable shall be done at a reasonable time and in a reasonable manner so as not to unreasonably interfere with XO Communications' business;

(ii) Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route approved by the City; and

(iii) The person or entity obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and save XO Communications harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence of the person or entity moving or removing such building or other object or the negligence of the agents, servants or employees of the person or entity moving or removing such building or other object.

Section 16. Forfeiture, Revocation and Remedies

If XO Communications shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon XO Communications a written notice to so comply within thirty (30) days from the date such notice is received by XO Communications. If XO Communications is not in compliance with this Franchise after expiration of said thirty (30) day period, the City may act to remedy the violation and may charge the costs and expenses of such action to XO Communications, provided, however, if any failure to comply with this Franchise by XO Communications cannot be corrected with due diligence within said thirty (30) day period (XO Communications' obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which XO Communications may so comply shall be extended for such time as may be reasonably necessary and so long as XO Communications commences promptly and diligently to effect such compliance.

The City may act without the thirty (30) day notice in case of an emergency. In the event XO Communications fails to substantially cure defaults on more than two (2) occasions, the City may in addition, by motion of City Council, declare an immediate forfeiture of this Franchise. No forbearance by the City shall constitute a waiver of the City's right to enforce any provision of this Franchise.

Section 17 Non-Waiver.

Failure of the City to declare any breach or default of this Franchise immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default, but the City shall have the right to declare any such breach or default at any time. Failure of the City to declare one breach or default does not act as a waiver of the City's right to declare another breach or default. In addition, the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions therein.

Section 18 No Waiver, Expansion, Change of Boundary

18.1 The City, in granting this Franchise, does not waive any rights which it may now have or may hereafter acquire with respect to the Franchise Area of the City under this

Franchise, and this Franchise shall not be construed to deprive the City of any such powers, rights, privileges which it now has or may hereafter acquire to regulate the use of and to control the Franchise Area covered by this Franchise. XO Communications shall be bound by all ordinances, resolutions, codes, rules, regulations or policies now or hereafter adopted regarding the City's Franchise Area.

18.2 Facilities in the City's Franchise Area that are incidental to the Franchise Area, or that have been, or are at any future time acquired, newly constructed, leased or utilized in any manner by XO Communications shall be subject to all provisions of this Franchise.

18.3 Any subsequent additions or modifications of the boundaries of the City, whether by annexation, consolidation, or otherwise, shall be subject to the provisions of this Franchise as to all such areas.

Section 19 Abandonment of Facilities.

Except as otherwise provided in this Section, in the event XO Communications abandons and permanently ceases use of any of its Facilities within the Franchise Area, XO Communications shall, within a reasonable period of time after such permanent cessation of use, remove such Facilities from the Franchise Area.

Section 20. Nonexclusive Franchise.

20.1 This Franchise is not, and shall not be deemed to be, an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises in, over, upon, under, across, and along the Franchise Area that do not interfere with XO Communications' rights under this Franchise. This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

20.2 By granting this Franchise, the City is not assuming any risks or liabilities therefrom, which shall be solely and separately borne by XO Communications. XO Communications shall, at its sole cost and expense, take all necessary and prudent steps to protect, support, and keep safe from harm its Facilities, or any part thereof, when necessary to protect the public health and safety.

20.3 This Franchise is only intended to convey a limited right and interest. It is not a warranty of title or interest in the Franchise Area or any other City-owned property. None of the rights granted herein shall affect the City's jurisdiction over its property, including but not limited to the Franchise Area.

Section 21. Shared Use of Excavations

21.1 XO Communications and the City shall exercise best efforts to coordinate construction work either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other Party and other utilities

within the Franchise Areas informed of its intent to undertake such construction work. XO Communications and the City shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

If at any time either XO Communications, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the other upon receipt of a written request to do so, an opportunity to use such excavation, provided that:

(a) Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;

(b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. The parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

The party causing the excavation to be made shall give the other parties a written notice at least ninety (90) days prior to the commencement of the project except in cases due to an emergency. The City reserves the right to require XO Communications to joint trench with other facilities if both parties are anticipating trenching within the same Franchise Area and provided that the terms of (a) and (b) above are met.

