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February 14, 2001

Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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**Re: CS Docket Nos. 00-253, 00-254, and 00-255**

Dear Secretary:

This letter is written on behalf of the City of Federal Way, Washington, to respond to the allegations of Metromedia Fiber Network Services, Inc., submitted to you in the above-referenced proceedings. This letter is intended as testimony by declaration of the undersigned, for which a hard copy will be submitted via mail following its electronic filing with the Commission.

Metromedia's comments characterize the actions of cities across the nation, including the City of Federal Way, as conditioning right-of-way access on "extortionate demands for money and in-kind compensation that clearly violate the [Federal Telecommunications] Act and/or state law." Metromedia Comments at 4. The City of Federal Way wishes to express the strongest possible objection to Metromedia's comments, as explained below. Further, the City urges the Commission to disregard Metromedia's comments in their entirety, as Metromedia seeks to have the Commission act in a way that is outside the scope of the proceeding pending before it – and therefore outside the Commission's jurisdiction as well.

1. Metromedia's Unfounded Attack on the City of Federal Way.

As they pertain to Federal Way, Metromedia's comments state that "The city of Federal Way, Washington requires carriers to pave 500 fee of road on either side of a new manhole. There is simply no structural justification for such a large amount of overlay." Metromedia Comments at 23. If Metromedia had made this comment in a judicial proceeding, it would be subject to sanctions under Civil Rule 11 – because it is frivolous.

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Metromedia is currently in the final stages of obtaining a franchise for a cross-city fiber build within Federal Way. The franchise ordinance has received the required review by the City Council's Finance, Economic Development and Regional Affairs Committee, and received a first reading before the full City Council. The franchise ordinance is scheduled for a second and final reading before the full Council on February 20. Because of the review it has previously received, the ordinance is on the Council's consent agenda, which means that it is likely to be approved on a single vote along with other consent agenda items near the very beginning of the Council meeting. A copy of the franchise, as submitted in the City Council agenda packet on February 13, is attached as Appendix A to this letter.

The franchise which Metromedia is about to receive **does not require repaving of 500 feet** on either side of a manhole, as Metromedia claims. Rather, Section 8 of the franchise requires installation of new asphalt overlay "**for a minimum distance of 300 feet from the cut or trench** on both sides of the cut or trench (i.e., a total distance of 600 feet), unless a shorter distance is approved by the Director [of Public Works]." The actual franchise requirement thus differs in **three** key ways from Metromedia's claim: (1) new overlay is required only from open trench or open cut construction, not on either side of a manhole; (2) repaving is required for 300 feet on either side – not the 500 feet claimed by Metromedia; and (3) the City's Public Works Director can permit repaving for a shorter distance if circumstances warrant.

In addition to Metromedia's false statement concerning Federal Way's repaving standard, Metromedia's claim that there is no structural reason for such a standard is also wrong. Unlike other cities in the Puget Sound region which have decaying streets and a multi-million dollar backlog in roadway maintenance, the City of Federal Way devotes substantial resources to street maintenance – between $1.5 million and $2.0 million annually out of an approximately $33 million budget. This amount does **not** include additional overlay performed as part of capital road construction projects. As a result (and unlike other nearby cities), Federal Way has an excellent road system, such that open cuts of any kind are a concern. Given the Pacific Northwest's extensive rainfall, open cut or open trench construction often results in roadway and/or roadbed degradation, in part due to the difficulty in achieving adequate compaction and/or sealing when repaving the narrow trenches preferred by utility providers such as Metromedia. The only way to ensure maintenance of the City's publicly funded infrastructure is to require overlay of an area of significant enough size to ensure an adequate seal and compaction, and to ensure drivability will not be impaired. This is a more than adequate reason to justify exercise of the City's constitutional police powers, and is certainly not the "no structural justification" claimed by Metromedia.

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Metromedia's implication that the City of Federal Way's overlay requirement is somehow not in compliance with the Act or state law is also belied by the language of the franchise itself. Section 18.1 of the franchise itself states that "City and Franchisee acknowledge and agree that the terms, conditions and provisions of this Franchise[1]. . .are consistent with applicable law, including but not limited to the Telecommunications Act of 1996, existing Washington State statutes and the FWCC [Federal Way City Code], as currently enacted and interpreted."

If the language of the franchise were not enough, Metromedia's own counsel has indicated that Metromedia is in agreement with the terms of the franchise and desires that the City Council adopt and approve the franchise ordinance. A copy of email correspondence from Metromedia's counsel, a lawyer from the reputable Seattle firm of Davis Wright Tremaine, is attached as Appendix B to this letter. The email indicates that Metromedia "intends to go forward" with the franchise in its present form, and that "there will not be any more haggling" by Metromedia over the terms.[2] Further, Metromedia's counsel appeared at the City Council meeting for the first reading of the ordinance, and indicated "yes" when asked whether the franchise was "in a form to move forward," and whether the Council "would be ok to move the franchise to final acceptance on February 20. A transcript of the colloquy between Councilmember Mary Gates and Metromedia counsel Stephanie Hicks (from the Davis Wright Tremaine firm) is attached as Appendix C to this letter.

As the foregoing discussion indicates, apparently Metromedia's in-house counsel in New Jersey, Karen Nations, failed to check the facts with her client before submitting her 33-page polemic to this Commission. This suggests that the Commission should view the entirety of Metromedia's claims with great skepticism: if Metromedia cannot get its facts straight with respect to a simple asphalt overlay requirement in its Federal Way franchise, what credibility can the remainder of its claims have?

