

ORDINANCE 3796

AN ORDINANCE OF THE CITY OF KIRKLAND AMENDING TITLE 26 OF THE KIRKLAND MUNICIPAL CODE RELATING TO TELECOMMUNICATIONS.

WHEREAS, recent federal Ninth Circuit case law interpreting the 1996 Federal Telecommunications Act (City of Auburn v. Qwest Corp., 247 F.3d 966 (9th Cir. 2001)) has placed limitations on the authority of municipalities to regulate its rights of way and negotiate telecommunications franchises and licenses; and

WHEREAS, the City desires to amend and modify the Kirkland Municipal Code so that it conforms to the Qwest decision;

NOW, THEREFORE, the City Council of the City of Kirkland do ordain as follows:

Section 1. Section 26.04.010 of the Kirkland Municipal Code is hereby amended to read as follows:

26.04.010 Purpose.

The purpose of this title is to:

- (1) Establish a local policy concerning telecommunications providers and services;
- (2) Establish clear and nondiscriminatory local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of telecommunications providers and services;
- (3) Promote competition in telecommunications;
- (4) Minimize unnecessary local regulation of telecommunications providers and services;
- (5) Encourage the provision of advanced and competitive telecommunications services on the widest possible basis to the businesses, institutions and residents of the city;
- (6) Permit and manage reasonable access to the public rights-of-way of the city for telecommunications purposes on a competitively neutral basis;
- (7) Conserve and manage the limited physical capacity of the public rights-of-way held in public trust by the city;
- (8) Assure that the city's current and ongoing costs of granting and regulating private access to and use of the public rights-of-way are fully paid by the persons seeking such access and causing such costs;
- (9) Secure fair and reasonable compensation to the city and the residents of the city, in a nondiscriminatory manner, to the extent permitted by law, for permitting private use of the rights-of-way;
- (10) Assure that all telecommunications carriers providing facilities or services within the city comply with the applicable ordinances, rules and regulations of the city;

(11) Assure that the city can continue to fairly and responsibly protect the public health, safety and welfare;

(12) Enable the city to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition and technological development.

Section 2. A new Section 26.04.025 of the Kirkland Municipal Code is hereby adopted to read as follows:

26.04.025 Assertion of state-wide grant.

The city may request, but not require, that a telecommunications carrier or provider with a state-wide grant to occupy right-of-way based on a predecessor telephone or telegraph company's existence at the time of the adoption of the Washington State Constitution obtain a license or franchise pursuant to Chapters 26.12 and 26.16 of this Title. A telecommunications carrier or provider asserting such a state-wide grant shall register with the city pursuant to Chapter 26.08 and, in so doing, provide the city with a statement detailing the basis for the assertion of a state-wide grant.

Section 3. Section 26.08.010 of the Kirkland Municipal Code is hereby amended to read as follows:

26.08.010 Registration required.

All telecommunications carriers having telecommunications facilities within the corporate limits of the city, or all telecommunications carriers or providers that offer or provide telecommunications service within the city, in whole or in part, shall register with the city hereunder on forms provided by the city clerk which shall include the following:

(1) The identity and legal status of the registrant, including any affiliates.

(2) The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.

(3) A description of registrant's existing or proposed telecommunications facilities within the city.

~~(4) A description of the telecommunications service that the registrant intends to offer or provide, or is currently offering or providing, to persons, firms, businesses or institutions within the city.~~

~~(4)(5)~~ Information sufficient for the city to determine whether the registrant is subject to public way licensing or franchising under this title.

~~(5)(6)~~ Information sufficient for the city to determine whether the transmission, origination or receipt of the telecommunications services provided or to be provided by the registrant constitutes an occupation or privilege subject to any municipal tax, permit, license or franchise fee.