Section 22. Franchise Term.

The initial term of the franchise shall be ten (10) years commencing on the Effective Date of the Franchise. At the expiration of the initial term, this Franchise shall be automatically extended, subject to approval of the Liberty Lake City Council, for an additional term of ten (10) years unless either party gives the other written notice of intent to terminate, which notice shall be given at least six (6) months before the expiration date.

Section 23. Assignment.

XO Communications shall not have the right to assign its rights, benefits and privileges in and under this Franchise without the prior written consent of the City, which consent shall not be unreasonably withheld, except that XO Communications may assign this Franchise without consent to any operating subsidiary or controlled affiliate of XO Communications. Any assignee shall, within thirty (30) days of the date of any assignment, file written notice of the assignment with the City together with its written acceptance of all terms and conditions of this Franchise. Notwithstanding the foregoing, XO Communications shall have the right, without such notice or such written acceptance, to mortgage its rights, benefits and privileges in and under this Franchise for the benefit of bondholders.

Section 24. Alteration of Franchise.

24.1 The City and XO Communications hereby reserve the right to alter, amend or modify the terms and conditions of this Franchise in accordance with the provisions of this Section.

24.2 At any time during the term of this Franchise, the City or XO Communications may request, by written notice, that the other Party promptly participate in negotiations to alter, amend or modify the terms and conditions of this Franchise.

24.3 Within a reasonable time after receipt of the notice required by Section 24.2, the City and XO Communications shall, at a mutually agreed-upon time and place, commence negotiations to alter, amend or modify the terms and conditions of this Franchise. The City and XO Communications shall conduct such negotiations in good faith and with due regard to all pertinent facts and circumstances; provided, however, that neither the City nor XO Communications shall be obligated to agree to any proposed alteration, amendment or modification. Further, no rights or privileges granted by this Franchise shall be prejudiced, impaired or otherwise affected by the failure of the City or XO Communications to agree to any proposed alteration, amendment or modification.

24.4 Neither the City nor XO Communications shall be obligated to continue negotiations after the expiration of ninety (90) days from the date they commence such negotiations; provided, however, the City and XO Communications may agree to continue such negotiations for an additional period of time.

24.5 Any alteration, amendment or modification to which the City and XO Communications agree shall be submitted to the legislative authority of the City as a proposed ordinance. The ordinance so proposed shall expressly provide that, unless XO Communications properly files a written notice of acceptance within sixty (60) days of its effective date, the ordinance shall not be effective and this Franchise shall not be altered, amended or modified. To the extent permitted by law, the party proposing the alteration, amendment or modification shall bear all actual administrative costs directly related to approval thereof.

Section 25 Franchise Dispute Resolution.

Except in cases of forfeiture under Section 16, disputes regarding the interpretation or execution of the terms of this Franchise shall be resolved by direct discussion between a decision-making representative of XO Communications and the City's Public Works Director. Such discussion shall take place as soon as reasonably possible once the Parties are aware of the dispute.

In the event that direct discussions do not result in resolution of the dispute, the Parties shall in good faith attempt resolution of the matter through mediation. The Parties shall select a mediator as soon as reasonably possible after the failure of direct discussions. Should the Parties not agree on mediator selection, either of them may request that one be appointed by the Seattle office of the American Arbitration Association. Once a mediator is appointed, the Parties shall abide by the rules and instructions of the mediator. A mediation session shall be held as soon as

reasonably possible after appointment of the mediator, and decision makers with authority to resolve the dispute shall personally attend the mediation session.

Participation in direct discussions and mediation shall be conditions precedent to the commencement of any other form of dispute resolution. The Parties shall share the cost of mediation fees and expenses equally. If a dispute continues to exist, venue for any legal action arising out of the existence of this Franchise shall be in the state or federal court located in Spokane County, Washington.

Section 26 Attorneys Fees and Costs.

Each Party shall pay for its own attorneys' fees and costs incurred in any action arising out of the existence of this Franchise.