2. <u>The Commission Should Not Consider Metromedia's Claims</u>

At bottom, the matter before this Commission is whether the requirements by a handful of Ohio cities that City Signals underground its fiber optic cable rather than string it aerially, somehow violate the Federal Telecommunications Act. This proceeding

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[1] The one caveat to this acknowledgment concerns Section 20.2, which does not pertain to repaving. In Section 20.2, Metromedia has voluntarily agreed, as a matter of contract, to provide the City with three, 1.25-inch conduits even if doing so is deemed to be more than the requirements of applicable law. In exchange, Metromedia received preferential scheduling of consideration of the franchise, including having a special Council Committee meeting called solely for the purpose of review of Metromedia's proposed franchise.

[2] This latter statement was made with the exception of a minor language revision requested by Metromedia counsel, which revision has been made by the City.

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is not about municipal right-of-way requirements in general, or even about the particular requirements of particular cities mentioned – inaccurately, as demonstrated above – by Metromedia. The Commission therefore lacks jurisdiction to take the type of action requested by Metromedia. The Commission should not consider Metromedia's claims – unless Metromedia itself initiates an appropriate action - - with appropriate notice and opportunity to respond to affected municipalities.[3]

3. Conclusion

For all the reasons set forth above, the Commission should disregard Metromedia's comments – particularly those concerning the City of Federal Way, which comments are false.

Thank you for your consideration of this letter. I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

Sincerely,

Bob C. Sterbank
City Attorney

BCS:tm

cc: David Moseley, City Manager
Cary Roe, Public Works Director
Stephanie Hicks, Davis Wright Tremaine
Karen Nations, Metromedia

Enclosures

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[3] Federal Way had less than two weeks to review Metromedia's comments and respond. Indeed, Federal Way was unaware that the proceeding even existed until it received Metromedia's lengthy diatribe.

APPENDIX "A"

**ORDINANCE NO. _____**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON, GRANTING METROMEDIA FIBER NETWORK SERVICES, INC., A DELAWARE CORPORATION, A NONEXCLUSIVE FRANCHISE TO OCCUPY RIGHTS-OF-WAY OF THE CITY OF FEDERAL WAY, WASHINGTON, WITHIN A SPECIFIED FRANCHISE AREA FOR THE PURPOSES OF INSTALLING, CONSTRUCTING, MAINTAINING, REPAIRING, AND RESTORING A FIBER OPTIC COMMUNICATIONS SYSTEM WITHIN AND THROUGH THE CITY OF FEDERAL WAY.**

WHEREAS, Metromedia Fiber Network Services, Inc. a Delaware corporation ("Metromedia") has requested a franchise from the City of Federal Way, in order to locate a fiber optic communications system within the right-of-way, as shown on Exhibit A hereto; and

WHEREAS, the City Council of Federal Way finds that it is in the public interest to grant such a franchise, which will specify the rights and duties of Metromedia; and

WHEREAS, RCW 35A.47.040 permits the City of Federal Way to grant nonexclusive franchises for the use of public streets, bridges or other public ways for, inter alia, conduits, wires and appurtenances for transmission of signals and other methods of communications; and

WHEREAS, in granting such a nonexclusive franchise, the City of Federal Way reserves such other powers and authorities granted to Washington code cities by general law;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

**Section 1. Definitions**

Where used in this Franchise the following terms shall be defined as follows:

**1.1** "City" means the City of Federal Way, Washington, a municipal corporation of the State of Washington, and its respective successors and assigns.

**1.2** "Council" means the City of Federal Way Council acting in its official capacity.

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1.3 "Director" means the Public Works Director, or designee, of the City of Federal Way Public Works Department.

1.4 "Facilities" means an underground fiber optic telecommunications system consisting of eight 1.5 inch conduits and fiber optic cable, and other necessary appurtenances, as specifically depicted in such plans approved by the City of Federal Way Public Works Director as part of the issuance of a right-of-way use permit or other approval. "Facilities" also means any other equipment approved by the Federal Way City Council by ordinance and incorporated herein by amendment.

1.5 "FWCC" means the Federal Way City Code.

1.6 "Franchise Area" means only that portion of the rights-of-way located in the City of Federal Way and shown in Exhibit A attached hereto, and/or any other areas approved by the Federal Way City Council and incorporated into this Ordinance via amendment.

1.7 "Franchisee" means Metromedia, and its successors and assigns if approved and/or permitted as provided in Section 24.3 herein.

1.8 "City Facilities" means an underground system of conduit, junction boxes, pull boxes system, access vaults and structures, including but not limited to three (3) one and one-quarter inch (1 ¼-inch) conduits, suitable for use as part of an underground fiber optic or other telecommunications system, as further described in Section 20.2 below.

**Section 2. Grant/Acceptance**

**2.1 Grant of Franchise.** The City hereby grants to Franchisee the nonexclusive right to enter upon the Franchise Area for the limited purpose of constructing, excavating, installing, maintaining, restoring, and repairing Facilities within the Franchise Area. This franchise is specifically limited to the right for Metromedia to install Facilities owned and operated by Metromedia. Franchisee may not provide cable television or open video system services, unless it first obtains a cable television franchise or open video system franchise or agreement from the City.

**2.2 Acceptance by Franchisee.** Franchisee shall have no rights under this Franchise, nor shall Franchisee be bound by the terms and conditions of this Franchise, unless Franchisee shall, within sixty (60) days after the effective date of this Franchise, file with the City its written acceptance of this Franchise and all of its terms and conditions.

**Section 3. Non-Franchise Area City Property**

This Franchise does not and shall not convey any right to Franchisee to install its Facilities on, under, over, across, or to otherwise use City-owned or leased properties of any kind outside the Franchise Area, or to install Facilities on, under, over, across or

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otherwise use any City owned or leased property within the Franchise Area other than the right-of-way depicted in Exhibit A and as described in Section 1.6 herein.

**Section 4. Term**

Subject to Franchisee filing its acceptance pursuant to Subsection 2.2, the term of this Franchise shall be for a period of ten (10) years commencing on the effective date of this Franchise, unless terminated earlier pursuant to this Franchise or other applicable law.