~~(6)(7)~~ To the extent allowed by law, Copies of the applicant's registration filed with the Washington Utilities and Transportation Commission pursuant to Chapter 480-121 WAC, ~~and any tariff or price list or other authorization or related filings as may be required by the WUTC to provide telecommunications~~

~~services.~~ Alternatively, applicant shall submit a statement detailing the basis (along with pertinent supporting materials) for its authorizations to provide telecommunications services ~~and any tariffs, filings or authorizations that affect the city's rates or costs or, in the further alternative, the reasons that registration and related filings with the WUTC is -are not required.~~

~~(7)(8)~~ To the extent allowed by law, information sufficient for the city to determine that the applicant has applied for and received any permit, operating license or other right or approvals required by the Federal Communications Commission to provide telecommunications services or facilities.

~~(8)(9)~~ Such other information as the city may reasonably require.

Section 4. Section 26.08.020 of the Kirkland Municipal Code is hereby amended to read as follows:

26.08.020 Purpose of registration.

The purpose of registration is to:

(1) Provide the city with accurate and current information necessary for the management and regulation of city right-of-way; concerning the telecommunications carriers and providers who offer or provide telecommunications services within the city, or that own or operate telecommunications facilities within the city;

(2) Assist the city in enforcement of this title;

(3) Assist the city in the collection and enforcement of any municipal taxes, franchise fees, license fees or charges that may be due to the city; and

(4) Assist the city in monitoring compliance with local, state and federal laws.

Section 5. Section 26.12.010 of the Kirkland Municipal Code is hereby amended to read as follows:

26.12.010 License.

Except as otherwise provided in this title, a license shall be required of any telecommunications carrier who desires to occupy any rights-of-way with any telecommunications facilities for the purpose of providing telecommunications services to persons or areas outside the city.

Section 6. Section 26.12.030 of the Kirkland Municipal Code is hereby amended to read as follows:

26.12.030 Determination by the city.

Within one hundred twenty days after receiving a complete application hereunder, the city shall make a determination granting or denying the application in whole or in part. The one-hundred-twenty-day period may be extended by a specific number of days or to a defined date by written agreement between the city and the applicant. If the application is denied, the determination shall include the reasons for denial. The reasons for denial of a license shall be supported by substantial evidence contained in a written

record. The following standards shall apply when determining to grant or deny the application:

- ~~(1) The financial and technical ability of the applicant.~~
- ~~(2) The legal status of the applicant.~~
- ~~(1)(3) The capacity of the rights-of-way to accommodate the applicant's facilities.~~
- ~~(2)(4) The capacity of the rights-of-way to accommodate additional utility and telecommunications facilities if the application is granted.~~
- ~~(3)(5) The damage or disruption, if any, to public or private facilities, improvements, service, travel or landscaping if the application is granted, giving consideration to an applicant's willingness and ability to mitigate and/or repair same.~~
- ~~(4)(6) The public interest in minimizing the cost and disruption of construction within the rights-of-way.~~
- ~~(7) The service that applicant will provide to the region.~~
- ~~(8) The effect, if any, on general public health, safety and welfare in the city's sole opinion if the application is granted.~~
- ~~(5)(9) The availability of alternate routes or locations for the proposed facilities.~~
- ~~(10) Applicable federal, state and local laws, regulations, rules and policies.~~
- ~~(6)(11) Such other factors as may relate to the city's authority to manage, regulate and control public rights-of-way, demonstrate that the grant to use the rights-of-way will serve the community interest.~~

Section 7. Section 26.12.060 of the Kirkland Municipal Code is hereby amended to read as follows:

26.12.060 Rights granted.

(a) No license granted hereunder shall convey any right, title or interest in rights-of-way but shall be deemed a license only to use and occupy the rights-of-way for the limited purposes and term stated in the grant.

(b) No license granted hereunder shall ~~authorize or~~ excuse a licensee from securing such further easements, leases, permits or other approvals as may be required to lawfully occupy and use rights-of-way.

(c) No license granted hereunder shall be construed as any warranty of title.

