

ORDINANCE NO 3450

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING METROPOLITAN FIBER SYSTEMS OF SEATTLE, INC., A DELAWARE CORPORATION, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS TELEPHONE BUSINESS.

Be it ordained by the City Council of the City of Kirkland as follows:

Section 1. Definitions. Where used in this franchise (the "Franchise") these terms have the following meanings:

(a) "MFS" means Metropolitan Fiber Systems of Seattle, Inc., a Delaware corporation, and its respective successors and assigns.

(b) "City" means the City of Kirkland, a municipal corporation of the State of Washington, and its respective successors and assigns.

(c) "Franchise Area" means: any, every and all of the roads, streets, avenues, alleys, highways and unrestricted utility easements 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.

(d) "Facilities" means wires, lines, conduits, cables, vaults, duct runs, and all necessary or convenient facilities and appurtenances thereto, whether the same be located over or under ground.

(e) "Ordinance" means this Ordinance No. 3450, which sets forth the terms and conditions of this Franchise.

Section 2.

A. Facilities within Franchise Area. The City does hereby grant to MFS the right, privilege, authority and franchise to:

(a) Construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across the Franchise Area for purposes of its telephone business as defined in RCW 82.04.065.

B. Permission Required to Enter Onto Other City Property. Nothing contained in this Ordinance is to be construed as granting permission to MFS to go upon any other public place other than those types of public places specifically designated as the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by the City must be sought on a case by case basis from the City.

C. Compliance with UTC Regulations. At all times during the term of this Franchise, MFS shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission

Section 3. Non-interference of Facilities.

A. MFS'S Facilities shall be located, relocated and maintained within the Franchise Area so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington. Whenever it is necessary for MFS, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, MFS shall, upon completion of such excavation, restore the surface of the Franchise Area, to the specifications established within the City of Kirkland Public Works Policies and Standards and in accordance with standards of general applicability imposed by the City by ordinance or administrative order. If MFS should fail to leave any portion of any Franchise Area so excavated in a condition that meets the City's specifications per the Public Works Policies and Standards, the City may after notice of not less than five days to MFS, which notice shall not be required in case of an emergency, order any and all work considered necessary to restore to a safe condition that portion of the Franchise area so excavated, and MFS shall pay to the City the reasonable cost of such work; which shall include among other things, the overhead expense of the City in obtaining completion of said work.

B. Any surface or subsurface failure occurring during the term of this Agreement and caused by any excavation by MFS shall be repaired to the City's specifications, within 30 days or upon 5 days written notice to MFS, the City shall order all work necessary to restore the damaged area to a safe and acceptable condition and MFS shall pay the reasonable costs of such work to the City.

Section 4. Relocation of Facilities.

A. Whenever the City causes the grading or widening of the Franchise Area or undertakes construction of any water, sewer or storm drainage line, lighting, signalization, sidewalk improvement, pedestrian amenities, or other public street improvement (for purposes other than those described in Section 4(B) below) and such project requires the relocation of MFS's then existing Facilities within the Franchise Area, the City shall:

(a) Provide MFS, at least 90 days prior to the commencement of such project, written notice that a project is expected to require relocation; and

(b) Provide MFS with reasonable plans and specifications for such grading or widening.

After receipt of such notice and such plans and specifications, MFS shall relocate such Facilities within the Franchise Area at no charge to the City so as to accommodate such street improvement project. The City shall cooperate with MFS to designate a substitute location for its Facilities within the Franchise Area. City will establish a date by which Facilities will be relocated, which date will be not less than 60 days after written notice to MFS as to the facility to be relocated. MFS must finish relocation of each such Facility by the date so established.

(B) Whenever any person or entity, other than the City, requires the relocation of MFS's Facilities to accommodate the work of such person or entity within the Franchise Area; or, whenever the City requires the relocation of MFS's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then MFS shall have the right as a condition of such relocation to require such person or entity to:

(a) make payment to MFS, at a time and upon terms acceptable to MFS, for any and all costs and expense incurred by MFS in the relocation of MFS's Facilities; and

(b) indemnify and save MFS 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 relocation of MFS's Facilities, to the extent such injury or damage is caused by the negligence of the person or entity requesting the relocation of MFS's Facilities or other negligence of the agents, servants or employees of the person or entity requesting the relocation of MFS's Facilities.