**Section 5. Location of Facilities**

**5.1 Location.** The Facilities shall be installed underground. The location of the underground Facilities and appurtenances, their depths below the surface of the ground or grade of a right-of-way, and any related existing equipment to which the Facilities are connected shall be depicted on "as-built" plans submitted to the City within ninety (90) days of the installation of the Facilities. The "as-built" plans shall be stamped by a Professional Engineer licensed by the State of Washington. Upon written request of the City, Franchisee shall update such "as-built" plans to reflect actual or anticipated improvements to the system. Any plans of anticipated improvements to the system so submitted shall be for informational purposes only and shall not obligate Franchisee to undertake any specific improvements, nor shall such plans be construed as a proposal to undertake any specific improvements.

**5.2 GIS Data.** At such time as Franchisee develops or employs Geographic Information System ("GIS") technology, Franchisee shall submit the information required in Subsection 5.1 above in digital GIS format, showing the location of its Facilities within the Franchise Area.

**5.3 Design Markings.** In the event the City desires to design new streets or intersections, renovate existing streets, or make any other public improvements, Franchisee shall at the City of Federal Way's reasonable request, provide the location of Franchisee's underground Facilities within the Franchise Area by either field markings or by locating the Facilities on the City's design drawings, and shall provide all other reasonable cooperation and assistance requested by the City.

**Section 6. Noninterference of Facilities**

Franchisee agrees to maintain its Facilities and perform any and all activities authorized by this Franchise: (1) so as not to unreasonably interfere with the free passage of traffic; (2) in accordance with the applicable laws of the State of Washington and City Code requirements, franchise provisions, regulations, resolutions and rules, as now existing or as hereafter amended; and (3) as required by the Director. This requirement applies whether or not the work is performed by the Franchisee, its agents, employees, subcontractors, or other third parties at Franchisee's direction.

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**Section 7. Requirement to Obtain Permits**

**7.1 Permits and Permit Applications.** Franchisee shall, at its expense, obtain all permits, (including rights-of-way permits), and pay all permit fees required by applicable City ordinances, regulations, resolutions and rules prior to commencing any work within the Franchise Area. Franchisee's permit applications shall be accompanied by plans stamped by a Professional Engineer licensed by the State of Washington, which plans shall show the position and location of the proposed facilities to be constructed, laid, installed, or erected at that time, show their relative position to existing rights-of-way or property lines upon prints drawn to scale, designate rights-of-way by their names and improvements, such as, but not limited to, sidewalks, curbs, gutters, shoulders of roadway, ditches, paved roadways, roadways to property lines, turnouts, parking strips, telephone or electric distribution poles, and water pipes existing on or under the ground to be occupied, or as required by the Director. The Franchisee shall specify the class and type of materials to be used, equipment to be used, and mode of safeguarding and facilitating the public traffic during construction. Materials and equipment shall be in new or like-new condition for its type and kind. The manner of excavation, construction, installation, backfill, and temporary structures such as, but not limited to, traffic turnouts and road obstructions shall meet the standards of the FWCC and be satisfactory to the Director. All traffic control shall be in accordance with the right-of-way permit, and shall be in accordance with the Manual on Uniform Traffic Control Devices (MUTCD). The Franchisee shall indicate on any permit application the time needed to complete the work. The time needed to complete the work is subject to approval by the City as a condition of the issuance of the permit or approval.

**7.2 Emergency Exception to Permit Requirement.** In the event of an emergency in which Franchisee's Facilities within the Franchise Area are in a condition as to immediately endanger the property, life, health or safety of any individual, Franchisee may take action immediately to correct the dangerous condition without first obtaining any required permit so long as: (1) Franchisee informs the City of the nature and extent of the emergency, and the work to be performed, prior to commencing the work; and (2) such permit is obtained by Franchisee as soon as practicable following cessation of the emergency.

**Section 8. Standard of Performance**

Franchisee shall not utilize open cut or open trench construction methods for installing Facilities, unless: (1) required by an emergency; or (2) unless boring is not technically feasible and permission is first obtained from the Director of Public Works. In the event that Franchisee utilizes open cut or open trench construction methods, Franchisee shall not excavate for a distance of more than one hundred feet (100') without immediately backfilling and compacting to surface grade and city standards. Backfilled trench areas within a driving lane must be patched, either temporarily or permanently, before the end of the work day in which they have been opened. Trench areas within the right-of-way, but not within a driving lane, must also be patched within the time limits specified by the City on the right-of-way use permit. Final surface restoration shall be completed within thirty (30) days and shall be equal to or better than the surface

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condition prior to permit issuance. As part of final surface restoration, Franchisee shall install new asphalt overlay for a minimum distance of 300 feet from the cut or trench on both sides of the cut or trench (i.e., a total distance of 600 feet), unless a shorter distance is approved by the Director. In the event that the City adopts a street or pavement degradation fee by ordinance, at the option of the City, Franchisee shall pay such fee in lieu of installing the new asphalt overlay required by this Section.

**Section 9. Survey Markers and Monuments**

Franchisee shall, using a licensed surveyor, immediately replace all markers or monuments disturbed during any work by Franchisee within the Franchise Area. Franchisee shall pay all costs associated with such lost, destroyed or disturbed monuments or markers, and all costs associated with the expense of replacement of such lost, destroyed or disturbed monuments or markers.

**Section 10. Surface Markings/Stakes**

Prior to Franchisee commencing any excavation work within the Franchise Area, Franchisee shall reference all monuments and markers relating to subdivisions, plats, highways, and other surveys. The reference points shall be located so that they shall not be disturbed during the Franchisee's operations under this Franchise. The method of referencing these monuments or other points shall be approved by the City before placement. The construction shall be made as expeditiously as conditions permit, and as directed by the City. A complete set of reference notes for monuments and other ties shall be filed with the City.