Section 8. Section 26.12.120 of the Kirkland Municipal Code is hereby amended to read as follows:

26.12.120 Amendment of grant.

(a) A new license application and grant shall be required of any telecommunications carrier that desires to extend or locate its telecommunications facilities in rights-of-way which are not included in a license previously granted hereunder.

(b) If ordered by the city to locate or relocate its telecommunications facilities in rights-of-way not included in a previously granted license, the city shall grant a license amendment without further application.

(c) A new license application and grant shall be required of any telecommunications provider that desires to add to or modify the telecommunications services provided pursuant to a license previously granted, if the proposed telecommunications services will cause the provider to occupy more or different rights of way.

Section 9. Section 26.12.130 of the Kirkland Municipal Code is hereby amended to read as follows:

26.12.130 Renewal applications.

A licensee that desires to renew its license hereunder shall, not more than one hundred eighty days nor less than ninety days before expiration of the current license, file an application with the city for renewal of its license which shall include the following information:

- (1) The applicable information required pursuant to the license application.
- (2) Any other information reasonably required by the city.

Section 10. Section 26.16.010 of the Kirkland Municipal Code is hereby amended to read as follows:

26.16.010 Franchise.

Except as otherwise provided in this title, a franchise shall be required of any telecommunications carrier who desires to occupy rights-of-way and to provide telecommunications services to any person or area in the city.

Section 11. Section 26.16.060 of the Kirkland Municipal Code is hereby amended to read as follows:

26.16.060 Rights granted.

(a) No franchise granted hereunder shall convey any right, title or interest in the rights-of-way but shall be deemed a franchise only to use and occupy the rights-of-way for the limited purposes and term stated in the grant.

(b) No franchise granted hereunder shall ~~authorize or~~ excuse a franchisee from securing such further easements, leases, permits or other approvals as may be required to lawfully occupy and use rights-of-way.

(c) No franchise granted hereunder shall be construed as any warranty of title.

Section 12. Section 26.16.090 of the Kirkland Municipal Code is hereby amended to read as follows:

26.16.090 Construction permits.

All franchisees are required to obtain construction and right-of-way permits and pay all fees for telecommunications facilities as required by the city; provided, however, that nothing in this title shall prohibit the city and a franchisee from agreeing to alternative plan review, permit and construction procedures in a franchise agreement; provided such alternative procedures provide substantially equivalent safeguards for responsible construction practices. Except as provided in this section, the city shall grant, condition or deny construction for right-of-way permits in writing within thirty days of receiving a complete application unless a franchisee has consented to a different time period or has not obtained a franchise license from the city. The city shall notify the franchisee in writing if more than thirty days are required to process the permit, the amount of additional time required, and the reasons for the additional time. Conditioned or denied permits may be appealed to the city hearing examiner within fourteen days of the date of the permit or permit denial.

Section 13. Section 26.16.110 of the Kirkland Municipal Code is hereby repealed.

Section 14. Section 26.16.120 of the Kirkland Municipal Code is hereby amended to read as follows:

26.16.120 Service to the city.

~~A franchisee shall make its telecommunications services available to the city at its most favorable rate for similarly situated users; provided, however, to the extent permitted by law, the city may negotiate more favorable rates or free service, the provision of in-kind services, equipment and facilities, or any combination thereof in lieu of other obligations of franchisee.~~ The city may, in accordance with Washington Laws of 2000, Chapter 83, Section 7, require a franchisee that is constructing, relocating or placing ducts or conduits in public right-of-way to provide the city with additional duct, conduit or related structures.

Section 15. Section 26.16.130 of the Kirkland Municipal Code is hereby amended to read as follows:

26.16.130 Amendment of grant.

(a) A new franchise application and grant shall be required of any telecommunications carrier that desires to extend its franchise territory or to locate its telecommunications facilities in rights-of-way which are not included in a franchise previously granted hereunder.

(b) If ordered by the city to locate or relocate its telecommunications facilities in rights-of-way not included in a previously granted franchise, the city shall grant a franchise amendment without further application.