C. Any condition or requirement imposed by the City upon any person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development) which necessitates the relocation of MFS's Facilities within the Franchise Area shall be subject to the provisions of subsection 4(B). However, in the event the City reasonably determines (and promptly notifies MFS in writing of such determination) that the primary purpose of imposing such condition or requirement upon such person or entity which necessitates such relocation is to cause the construction of an improvement on the City's behalf and in a manner consistent with City-approved improvement plans (as described in 4(A) above) within a segment of the Franchise Area then:

MFS shall require only those costs and expenses incurred by MFS in integrating and connecting such relocated Facilities with MFS's other Facilities to be paid to MFS by such person or entity, and MFS shall otherwise relocate its Facilities within such segment of the Franchise Area in accordance with the provisions of subsection 4(A) above.

D. This Section 4 shall govern all relocations of MFS's Facilities required in accordance with this Franchise. Any required relocation of MFS's Facilities which also involves a conversion of above-ground Facilities to underground Facilities shall, as to those Facilities being converted from above-ground Facilities to underground Facilities, be arranged and accomplished in accordance with Section 11. Nothing in this Section 4 shall require MFS to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other rights not arising under this Franchise.

E. MFS recognizes the need for the City to maintain adequate width for installation and maintenance of City owned and/or Northshore Utility District owned utilities such as, but not limited to, sanitary sewer, water, and storm drainage. Thus, the City reserves the right to maintain clear zones within the public right-of-way for installation and maintenance of said utilities. The clear zones for each right-of-way segment shall be noted and conditioned with the issuance of each right-of-way permit. If adequate clear zones are unable to be achieved on a particular right-of-way, MFS shall locate in an alternate right-of-way, obtain easements from private property owners, or propose alternate construction methods which maintain and/or enhance the existing clear zones.

Section 5. Indemnification. MFS shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of MFS or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted MFS in this Franchise. Provided, however, such indemnification shall not extend to injury or damage caused by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify MFS thereof, and MFS shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand; provided further, that in the event any suit or action be begun against the City based upon any such claim or demand, the City shall likewise promptly notify MFS thereof, and MFS 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.

Section 6. Moving Buildings Within the Franchise Area.

Before granting permission to any person or entity other than the City to use the Franchise Area for the moving or the removal of any building or other object, the City shall require such person or entity to make any necessary arrangements with MFS for the temporary adjustment of MFS's Facilities to accommodate the moving or removal of such building or other object. Such necessary arrangements with MFS shall be made, to MFS's satisfaction, not less than fourteen (14) days prior to the moving or removal of said building or other object. In such event, MFS shall, at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its wires which may obstruct the moving or removal of such building or other object, provided that:

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

(b) 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 which will minimize the interruption of utility service, interference with transportation and potential detriments to the public safety, as determined by the City.

(c) The person or entity other than the City obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and save MFS harmless from any and all claims and demands made against it on account of injury or damage to the person or property or 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 or willful misconduct of the person or entity moving or removing such building or other object or the negligence or willful misconduct of the agents, servants or employees of the person or entity moving such building or other object.

Section 7. Default. If MFS shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon MFS a written order to so comply within thirty (30) days from the date such order is received by MFS. If MFS 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 MFS. The City may act without the thirty (30) day notice in case of an emergency. The City may in addition, by ordinance, declare an immediate forfeiture of this Franchise, provided, however, if any failure to comply with this Franchise by MFS cannot be corrected with due diligence within said thirty (30) day period (MFS's obligation to comply and to proceed with

due diligence being subject to unavoidable delays and events beyond its control), then the time within which MFS may so comply shall be extended for such time as may be reasonably necessary and so long as MFS commences promptly and diligently to effect such compliance.

In addition to other remedies provided herein, if MFS is not in compliance with requirements of the Franchise, and if a good faith dispute does not exist concerning such compliance, the City may place a moratorium on issuance of pending MFS right-of-way use permits until compliance is achieved.

Section 8. Nonexclusive Franchise. 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 over, upon, and along the Franchise Area which do not interfere with MFS's 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.

Section 9. Franchise Term. This Franchise is and shall remain in full force and effect for a period of ten (10) years from and after the effective date of the Ordinance, provided that the term may be extended for an additional five (5) years upon the agreement of MFS and the City; and provided further, however, MFS shall have no rights under this Franchises nor shall MFS be bound by the terms and conditions of this Franchise unless MFS shall, within thirty (30) days after the effective date of the Ordinance, file with the City its written acceptance of this Franchise, in a form acceptable to the City Attorney.