**Section 11. Right of City to Complete Work**

In the event Franchisee fails to comply with any applicable federal, state or City laws, ordinances, rules, regulations or standards or with any of the terms of this Franchise, and such noncompliance continues for a period of ten (10) days after Franchisee receives written notice from the City regarding the noncompliance, the City may, but in no event is the City obligated to, order any work completed, including without limitation Franchisee's obligation to repair and Franchisee's obligation to remove or relocate facilities. If the City causes such work to be done by its own employees or by any person or entity other than Franchisee, Franchisee shall, upon the City's written request, immediately reimburse the City for all reasonable costs and expenses incurred by the City in having such work performed, which costs may include the City's reasonable overhead expenses and attorneys' fees. However, the City shall not have any electrical work accomplished by any person or entity other than Franchisee or a qualified and licensed electrical contractor.

**Section 12. Work by City**

**12.1 City Reservation of Rights.** The City reserves the right to use, occupy and enjoy all or any part of the Franchise Area, either above, below, or adjacent to the Facilities, for any purpose that is not inconsistent with the terms and conditions of this Franchise. The rights reserved herein include, without limitation, the construction,

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installation, and/or maintenance of any electrical, water, utility, telecommunications, sewer or storm drainage line, traffic signals, street lights, trees, landscaping, bicycle paths and lanes, equestrian trails, sidewalks, other pedestrian amenities, and other public street improvement projects.

This Franchise is not an exclusive Franchise and shall not be construed to in any manner prohibit the City from granting other and further franchises in, under, over, upon, and along the Franchise Area, nor from exercising such other powers and authorities granted to the City by the Washington State Constitution and general law.

**12.2 Relocation of Franchisee's Facilities.**

In the event that exercise of any of the rights reserved under Section 12.1 above reasonably requires the City to construct, alter, repair, or improve the right-of-way ("City work"), and the City work necessitates the relocation of the Facilities then existing in the Franchise Area, the City may require Franchisee to relocate the Facilities, as provided herein.

**12.2.1 City's Duties.** The City shall:

(a) Provide written notice as soon as practicable of the requirement for relocation and the date by which relocation shall be completed. The City shall calculate the date for completion of the relocation in accordance with RCW 35.99.060; and

(b) Provide Franchisee with copies of pertinent portions of the City's plans and specifications so that Franchisee may relocate its Facilities to accommodate the City work.

**12.2.2 Franchisee's Duties.** Franchisee shall:

(a) No later than the date set by the City for completion of the relocation (unless adjusted by the City or a reviewing court pursuant to RCW 35.99.060) raise, lower, or move the Facilities to the location or position directed by the City, to cause the least interference with the City work and to conform to such new grades as may be established. If the City improves the right-of-way and, if directed by the City, Franchisee shall replace the Facilities with substitute Facilities conforming to the specifications for the improvement of the right-of-way;

(b) bear all costs and expenses of the relocation and provision of substitute Facilities, except as provided in RCW 35.99.060.

**Section 13. Damage Repair**

In case of damage by the Franchisee, its agents or employees or by the Facilities of the Franchisee to rights-of-way, or to public and private improvements to rights-of-way, the Franchisee agrees to repair the damage at its own cost and expense. The Franchisee shall, upon discovery of any such damage, immediately notify the City. The

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City will inspect the damage, and set a time limit for completion of the repair. If the City discovers damage caused by the Franchisee to rights-of-way, or to public and private improvements to rights-of-way, the City shall give the Franchisee notice of the damage and set a time limit in which the Franchisee must repair the damage. In the event the Franchisee does not repair a right-of-way or an improvement to a right-of-way as required in this section, the City may repair the damage and recover the costs and expenses of such repair from Franchisee in accordance with the provisions of Section 11 of this Agreement.

**Section 14. Default**

**14.1 Notice of Default.** In addition to other remedies set forth herein, if Franchisee shall fail to comply with any of the provisions of this Franchise, the City may serve a written notice to Franchisee ordering such compliance and Franchisee shall have sixty (60) days from the receipt of such notice in which to comply.

**14.2 Revocation of Franchise.** If Franchisee is not in compliance with this Franchise after the expiration of the sixty (60) day period, the City may, by resolution, declare the Franchise immediately revoked.

**Section 15. Limited Rights**

This Franchise is intended to convey only a limited right and interest to Franchisee in the Franchise Area. This Franchise is not a warranty of title or conveyance of any ownership interest in or to the Franchise Area to Franchisee.

**Section 16. Eminent Domain**

The existence of this Franchise shall not preclude the City from acquiring by condemnation, in accordance with applicable law, all or a portion of Franchisee's Facilities within the Franchise Area for the fair market value thereof. In determining the value of such Facilities, no value shall be attributed to the right to occupy the Franchise Area conferred by this Franchise.

**Section 17. Vacation**

If at any time the City, by ordinance, vacates all or any portion of the Franchise Area, the City will not be liable for any damages or loss to the Franchisee by reason of such vacation.. The City shall notify Franchisee in writing not less than 20 days prior to public hearing under FWCC § 13-102 on any petition for vacation of Franchise Area occupied by Franchisee. The City may, after thirty (30) days prior written notice to Franchisee, terminate this Franchise with respect to any vacated area for which Franchisee had notice as provided herein. This section shall not be construed as authorization by the City to occupy any land rendered privately owned as a result of a street vacation, nor shall this section be construed as obligating the City to reserve any easement for the Franchisee in a vacated area.