(c) A franchise application and grant shall be required of any telecommunications provider that desires to add to or modify the telecommunications services provided pursuant to a franchise previously granted, if the proposed telecommunications services will cause the provider to occupy more or different rights of way.

Section 16. Section 26.16.140 of the Kirkland Municipal Code is hereby amended to read as follows:

26.16.140 Renewal applications.

A franchisee that desires to renew its franchise hereunder shall, not more than one hundred eighty days (except as otherwise provided by federal law) nor less than one hundred twenty days before expiration of the current franchise, file an application with the city for renewal of its franchise which shall include the following information:

- (1) The applicable information required pursuant to the franchise application.
- (2) Any other information reasonably required by the city.

Section 17. Section 26.20.010 of the Kirkland Municipal Code is hereby amended to read as follows:

26.20.010 Grant of franchise.

The city may grant one or more cable television franchises containing such provisions as are reasonably necessary to protect the public interest, and each such franchise shall be awarded in accordance with and subject to the provisions of this title. This title may be amended from time to time, and in no event shall this title be considered a contract between the city and a franchisee such that the city would be prohibited from amending any provision hereof; provided no such amendment shall in any way impair any contract right or increase obligations of a franchisee under an outstanding and effective franchise except in the lawful exercise of the city's police power. This chapter shall be in addition to the requirements of Chapter 7.61, Cable Television—Procedures and Terms for Grant of Franchises, {as such Chapter 7.61 now exists or may be amended from time to time, ~~and~~ in the event of a conflict between this chapter and Chapter 7.61, Chapter 7.61, as it now or hereafter exists, shall control}.

Section 18. Section 26.24.140 of the Kirkland Municipal Code is hereby amended to read as follows:

26.24.140 Duty to provide information.

Within ten days of a written request from the city clerk, each grantee shall furnish the city clerk with information sufficient to demonstrate:

- (1) That grantee has complied with all requirements of this title.

(2) That all taxes and fees due the city in connection with the telecommunications services and facilities provided by the grantee have been properly collected and paid by the grantee.

~~(3) That grantee has furnished the city with all necessary information with respect to grantee's facilities in city rights-of-way. That all books, records, maps and other documents maintained by the grantee with respect to its facilities within the rights-of-way have been made available for inspection by the city clerk and the public works director at reasonable times and intervals.~~

Section 19. Section 26.24.150 of the Kirkland Municipal Code is hereby amended to read as follows:

26.24.150 Leased capacity.

Subject to the provisions of Section 26.24.230 of this chapter, a grantee shall have the right to offer or provide capacity or bandwidth to another telecommunications provider, ~~with prior city approval~~, provided that:

~~(1) Grantee shall furnish the city in advance with a copy of any such proposed lease or agreement.~~

~~(2) The proposed lessee or person shall comply with all of the requirements of this title.~~

Section 20. Section 26.24.230 of the Kirkland Municipal Code is hereby repealed.

Section 21. Section 26.24.240 of the Kirkland Municipal Code is hereby repealed.

Section 22. Section 26.24.250 of the Kirkland Municipal Code is hereby amended to read as follows:

26.24.250 Revocation or termination of grant.

A license or franchise granted by the city to use or occupy rights-of-way may be revoked for any one or more of the following reasons:

(1) Construction or operation at an unauthorized location.

~~(2) Unauthorized transfer of control of the grantee.~~

~~(3) Unauthorized assignment of a license or franchise.~~

~~(4) Unauthorized sale, assignment or transfer of the grantee's franchise or license assets or an interest therein.~~

~~(2)(5) Material m~~Misrepresentation or lack of candor by or on behalf of a grantee in any application to the city.

~~(3)(6) Abandonment of telecommunications facilities in the rights-of-way.~~

~~(4)(7) Failure to relocate or remove telecommunications facilities as required in this title.~~

~~(5)(8) Failure to pay taxes, compensation, fees or costs when and as due the city.~~

~~(9) Insolvency or bankruptcy of the grantee.~~

~~(6)(10)~~ Violation of a material provision of this title.

