

ORDINANCE NO. 3906

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING The Lake Washington School District, a public school district, 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 FIBER OPTIC CABLE.

The City Council of the City of Kirkland do ordain as follows:

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

(a) "School District" means The Lake Washington School District, a public school district and a municipal corporation of the State of Washington, 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 such limits as 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, which sets forth the terms and conditions of this Franchise.

Section 2.

A. Facilities within Franchise Area. The City hereby grants to School District 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 installing, maintaining, and operating a Fiber Optic Network designed for the transmission of electronic data.

B. Permission Required to Enter Onto Other City Property. *Nothing contained in this Ordinance is to be construed as granting permission to School District 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. Permission shall not be unreasonably withheld.*

C. Compliance with WUTC Regulations. At all times during the term of this Franchise, School District shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission, ("W.U.T.C.").

Section 3. Non-interference of Facilities

A. School District'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 School District, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, School District 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 School District 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 written notice of not less than ten (10) days to School District, 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 School District shall pay to the City the reasonable cost of such work.

B. Any surface or subsurface failure occurring during the term of this Agreement and caused by any excavation by School District shall be repaired to the City's specifications, within 30 days of the discovery of such failure or upon 5 days' written notice to School District. Should School District fail to adequately remedy such failure, the City shall have the right to remedy the failure in accordance with Section 3A.

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 School District's then existing Facilities within the Franchise Area, the City shall:

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

(b) Provide School District with reasonable plans and specifications for such grading or widening, construction, or other public street improvement.

After receipt of such notice and such plans and specifications, School District shall relocate such Facilities within the Franchise Area, at no charge to the City so as to accommodate such street improvement project, provided, however, for any Facilities that are jointly owned by the School District and the City, the costs to relocate shall be based on the proportionate share of ownership of the fiber optic strands within the fiber optic cable. The City shall cooperate with School District to designate a substitute location for its Facilities within the Franchise Area. In cooperation with the School District, City will establish a date by which the commencement of the work for the Facilities will be relocated, which date will be not less than 60 days after written notice to School District as to the facility to be relocated. School District must finish relocation of each such Facility by the date so established.

B. Whenever any person or entity requires the relocation of School District's Facilities to accommodate the work of such person or entity within the Franchise Area or whenever the City requires the relocation of School District's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then School District shall have the right as a condition of such relocation, which the City agrees to enforce prior to issuance of any permit, to require such person or entity to:

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

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

School District shall require only those costs and expenses incurred by School District in integrating and connecting such relocated Facilities with School District's other Facilities to be paid to School District by such person or entity, and School District 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 School District's Facilities required in accordance with this Franchise. Any required relocation of School District'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 School District 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. School District 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, School District 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. School District 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 School District or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted School District 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 School District in writing of the claim thereof, and School District 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 School District thereof, and School District 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 School District for the temporary adjustment of School District's Facilities to accommodate the moving or removal of such building or other object. Such necessary arrangements with School District shall be made, to School District's satisfaction, not less than fourteen (14) days prior to the moving or removal of said building or other object. In such event, School District 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 School District'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 School District 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 School District shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon School District a written notice to so comply within thirty (30) days from the date such order is received by School District. If School District 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 School District, provided, however, if any failure to comply with this Franchise by School District cannot be corrected with due diligence within said thirty (30) day period (School District'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 School District may so comply shall be extended for such time as may be reasonably necessary and so long as School District 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 the School District fails to cure defaults on more than two (2) occasions, the City may in addition, by ordinance, declare an immediate forfeiture of this Franchise

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 School District'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, and automatically renew for an additional ten (10) years upon the agreement of School District and the City; and provided further, however, School District shall have no rights under this Franchise nor shall School District be bound by the terms and conditions of this Franchise unless School District 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 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 School District shall be performed by School District 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, School District 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 School District's actions related to a specific franchise issue.

C. In the event that any territory served by School District 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.

D. School District is responsible for painting over or removing any graffiti on the School District's facilities covered by this Agreement. School District shall commence removal or painting over graffiti within ten (10) days of written notice and it shall diligently pursue completion of such removal or painting.

Section 11. Undergrounding. The City encourages School District to locate or relocate its facilities underground when and where practical. School District acknowledges that the City desires to promote a policy of undergrounding of Facilities within the Franchise Areas. School District will cooperate with the City in the undergrounding of School District's Facilities

within the Franchise Areas. If, during the term of this Franchise, the Facilities within any Franchise Area are undergrounded, the School District will participate and pay their proportionate share for the Fiber Optic Cable to be undergrounded based upon the School District's proportional ownership of the fiber strands being undergrounded. For example, should there be 100 fiber strands undergrounded, and the School District has 40 fibers allocated to it, the School District would be responsible for 40% of the cost to underground the Fiber Optic Cable. School District shall comply with all federal, state and City regulations on undergrounding. This Section 11 shall govern all matters related to undergrounding of School District'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 School District'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 School District, direct that School District 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 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 Land Use Code and applicable development standards.