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**Section 18. Compliance with Laws**

**18.1 General.** Franchisee shall comply with all applicable federal, state and City laws, franchises, resolutions, regulations, standards and procedures, as now existing or hereafter amended or adopted, including without limitation the State Environmental Policy Act; provided, however, that if any term or condition of this Franchise and any term or condition of any City law, code, franchise, resolution, regulation, standard, procedure, permit or approval are in conflict, the term or condition of this Franchise shall control. City and Franchisee acknowledge and agree that the terms, conditions and provisions of this Franchise, except for Section 20.2, are consistent with applicable law, including but not limited to the Telecommunications Act of 1996, existing Washington State statutes and the FWCC, as currently enacted and interpreted.

**18.2 Future City Regulation.** Subject to Section 18.1 above, Franchisee acknowledges that the City may develop rules, regulations, ordinances and specifications of general applicability for the use of the right-of-way which shall govern Franchisee's Facilities and activities hereunder as if they were in effect at the time this Franchise was executed by the City and Franchisee covenants and agrees to be bound by same to the extent they are consistent with the Constitution of the State of Washington.

**Section 19. Guarantee**

Franchisee shall guarantee work completed by the Franchisee under this Franchise for a period of 10 years against settlement or repair including Facilities and right-of-way restoration; provided, however, Franchisee is not guaranteeing the provision of any specific telecommunications services.

**Section 20. Administrative Costs and City Owned Facilities**

**20.1 Charge for Administrative Costs.** Pursuant to RCW 35.21 and RCW 35.99.010(6), fees may be collected for administrative expenses related to such franchise and Franchisee does hereby warrant that its operations as authorized under this Franchise are those of a Service Provider and telephone business as defined in RCW 82.04.065. In recognition of Franchisee's status, the City shall be entitled to reimbursement of all actual costs, including reasonable overhead costs associated with the administration of this Franchise or costs incurred by the City for actions undertaken in accordance with the Franchise. These costs shall include, but not be limited to wages, benefits, equipment and supplies for activities such as plan review, permit processing and permit inspections. Such costs shall be billed to Franchisee on a quarterly basis and Franchisee shall pay such costs within thirty (30) days of receipt of such bills. Each bill shall include verifiable detail as to the nature of the costs incurred. Failure by Franchisee to make full payment of bills within the time specified shall be considered sufficient grounds for the termination of all rights and privileges existing under this Franchise. Franchisee also agrees to pay a fee or a charge to cover the actual reasonable administrative expenses incurred by the City which are directly related to preparing and approving this Franchise. Nothing herein shall preclude the City from charging administrative fees or recovering any administrative costs incurred by the City in the

approval of permits or in the supervision, inspection or examination of all work by Franchisee in the Franchise Area as prescribed in accordance with applicable provisions of the FWCC or as permitted by other applicable law. Franchisee shall be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise or under ordinances of the City. Where the City incurs costs and expenses for review or inspection of activities undertaken through the authority granted in this Franchise or any ordinance relating to the subject for which a permit fee is not established, Franchisee shall pay such costs and expenses directly to the City. In addition to the above, Franchisee shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency involving Franchisee's Facilities. Further, Franchisee shall also pay all taxes and pavement and street degradation fees which are authorized by law or City ordinance and may now or hereafter be required and imposed by the City.

**20.2 City Facilities.**

**20.2.1 Installation and Location.** As part of and at the same time as the its initial installation of the Facilities, Franchisee shall install City Facilities, at Franchisee's sole cost, within the Franchise Area in the same locations as the Facilities, all as approved by the Director through issuance of a right-of-way use permit or other approval. Franchisee shall have no obligation to install conduit in locations where the Franchisee is not installing conduit but is only installing fiber optic cable within existing buried conduit. The locations and spacing of junction boxes, pull boxes, and other access structures or vaults to be installed as part of the City Facilities shall be as specified by the Director. The City Facilities will not be connected to the access structures and vaults of Franchisee. The conduit and other components comprising the City Facilities shall meet the specifications reasonably established by the Director, as set forth in Exhibit A, and shall at a minimum be of the same type and quality as the materials used by Franchisee in its Facilities. Franchisee shall not be required to install City Facilities beyond those shown in the plans approved by the Director as part of the right-of-way use permit or other City approval.

**20.2.2 Use of City Facilities.** The City shall inform Franchisee of the use, and any change in use, of the City Facilities. As part of such use, the City may run its own signal cable and/or fiber optic cable through the City Facilities at some future time, and Franchisee warrants that the City Facilities shall be adequate for such purpose. The City may not use the City Facilities to provide telecommunications or cable television service for hire, sale, or resale to the general public unless authorized by this Franchise or by general law, and only in compliance with any requirements therein. Franchisee shall be responsible for obtaining all necessary permits, franchises, and/or approvals necessary for installation of the City Facilities; the City shall cooperate in providing any information or documents necessary for such permits, franchises, and/or approvals.

**20.2.3 Inspection.** During installation of the City Facilities, the City shall have the right to observe and inspect the installation.

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**20.2.4 Transfer of City Facilities.** After installation of the City Facilities is completed by Franchisee, Franchisee shall notify the City and the City shall have thirty (30) business days to notify Franchisee whether it accepts or rejects, for cause, the City Facilities. In the event of a rejection for cause, Franchisee shall promptly make such repairs as are reasonably required to make the City Facilities usable by the City, notify the City when such repairs are complete, and the notification process shall repeat until City acceptance is achieved. Upon City acceptance, Franchisee shall assign and transfer to the City, by bill of sale and an assignment and assumption agreement, any and all of its rights and obligations with respect to the City Facilities, and the City shall immediately accept and assume all such rights and obligations (the "Transfer").