~~(7)(11)~~ Violation of a material term of a license or franchise.

Section 23. Section 26.28.030 of the Kirkland Municipal Code is hereby amended to read as follows:

26.28.030 Construction permits.

No person shall construct or install any telecommunications facilities within the city without first obtaining a construction permit therefore, provided, however:

(1) No permit shall be issued for the construction or installation of telecommunications facilities within the city unless the telecommunications carrier has filed a registration statement with the city pursuant to this title.

(2) Except as otherwise provided in this title, ~~no~~ permit shall be issued for the construction or installation of telecommunications facilities in the rights-of-way unless the telecommunications carrier has applied for and received a franchise or license pursuant to this title.

(3) Unless otherwise provided by law, a franchise or license, no permit shall be issued for the construction or installation of telecommunications facilities without payment of all fees pursuant to this title.

(4) No permit shall be issued to cut any public way, the surface of which is less than five years old, unless the grantee overlays the surface of any public way which is cut by the grantee.

Section 24. Section 26.28.180 of the Kirkland Municipal Code is hereby repealed.

Section 25. Section 26.28.190 of the Kirkland Municipal Code is hereby repealed.

Section 26. Section 26.32.010 of the Kirkland Municipal Code is hereby amended to read as follows:

26.32.010 Registration fee.

Each application for registration as a telecommunications carrier or provider shall be accompanied by a fee in such amount as the city ~~clerk finance-director~~ determines is required to cover all direct and indirect costs associated with the registration process.

Section 27. Section 26.32.020 of the Kirkland Municipal Code is hereby amended to read as follows:

26.32.020 Pre-application conference and application fee.

Prior to the acceptance of an application by the city, applicants shall participate in a pre-application conference with the city for the purpose of establishing the application fee. The purpose of establishing the application fee

is to ensure the recovery of the city's direct and indirect costs and expenses associated with the review of the application including, but not limited to, actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary to adequately review and analyze the application. The application fee shall be established by the city clerk ~~finance director~~ and shall be a minimum of up to two thousand five hundred dollars and with the maximum fee established depending upon estimated reasonable city costs and expenditures in review of the application. All disputes in the amount required shall be resolved by an appeal to a hearing examiner. All franchisee and licensee applicants shall deposit the application fee with the city. This application fee shall be applied towards actual expenses and costs of the city. Any unencumbered application fees shall be refunded to the applicant upon written request of the applicant, but in no event earlier than sixty days after granting or denial of the permit. In the event the city's actual costs associated with application review exceed the application fee, the applicant shall reimburse the city within 30 days of receiving written notice from the city requesting reimbursement. The city's notice shall contain the reimbursement amount and a description of the costs incurred by the city in connection with review of the application.

Section 28. Section 26.32.070 of the Kirkland Municipal Code is hereby amended to read as follows:

26.32.070 Construction permit fee.

Prior to issuance of a construction permit, the permittee shall pay a permit fee to be calculated in accordance with Section 5.74.040 of the Kirkland Municipal Code. ~~equal to one thousand dollars or 0.75 percent of the estimated cost of constructing the telecommunications facilities, as certified by the applicant's engineer and approved by the city engineer, whichever is greater.~~ The purpose of the construction permit fee shall be to recover the city's actual attributable direct and indirect construction plan review costs and expenses, as well as damage or rights-of-way value diminution as a result of permittees occupancy of the right-of-way. ~~The city hereby finds that it must at this time attribute damage and diminution of value to permittee until such time as actual costs can be ascertained. This results from the complexity of the city to ascertain the number and type of all right of way permittees hereunder as well as the extent and nature of all future such occupancy. Therefore, the city may, within six months of the effective date of the ordinance codified in this title, institute a program to further analyze the value of city rights of way, after which the city shall review the fees of this section, and adjust them to the extent the city determines in its sole discretion is necessary, if any, to more accurately represent ascertainable actual costs associated with future permittee's occupancy. In no event shall construction permit fees received prior to such study and analysis be refunded or increased. A permittee may request review of the fees required herein by initiation of the fee review process of Section 26.32.100 of this chapter.~~