Section 10. Compliance with codes and regulations.

A. The rights, privileges and authority herein granted are subject to and governed by this ordinance and all other applicable ordinances and codes of the City of Kirkland, as they now exist or may hereafter be amended. Nothing in this ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by MFS shall be performed by MFS in accordance with applicable federal, state and city rules and regulations, including the City Public Works Policies and Standard Plans, and any required permits, licenses or fees, and applicable safety standards then in effect.

B. Upon written inquiry, MFS shall provide a specific reference to either the federal, state, or local law or the W.U.T.C. order or action establishing a basis for MFS's actions related to a specific franchise issue.

C. In the event that any territory served by MFS is annexed to the City after the effective date of this Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

Section 11. Undergrounding. The City encourages MFS to locate or relocate its facilities underground when and where practical. MFS acknowledges that the City desires to promote a policy of undergrounding of Facilities within the Franchise Areas. MFS will cooperate with the City in the undergrounding of MFS's Facilities within the Franchise Areas. If, during the term of this Franchise, the City shall direct MFS to underground Facilities within any Franchise Area, such undergrounding shall be at no cost to the City, MFS shall comply with all federal, state and City regulations on undergrounding at the very least. This Section 11 shall govern all matters related to undergrounding of MFS's Facilities (i.e., conversion or otherwise) within the Franchise Areas.

(a) Street improvements. If the City undertakes any street improvement which would otherwise require relocation of MFS's above-ground facilities in accordance with subsection 4(a) above, or if subsection 4(c) above applies, the City may, by written notice to MFS, direct that MFS convert any such Facilities to underground Facilities. Any such conversion shall be done subject to and in accordance with schedules and Tariffs on file with the W.U.T.C.

(b) Location of Equipment. All Facilities to be installed within the Franchise Area shall be installed underground; provided, however, that such Facilities may be installed above ground if so authorized by the City, which authorization shall not be unreasonably withheld or delayed, consistent with the provisions of the City's Land Use Code and applicable development standards.

Section 12 Record of Installations and Service. With respect to excavations by MFS and the City within the Franchise Area, MFS and the City shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state law.

Upon written request of the City, MFS shall provide the City with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

As built drawings of the precise location of any Facilities placed by MFS in any street, alley, avenue, highway, easement, etc., shall be made available to the City within 10 (ten) working days of request.

Section 13.

A. City Use of Poles and Facilities. The City Shall have the right, subject to such reasonable rules and regulations as may be prescribed by MFS and subject to the limitations prescribed by RCW

70.54.090 or any other applicable law, to post City signs on utility poles owned by MFS within the Franchise Area.

With respect to poles and trenches which are facilities and which are (1) wholly owned by MFS and (2) within the Franchise Area, the City, subject to MFS's prior written consent, which may not be unreasonably withheld, may install and maintain City owned overhead wires upon such poles, and underground conduits in such trenches, for police, fire and other noncommercial communications purposes, subject to the following:

(a) Such installation and maintenance shall be done by the City and any additional costs shall be at the City's expense;

(b) MFS shall have no obligation under the indemnification provisions of the Franchise for the installation or maintenance of such City owned wires or conduits.

(c) MFS shall not charge the City a fee for the use of such poles or trenches in accordance with this Section 14 as a means of deriving revenue therefrom; provided, however, nothing herein shall require MFS to bear any cost or expense in connection with such installation and maintenance by the City.

B. City Access. If the City requests telecommunication services from MFS, MFS shall allow the service at MFS' most favorable rate charged for a similar service within the state of Washington. Other terms and conditions of the provision of such services may be determined between MFS and the City in a separate agreement.

Section 14. Other Use of Poles and Facilities. With respect to poles owned or placed by MFS in the Franchise Area, or trenches or other facilities developed or placed in the Franchise Area by MFS, City may approve attachment or addition of devices to such places or use of such facilities by another franchisee or user, so long as such action will not unreasonably interfere with MFS's rights under this Franchise. MFS may not charge City any fee or costs based on such City approval, but MFS may seek from others compensation as necessary to recover its costs and expenses arising from actions taken pursuant to approvals given as per this Section.