**20.2.5 Maintenance and Repair of City Facilities.** Following the Transfer, (a) Franchisee shall have no obligation to maintain and/or repair all or any portion of the City Facilities, and such repair and maintenance obligations shall be the sole responsibility of the City, provided, however, that Franchisee shall be obligated to repair any defects in the City Facilities discovered within two (2) years of the Transfer, and Franchisee shall be obligated to repair any damage or defects to City Facilities arising out of Franchisee's actions under this Franchise; (b) the City shall be solely responsible for any and all taxes, fees and assessments relating to the ownership, use and maintenance of the City Facilities, except as provided in Section 20.1.9(a) above; (c) the City shall indemnify, defend, and hold harmless Franchisee and its officers, directors, shareholders, agents, employees and volunteers against any and all liability, claims, actions, causes of action, expenses or demands whatsoever against any of them, including any injury to or death of any person or damage to property or other liability of any nature, arising out of or connected with the City's ownership, use, maintenance and repair of the City Facilities, except that this section shall not be construed as requiring the City to indemnify, hold harmless or defend the Franchisee against claims or damages arising from the negligence or willful misconduct of the Franchisee, its agents, independent contractors or employees, nor shall this section be construed as requiring the City to indemnify Franchisee against costs, claims or damages for which Franchisee is otherwise responsible under this Franchise, and (d) Franchisee shall provide to the City a copy of as-built drawings of the City Facilities.

Franchisee has voluntarily agreed to this Section 20.2 as a matter of contract even if it is deemed to be more than the requirements of applicable law.

**Section 21. Indemnification**

Franchisee agrees to indemnify and hold harmless and defend the City, its elected officials, officers, employees, agents, and volunteers from any and all claims, demands, losses, actions and liabilities (including costs and all attorneys' fees) to or by any and all persons or entities, including, without limitation, their respective agents, licensees, or representatives, arising from, resulting from, or connected with this Franchise to the extent caused in part or in whole by the acts, errors or omissions of the Franchisee, its officers, partners, shareholders, agents, employees, or by the Franchisee's breach of any provision of this Franchise; provided, however, that this section shall not be construed as requiring Franchisee to indemnify, hold harmless or defend the City against claims or

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damages arising from the negligence or willful misconduct of the City, its agents or employees. In the event any claim, demand, suit or action is commenced against the City, which gives rise to Franchisee's obligation pursuant to this Section 21, the City shall promptly notify Franchisee thereof. Franchisee's selection of an attorney to defend any such claim, demand, suit or action shall be subject to the City's approval, which shall not be unreasonably withheld. Franchisee shall not settle or compromise any such suit or action except with the prior written consent of the City, which shall not be unreasonably withheld. The City shall have the right at all times to participate through its own attorney in any suit or action which arises pursuant to this Franchise when the City determines that such participation is required to protect the interest of the City or the public. In the event it is determined that RCW 4.24.115 applies to this Franchise, Franchisee agrees to defend, hold harmless and indemnify the City to the maximum extent permitted thereunder, to the full extent of Franchisee's negligence. The provisions of this Section 21 shall survive the expiration or termination of the Franchise for a period of three (3) years.

**Section 22. Insurance**

**22.1 Minimum Limits.** The Franchisee agrees to carry as a minimum, the following insurance, in such forms and with such carriers as are satisfactory to the City.

(a) Workers compensation and employer's liability insurance in amounts sufficient pursuant to the laws of the State of Washington;

(b) Commercial general liability insurance with combined single limits of liability of not less than $2,000,000 for bodily injury, including personal injury or death, products liability, contractual coverage, operations, explosion, collapse, underground and property damage; and

(c) Automobile liability insurance with combined single limits of liability of not less than $2,000,000 for bodily injury, including personal injury or death and property damage.

**22.2 Mandatory Insurance Provisions.** The comprehensive general liability insurance and automobile liability insurance policies shall be endorsed to contain the following provisions:

(a) The City, its officers, elected officials, employees, and volunteers are to be named as additional insureds;

(b) Coverage shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;

(c) Coverage shall not be suspended, canceled, modified or reduced except after thirty (30) days prior written notice to the City delivered by certified mail, return receipt requested; and

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(d) Coverage shall be primary as to the City, its officers, officials, employees and volunteers. Any insurance or self-insurance by the City, its officers, officials, employees or volunteers shall be in excess of Franchisee's required insurance.

**22.3 Verification of Coverage.** Franchisee shall furnish the City with certificates of insurance and original endorsements evidencing the coverages required by this Section. The certificates and endorsements shall be signed by a person authorized by the insurer to bind coverage on its behalf and must be received and approved by the City prior to the commencement of any work. At the City's request, Franchisee shall deliver certified copies of all required insurance policies.

**Section 23. Bond**

Before commencing work within the City, the Franchisee shall post a bond in the amount of 120% of the value of work to be performed in connection with the Facilities to guarantee performance of the construction, performance, maintenance or repair in accordance with any permits required by Section 7, with the standard of performance as referenced in Section 8, and with the City's rights as specified herein. Procedures for submission and release of the bond shall be as provided in FWCC Sections 22-146 and 22-175 or as otherwise provided in the City Code. In the event that the Franchisee fails to perform as required herein or by any permits required by Section 7, the City may perform the work as provided in Section 11 above, and may have recourse to the bond in addition to or in lieu of the remedies provided in Section 11, at the City's sole discretion. Franchisee shall be entitled to return of the bond, or portion thereof, as remains sixty (60) days after the expiration of the term of the Franchise, provided the City has not notified Franchisee of any actual or potential damages incurred as a result of Franchisee's operations pursuant to the Franchise or as a result of default thereunder.

**Section 24. General Provisions**

**24.1 Entire Agreement.** This Franchise contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Franchise and no prior agreements or understandings pertaining to any such matters shall be effective for any purpose.

**24.2 Modification.** No provision of this Franchise may be amended or added to except by an agreement in writing signed by both of the parties.