Section 29. Section 26.32.100 of the Kirkland Municipal Code is hereby amended to read as follows:

26.32.100 Fee review process, ~~finance director~~ city clerk and hearing examiner.

Any applicant or permittee may initiate a review of the fees established in Sections 26.32.020 through ~~or 26.32.080090~~ of this chapter. Within ten days of notice of the fee determined by the city clerk ~~finance director~~, applicant or permittee may appeal to the hearing examiner. Pursuant to the provisions of Chapter 3.34 of this code, the hearing examiner is authorized to review and make determinations as provided herein.

Section 30. A new Section 26.24.290 of the Kirkland Municipal Code is hereby adopted to read as follows:

26.24.290 Non-telecommunication services.

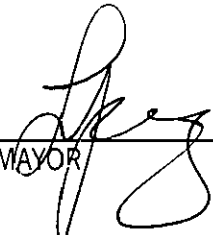
If a telecommunications provider intends to provide services that do not fall within the scope of "telecommunication services," as defined in this Code or the Federal Telecommunications Act of 1996 (as it now exists or is hereafter amended), then the provider shall be required to obtain a separate franchise from the City for those services. The separate franchise process for non-telecommunication services shall not be governed by this Title.

Section 31. If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of the ordinance, or the application of the provision to other persons or circumstances is not affected.

Section 32. This ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.107, 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 open meeting this 4th day of September, 2001.

Signed in authentication thereof this 4th day of September, 2001.



MAYOR

Attest:



City Clerk

Approved as to Form:



City Attorney

Ord\telecomrev

PUBLICATION SUMMARY
OF ORDINANCE NO. 3796

AN ORDINANCE OF THE CITY OF KIRKLAND AMENDING TITLE 26 OF THE KIRKLAND MUNICIPAL CODE RELATING TO TELECOMMUNICATIONS.

SECTION 1. Amends Section 26.04.010 of the Kirkland Municipal Code ("KMC") relating to Purpose.

SECTION 2. Adds a new Section 26.04.025 to the KMC relating to Assertion of state-wide grant.

SECTION 3-12. Amends Sections 26.08.010, 26.08.020, 26.12.010, 26.12.030, 26.12.060, 26.12.120, 26.12.130, 26.16.010, 26.16.060 and 26.16.090 of the KMC.

SECTION 13. Repeals Section 26.16.110 of the KMC.

SECTIONS 14-19. Amends Sections 26.16.120, 26.16.130, 26.16.140, 26.20.010, 26.24.140 and 26.24.150 of the KMC.

SECTIONS 20-21. Repeals Sections 26.24.230 and 26.24.240 of the KMC.

SECTIONS 22-23. Amends Sections 26.24.250 and 26.28.030 of the KMC.

SECTIONS 24-25. Repeals Sections 26.28.180 and 26.28.190 of the KMC.

SECTIONS 26-29. Amends Sections 26.32.010, 26.32.020, 26.32.070 and 26.32.100 of the KMC.

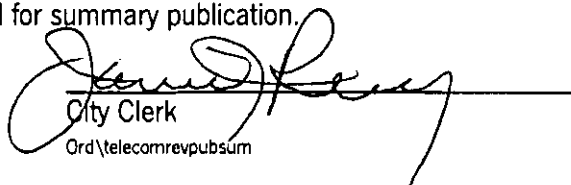
SECTION 30. Adds a new Section 26.24.290 to the KMC relating to Non-telecommunication services.

SECTION 31. Provides a severability clause for the ordinance.

SECTION 32. 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 meeting on the 4th day of September, 2001.

I certify that the foregoing is a summary of Ordinance 3796 approved by the Kirkland City Council for summary publication.


City Clerk
Ord\telecomrevpubsum