Section 15. Shared Use of Excavations. MFS 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. MFS 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, or from time to time, either MFS, the City, or another franchise, 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 City reserves the right to not allow open trenching for five years following a street overlay or improvement project. MFS shall be given written notice at least 90 days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five year street trenching moratoriums.

The City reserves the right to require MFS to joint trench with other franchisees if both parties are anticipating trenching within the same franchise area and provided that the terms of (a) and (b) above are met.

Section 16. Insurance. MFS shall maintain in full force and effect throughout the term of this Franchise, a minimum of One Million Dollars (\$1,000,000.00) liability insurance for property damage and bodily injury.

The City shall be named as an additional insured on any policy of liability insurance obtained by MFS for the purpose of complying with the requirements of this section if and to the extent that:

(a) MFS's insurance carrier is willing to name the City as an additional insured without prejudice, in any way, to the rights and coverages afforded MFS by such policy of insurance;

(b) Naming the City as an additional insured on such policy of insurance does not cause the cost to MFS of maintaining such insurance to be increased.

In satisfying the insurance requirements set forth in this section, MFS may self-insure against such risks in such amounts as are consistent with good utility practice. MFS shall provide the City with sufficient written evidence, upon request, that such insurance (or self-insurance) is being so maintained by MFS. Such written evidence shall include, to the extent available from MFS's insurance carrier, a written certificate of insurance with respect to any insurance maintained by MFS in compliance with this Section.

Section 17. Tariff Changes. If MFS shall file, pursuant to Chapter 80.28 RCW, with the Washington Utilities and Transportation Commission (or its successor) any tariff affecting the City's rights arising under this Franchise, MFS shall give the City Clerk written notice thereof within five (5) days of the date of such filing.

Section 18. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon MFS, and no right, privilege, license or authorization granted to MFS hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold. Notwithstanding the foregoing, MFS may assign this agreement to an affiliate or subsidiary without the consent of, but upon notice to the City.

Section 19. Miscellaneous. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

MFS shall pay for the City's reasonable administrative costs in drafting and processing this franchise agreement and all work related thereto. MFS shall further be subject to all permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City. Where the City incurs cost and expenses for review, inspection, or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, MFS shall pay such costs and expenses directly to the City. In addition to the above, MFS shall promptly reimburse the City for any and all costs it reasonably incurs in response to any emergency involving MFS's facilities.

City has the right, but not the obligation, to take over control and ownership of Franchisee's facilities in the ROW, specifically including the fiber-optic network, without compensation, if: (1) such facilities are abandoned; or (2) in the event this Franchise is terminated and Franchisee does not remove such facilities at its own expense.

This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise, and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 5 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by MFS of any and all rights, benefits, privileges, obligations, or duties

in and under this Franchise, unless such permit, approval, license, agreement or document specifically:

(a) references this Franchise; and

(b) states that it supersedes this Franchise to the extent it contains terms and conditions which change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.


In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit, approval, license, agreement of other document, the provisions of this Franchise shall control.

This Franchise is subject to the provisions of any applicable tariff now or hereafter on file with the Washington Utilities and Transportation Commission or its successor. In the event of any conflict of inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control.

Section 20. Effective date. This Ordinance, being in compliance with RCW 35A.47.040, shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017 Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in regular, open meeting this 17th day of January, 1995.

Signed in authentication thereof this 17th day of January, 1995.




MAYOR

Attest:



City Clerk

Approved as to Form:



City Attorney
MSF1.JAN

PUBLICATION SUMMARY OF ORDINANCE NO. 3450

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING METROPOLITAN FIBER SYSTEMS OF SEATTLE, INC., A DELAWARE CORPORATION, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS TELEPHONE BUSINESS.

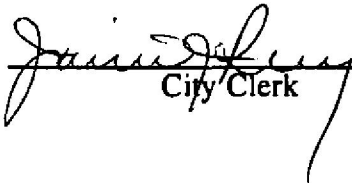
SECTIONS 1-16. Provide for the grant to MFS of a franchise for a telephone business for ten years on specified terms and conditions.

SECTIONS 17-19. Set forth administrative provisions for the franchise and concerning its legal effect.

SECTION 20. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The ordinance was passed by the Kirkland City Council at its regular meeting on the 17 th day of Jan., 1995.

I certify that the foregoing is a summary of ordinance 3450 approved by the Kirkland City Council for summary publication.


City Clerk