**24.3 Assignment and Leasing /Subleasing.**

**24.3.1 Assignment.** This Franchise may not be assigned or transferred without the prior, express, written approval of the City, which approval shall not be unreasonably withheld, provided that the Franchisee shall have the right to mortgage its rights, benefits and privileges in and under this Franchise to secure any indebtedness without notice or approval. Any attempted assignment or transfer in violation of this section shall be void. The transfer of the rights and obligations of Franchisee to a parent, subsidiary, affiliate, or to any successor in interest or entity

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acquiring fifty-one percent (51%) or more of Franchisee's stock or assets, shall be deemed an assignment. The City's review of a proposed assignment or transfer shall be based on the following criteria: (i) the transferee shall have technical expertise, capabilities and financial strength to meet the obligations of the Franchise and being at least equal to or greater than that of Franchisee during the twelve (12) months prior to the transfer; and (ii) the proposed transferee's record of performance under similar agreements. Further, the transferee shall assume all of the obligations of Franchisee hereunder, and Franchisee shall not be released from the obligations of this Franchise by virtue of such transfer until the City consents to such transfer or assignment. Franchisee shall give to the City thirty (30) days' prior written notice of any such proposed assignment or transfer and shall provide all necessary information to the City, including financial data and proof that the assignee/transferee shall assume all obligations of this franchise, in order to enable the City to evaluate whether the proposed transferee satisfies the foregoing criteria. The City shall take action on the proposed assignment or transfer no later than ninety (90) days of receipt of all necessary information. In the case of any proposed transfer for which the City's approval is required hereunder, Franchisee agrees that the City's reasonable expenses incurred in reviewing such transfer or assignment proposal are Franchise administration expenses, which shall be reimbursed pursuant to Section 20.1 herein. To the extent allowed by law or a court of competent jurisdiction, the City shall treat documents and financial data provided by Franchisee for City evaluation under this Section as confidential and exempt from public disclosure. Within thirty (30) days of the date of any approved assignment or transfer, Franchisee and assignee or transferee shall file written notice of the assignment or transfer with the City together with written acceptance of all terms and conditions of this Franchise.

**24.3.2 Leasing / Subleasing.** Notwithstanding the provisions of Section 24.3.1 above, Franchisee may, in the ordinary course of its business lease or sublease a portion of the Facilities to other entities, provided that Franchisee shall not permit any such lessee or sublessee to locate, service, repair, relocate, remove or control the leased or subleased Facilities until the lessee or sublessee has first obtained a franchise from the City. Franchisee may grant a right of user interest in the Facilities or offer or provide capacity or bandwidth from the Facilities without the prior written notice or consent of the City, PROVIDED THAT Franchisee shall at all times retain exclusive control over the Facilities and shall remain responsible for locating, servicing, repairing, relocating or removing the Facilities pursuant to the terms and conditions of this Franchise. In the event Franchisee desires to enter into an agreement to transfer the ability to locate, service, repair, relocate, remove or control of the Facilities, Franchisee shall comply with the provisions of Section 24.3.1 herein and provide notice of the name, mailing address and telephone number of any person or entity proposing or requesting to obtain control of the Facilities, so that the City may contact and discuss franchise requirements with said person or entity. Any agreement entered into in violation of this subsection shall be void.

**24.3.3 Tax Enforcement.** To the extent not prohibited by applicable law, within thirty (30) days of a written request of the City with respect to Franchisee's customers within the City, Franchisee shall provide such information deemed necessary by the City to determine the compliance of Franchisee and

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Franchisee's customers with FWCC Chapter 14, Article 5. Any such information provided by Franchisee shall be treated as confidential and shall not be made public in accordance with FWCC Section 14-181.

**24.4 Attorney Fees.** In the event the City or the Franchisee defaults on the performance of any terms in this Franchise, and the Franchisee or the City places the enforcement of the Franchise or any part thereof or for the collection of any monies due, or to become due hereunder, in the hands of an attorney, or files suit upon the same, the prevailing party shall be entitled to an award of all reasonable attorneys' fees, costs and expenses. The venue for any dispute related to this Franchise shall be King County, Washington, unless a court of competent jurisdiction determines that an administrative agency outside of King County has primary jurisdiction, in which case venue shall be at said administrative agency.

**24.5 No Waiver.** Failure of either party to declare any breach or default by the other party immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default, but such party shall have the right to declare any such breach or default at any time. Failure of either party to declare one breach or default does not act as a waiver of such party's right to declare another breach or default.

**24.6 Governing Law.** This Franchise shall be made in and shall be governed by and interpreted in accordance with the laws of the State of Washington.

**24.7 Authority.** Each individual executing this Franchise on behalf of the City and Franchisee represents and warrants that such individual is duly authorized to execute and deliver this Franchise, respectively, on behalf of the Franchisee or the City.

**24.8 Notices.** Any notices required to be given by the City to Franchisee or by Franchisee to the City shall be delivered to the parties at the following addresses:

Franchisee:
Metromedia Fiber Network Services, Inc.
Attn: V.P. Legal Affairs
360 Hamilton Ave.
White Plains, NY 10601

City:
City of Federal Way
Attn: City Attorney
33530 1st Way South
P. O. Box 9718
Federal Way WA 98063-9718

Any notices may be delivered personally to the addressee of the notice or may be deposited in the United States mail, postage prepaid, to the address set forth herein. Any

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notice so posted in the United States mail shall be deemed received three (3) days after the date of mailing.

**24.9 Captions.** The respective captions of the sections of this Franchise are inserted for convenience of reference only and shall not be deemed to modify or otherwise affect in any respect any of the provisions of this Franchise.

**24.10 Remedies Cumulative.** Any remedies provided for under the terms of this Franchise are not intended to be exclusive but shall be cumulative with all other remedies available to the City at law, in equity or by statute.

**Section 25. Severability**

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

**Section 26. Ratification**

Any City act consistent with the authority and prior to the effective date of this Franchise is hereby ratified and affirmed.