Section 12. Record of Installations and Service. With respect to excavations by School District and the City within the Franchise Area, School District 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, School District 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 School District in any street, alley, avenue, highway, easement, etc., shall be made available to the City within thirty (30) working days of request.

Section 13. City Use of Facilities.

A. With respect to trenches which are facilities and which are (1) owned by School District and (2) within the Franchise Area, the City, subject to School District's prior written consent, which may not be unreasonably withheld, may install and maintain City owned conduit in such trenches, for police, fire and other noncommercial communications purposes, subject to the following:

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

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

(3) School District shall not charge the City a fee for the use of such trenches in accordance with this Section as a means of deriving revenue therefrom; provided, however, nothing herein shall require School District 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 School District, terms and conditions of the provision of such services will be determined between School District and the City in a separate agreement.

C. Pole Attachment Agreements. It is agreed and understood that School District shall not install poles in the Franchise Area, nor shall it acquire poles from any other entity with Facilities in the Franchise Area; provided, however, that nothing in this Franchise shall prohibit School District from entering into pole attachment agreements with pole-owners in the Franchise Area.

Section 14. Shared Use of Excavations. School District 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. School District 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 School District, 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. School District 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 School District 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 15. Insurance. School District 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 School District for the purpose of complying with the requirements of this section.

In satisfying the insurance requirements set forth in this section, School District may self-insure against such risks in such amounts as are consistent with good utility practice or shall obtain a coverage agreement through a Risk Pool authorized by Chapter 39.24 RCW which shall provide liability coverage to the District for the liabilities contractually assumed by the School District in this Agreement. School District shall provide the City with an insurance certificate indicating that such insurance (or self-insurance) is being so maintained by School District. The City may, in addition, require School District to provide additional insurance information, including but not limited to a copy of the insurance policy on which the insurance certificate is based.

Section 16. Tariff Changes. If School District 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, School District shall give the City Clerk written notice thereof within five (5) days of the date of such filing.

Section 17. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon School District, and no right, privilege, license or authorization granted to School District 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, School District may assign this agreement to an affiliate or subsidiary without the consent of, but upon notice to, the City.

Section 18. 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.

In consideration for the shared use of the franchise by the City and the School District, the City's shall waive costs in drafting and processing this franchise agreement and all work related thereto. School District shall not be subject to any franchise permit fees or any other fees or expenses associated with activities undertaken through the authority granted in this franchise ordinance for projects subject to and associated with the General Terms and Conditions for sharing of fiber optic installment projects between the City, School District, City of Bellevue and University of Washington, or under the laws of the City.

City has the right, but not the obligation, to take over control and ownership of Franchise'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 Agreement may be recorded with the King County recording office. 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 School District 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.

Except as may be stated in an Interlocal Agreement between the City and the District, 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 19. Notice. Any notice required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033
Attn: City Clerk

Lake Washington School District
Attn: Robert Collard
PO Box 97039
Redmond, WA. 98073-9739

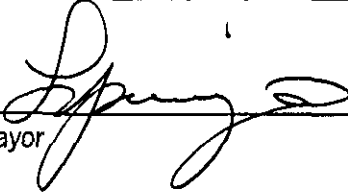
With a copy to:

David A. Alskog
Livengood, Fitzgerald & Alskog, PLLC
PO Box 908
Kirkland, WA 98083

Section 20. Effective date. This Ordinance, in compliance with RCW 35A.47.040, shall be in full force and effect five (5) 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 open meeting
this 21st day of October, 2003.

Signed in authentication thereof this 21st day of October,
2003.



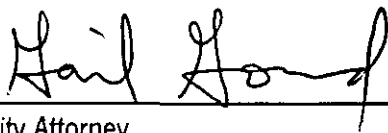
Mayor

Attest:



City Clerk

Approved as to Form:



City Attorney
Ord\Franchise final

PUBLICATION SUMMARY
OF ORDINANCE NO. 3906

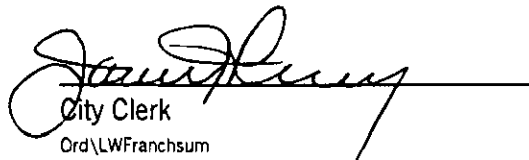
AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING The Lake Washington School District, a public school district, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS FIBER OPTIC CABLE.

SECTIONS 1-19. Provide for the grant to The Lake Washington School District of a franchise for ten years on specified terms and conditions.

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 meeting on the 21st day of October, 2003.

I certify that the foregoing is a summary of Ordinance 3906 approved by the Kirkland City Council for summary publication.


City Clerk
Ord\LWFranchsum