Section 27 Prior Franchises Superseded.

Upon XO Communications' acceptance of this Franchise, all rights and obligations of the City and XO Communications under the prior Franchise granted by the City (Ordinance No. 41) shall terminate, and the Parties' rights and obligations shall be governed by the terms and conditions provided in this Franchise as of the Effective Date. Termination of the prior Franchise shall not, however, relieve the Parties from any obligations which accrued under said Franchise prior to XO Communications' acceptance, including but not limited to, any outstanding indemnity or administrative fee payment obligations.

Section 28 Headings.

The headings or titles in this Franchise are for the purpose of reference only and shall not in any way affect the interpretation or construction of this Franchise.

Section 29 Acceptance of Franchise by XO Communications.

XO Communications has provided its unconditional written acceptance of all the terms and conditions of the Franchise.

Section 30 Severability.

If any section, sentence, clause or phrase in this Franchise shall be held to be invalid, unenforceable, or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity, enforceability, or the constitutionality of any other section, sentence, clause or phrase of this Franchise.

Section 31 Notice.

For purposes of this Franchise, the contact information and addresses for the City and XO Communications shall be as follows:

If to the City: Community Development and Planning Director

22710 E. Country Vista Drive
Liberty Lake, WA 99019

With Copy to:

Sean P. Boutz, City Attorney
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201

If to XO Communications: Gegi Leeger, Director – Regulatory Contracts
13865 Sunrise Valley Drive
Herndon, VA 20171

From time to time the City and XO Communications may designate another person and/or address for all purposes of this Franchise by a notice given to the other Party in accordance with the provisions hereof.

Section 32. Effective Date.

This Ordinance shall be effective on May 31, 2011, after having been published as required by law, having been passed at a regular meeting of the City Council, with approval of the Mayor of the City, and acceptance by XO Communications.

ADOPTED by the City Council this 17th day of May, 2011.

CITY OF LIBERTY LAKE

Wendy VanOrman
Mayor Wendy Van Orman

ATTEST:

Ann Swenson
Ann Swenson, City Clerk

APPROVED AS TO FORM:

Sean P. Boutz
Sean P. Boutz, City Attorney

UNCONDITIONAL ACCEPTANCE BY XO COMMUNICATIONS:

I, the undersigned officer of XO Communications Services, Inc., am authorized to bind XO Communications Services, Inc. and to unconditionally accept the terms and conditions of the foregoing City of Liberty Lake Franchise Ordinance, which are hereby accepted by XO Communications Services, Inc. this 12th day of May, 2011.

XO COMMUNICATIONS SERVICES, INC.

By: [Signature]

Name: Heather B. Gold

Title: SVP - External Affairs

STATE OF Virginia)
) ss.
COUNTY OF Fairfax)

I certify that I know or have satisfactory evidence that Heather B. Gold is the person who appeared before me, and said person acknowledged that s/he signed this instrument, on oath stated that s/he was authorized to execute the instrument and acknowledged it as the SVP - External Affairs of XO Communications Services, Inc., a Delaware corporation, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: May 12, 2011

[Signature]

Notary Public for the State of Commonwealth of Virginia

Print Name: Meaghan P. Murray

Residing in: Fairfax

My Commission Expires: December 31, 2011



CERTIFICATION

I, the undersigned City Clerk of the City of Liberty Lake, of Spokane County, Washington, HEREBY CERTIFY that the foregoing Ordinance is a full, true and correct copy of Ordinance No. 192 duly adopted at a regular meeting of the City Council of said City, duly and regularly held at the regular meeting placed thereof on May 17, 2011 of which meeting all members of said City Council had due notice and at which a majority thereof were present; and that at said meeting said Ordinance was adopted by the following vote: unanimous, 4-0.

AYES, and in favor thereof: Mayor Pro Tem Crump; Council Members: Kaminskas, Schuler, and Beckett.

NAYS: None.

ABSENT: Council Members: Owens, Romney, and Langford.

ASTAINED: None.

CITY OF LIBERTY LAKE



CITY CLERK