PASSED by the City Council of the City of Federal Way this _____ day of _____, 2001.

CITY OF FEDERAL WAY

_____
MAYOR, MIKE PARK

ATTEST:

_____
CITY CLERK, N. CHRISTINE GREEN, CMC

APPROVED AS TO FORM:

_____
CITY ATTORNEY, BOB C. STERBANK

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FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:
ORDINANCE NO. _____

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ACCEPTANCE:

The undersigned hereby accepts all the rights and privileges of the above-granted Franchise and acknowledges that such rights and privileges are subject to and limited by all of the terms, conditions and obligations contained therein.

DATED this _____ day of _____, 2001.

METROMEDIA FIBER NETWORKS, INC.

By: _____

Its:

_____

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**EXHIBIT A**

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**EXHIBIT B**

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APPENDIX "B"

**From:** "Hicks, Stephanie" <stephaniehicks@dwt.com>
**To:** 'Robert Sterbank' <Robert.Sterbank@ci.federal-way.wa.us>
**Date:** 2/6/01 1:05PM
**Subject:** RE: Metromedia

Bob: There will not be any more haggling, save for my requested minor revision. I understand regarding the scheduling for the change at this point. Although there is not any difference in effect, my client would prefer to see the fact that the City cannot provide service for hire at this point more clearly stated. Thanks for your assistance.

Stephanie M. Hicks
Davis Wright Tremaine LLP
1800 Bellevue Place
10500 N.E. 8th Street
Bellevue, WA 98004-4300
(425) 646-6113
(425) 646-6199 (fax)
stephaniehicks@dwt.com

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-----Original Message-----
From: Robert Sterbank [mailto:Robert.Sterbank@ci.federal-way.wa.us]
Sent: Tuesday, February 06, 2001 12:14 PM
To: Hicks, Stephanie
Subject: RE: Metromedia

Hi Stephanie:

Does "we intend to go forward at this point" mean that Metromedia is in agreement with the terms of the franchise? I need to be sure that we are not in a situation where Metromedia has taken the benefits of the expedited scheduling the Council has provided but later starts haggling over the franchise terms. Could you please let me know?

As for the change you requested, I'm not sure there is any difference in

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effect, but cannot make a change at this point in any event. I will check with the City Manager and the Mayor as to whether a change could be made between the first reading (tonight) and the second (two weeks from now).

Bob

>>> "Hicks, Stephanie" <stephaniehicks@dwt.com> 02/06/01 12:01PM >>>
Thanks, Bob. I have scanned through the agreement and we intend to go forward at this point. Can you make one revision to the sentence regarding resale to the general public, though? This proposed change may allow my client to sleep better.

Please change: The City may use the City Facilities to provide telecommunications or cable television service for hire, sale, or resale to the general public only as authorized by this Franchise or by general law, and only in compliance with any requirements therein.

To: The City may not use the City Facilities to provide telecommunications or cable television service for hire, sale, or resale to the general public unless authorized by this Franchise or by general law, and then only in compliance with any requirements therein.

See you this evening. Thanks--

Stephanie M. Hicks
Davis Wright Tremaine LLP
1800 Bellevue Place
10500 N.E. 8th Street
Bellevue, WA 98004-4300
(425) 646-6113
(425) 646-6199 (fax)
stephaniehicks@dwt.com

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-----Original Message-----
From: Robert Sterbank [mailto:Robert.Sterbank@ci.federal-way.wa.us]
Sent: Tuesday, February 06, 2001 11:55 AM
To: Hicks, Stephanie
Subject: Metromedia

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Hi Stephanie:

Attached is the version of the franchise ordinance submitted to City Council. So that I can let the City Manager know that things are on track, please confirm that Metromedia is in agreement with the franchise terms and desires that the Council consider and take action on the franchise this evening. Thanks!

Bob

REC

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APPENDIX "C"

City of Federal Way City Council Meeting – February 6, 2001

Councilmemeber Gates:

As my fellow Council colleges remember this was on our agenda once before, and at the last minute it was pulled from the agenda at the request of Metromedia.

I understand that there has been conversation back and forth and that there is a Metromedia representative here in the audience. Is that correct? Basically are we to understand now that this is in a form to move forward and that we would be okay for finally acceptance to our February 20.

Stephanie Hicks (Metromedia Counsel):

Yes

Councilmemember Gates:

Okay, because what we typically do if there is an amendment or anything we take care of that before we start the process of moving to February 20.

Stephanie Hicks (Metromedia Counsel):

Yes

Councilmember Gates:

Thank you. In that case I would move the Council Bill 262 to final adoption for the February 20 Council agenda.

K:\telecom\metromedia.transcc2-6-01

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Federal Communications Commission

## The FCC Acknowledges Receipt of Comments From ...

# City of Federal Way - Responder to Comments of Metromedia

## ...and Thank You for Your Comments

Your Confirmation Number: [illegible]

Date Received: Feb 14 2001

Docket: 00-253

Number of Files Transmitted: 1

| File Name | File Type | File Size (bytes) |
|---|---|---|
| COMMENT | Microsoft Word | 98817 |

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*updated 07/07/00*

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Federal Communications Commission

## The FCC Acknowledges Receipt of Comments From ...

# City of Federal Way - Responder to Comments of Metromedia

## ...and Thank You for Your Comments

Your Confirmation Number is: [illegible]

Date Received: Feb 14 2001

Docket: 00-254

Number of Files Transmitted: 1

| File Name | File Type | File Size (bytes) |
|---|---|---|
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Federal Communications Commission

## The FCC Acknowledges Receipt of Comments From ...

# City of Federal Way - Responder to Comments of Metromedia

## ...and Thank You for Your Comments

Your Confirmation Number: [illegible]

Date Received: Feb 14 2001

Docket: 00-255

Number of Files Transmitted: 1

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|---|---|---|
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