

ORDINANCE NO. 2066 (2011)

AN ORDINANCE OF THE CITY OF BOTHELL, WASHINGTON, GRANTING TO SPECTRUM NETWORKS, INC., AND ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR TEN YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A FIBER OPTIC CABLE NETWORK, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF BOTHELL, WASHINGTON

WHEREAS, Spectrum Networks, Inc, has requested that the City Council grant it a nonexclusive franchise, and

WHEREAS, the City Council has the authority to grant franchises for the use of its streets and other public properties pursuant to RCW 35A.47.040, NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF BOTHELL, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Franchise Granted. Pursuant to RCW 35A.47.040, the City of Bothell, a Washington municipal corporation (hereinafter the "City "), hereby grants to Spectrum Networks, Inc. (the "Franchisee"), a Delaware Corporation, its heirs successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a franchise for a period of ten (10) years, beginning on the effective date of this ordinance, set forth in Section 26 herein.

This franchise shall grant Franchisee the right, privilege, and authority to construct, operate, maintain, replace, acquire, sell, lease and use all necessary Facilities for a fiber optic cable network, in, under, on, across, over, through, along or below the public Rights-of-Ways located in the City of Bothell, as approved under City permits issued pursuant to this franchise. Public "Rights-of-Way" or "Franchise Area" as used herein means all public streets, roads, alleys, and highways of the City as now or

hereafter laid out, platted, dedicated or improved. "Facilities" as used herein means a fiber optic cable system, with all necessary cables, wires, conduits, ducts, pedestals, antennas, electronics, and other necessary appurtenances; provided that new utility poles for overhead wires or cabling are specifically excluded. Equipment enclosures with air conditioning or other noise generating equipment are also excluded from permitted "Facilities."

Section 2. Non-exclusive Franchise Grant. This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below, or across any said Rights-of-Way. Such franchise shall in no way prevent or prohibit the City from using any of said roads, streets, or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new Rights-of-Way, thoroughfares and other public properties of every type and description.

Section 3. Location of Fiber Optics Network Facilities. Franchisee is creating a Fiber Optic Cable Network, consisting partially of Facilities within the City. Franchisee may locate its Facilities anywhere within the Franchise Area consistent with the City's Design and Construction Standards and subject to the City's applicable permit requirements. Franchisee shall not be required to amend this franchise to construct or acquire Facilities within the Franchise Area.

Section 4. Relocation of Fiber Optic Cable Network Facilities.

Section 4.1 Franchisee agrees and covenants to protect, support, temporarily disconnect, relocate or remove from any street any of its installations when reasonably required by the City by reason of traffic conditions or public safety, dedications of new Rights-of-Way and the establishment and improvement thereof, widening and improvement of existing Rights-of-Way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or

structure by any governmental agency acting in a governmental capacity, provided that Franchisee shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of cable required to be temporarily disconnected or removed. Except as otherwise provided by law, the costs and expenses associated with relocations ordered pursuant to Subsection 4.1 or 4.2 of this Section shall be borne by Franchisee.

Section 4.2 Any condition or requirement imposed by the City upon any person or entities (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals for permits for zoning, land use, construction or development) which reasonably necessitates the relocation of Franchisee's facilities within the Franchise Area shall be a required relocation for purposes of subsection 4.1 above, provided that the condition or requirement imposed on such person or entity which necessitates relocation of Franchisee's facilities is directly related to a public improvement or structure.

Section 4.3 If the City determines that the project necessitates the relocation of Franchisee's then existing facilities, the City shall:

- A. At least sixty (60) days prior to the commencement of such improvement project, provide Franchisee with written notice requiring such relocation; and
- B. Provide Franchisee with copies of pertinent portions of the plans and specifications for such improvement project and a proposed location for Franchisee's facilities so that Franchisee may relocate its facilities in other City Rights-of-Way in order to accommodate such improvement project.
- C. After receipt of such notice and such plans and specifications, Franchisee shall complete relocation of its facilities at least ten (10) days prior to commencement of the City's project at no charge or expense to the City. Relocation shall be accomplished in such a manner as to accommodate the City's project.

Section 4.4 Franchisee may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise Franchisee in writing if one or more of the alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the facilities. If so requested by the City, Franchisee shall submit as its sole cost and expense additional information to assist the City in making such evaluation. The City shall give each alternative proposed by Franchisee full and fair consideration. In the event the City ultimately determines that there is no other reasonable or feasible alternative, Franchisee shall relocate its facilities as otherwise provided in this Section. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

Section 4.5 The provisions of this Section shall in no manner preclude or restrict Franchisee from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

Section 5. Undergrounding of Facilities. Except as specifically authorized by permit of the City, Franchisee shall not be permitted to erect poles or to run or suspend wires, cables or other facilities thereon, but shall lay such wires, cables or other facilities underground in the manner required by the City. Franchisee acknowledges and agrees that if the City does not require the undergrounding of its facilities at the time of permit application, the City may, at any time in the future, require the conversion of Franchisee's aerial facilities to underground installation at Franchisee's expense.

Whenever the City may require the undergrounding of the aerial utilities in any area of the City, Franchisee shall underground its aerial facilities in the manner reasonably specified by the City, concurrently with and in the area of the other affected utilities. Where other utilities are present and involved in the undergrounding project, Franchisee shall only be required to pay its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of

Franchisee's own facilities. "Common costs" shall include necessary costs not specifically attributable to the undergrounding of any particular facility, such as costs for common trenching and utility vaults. "Fair share" shall be determined for a project on the basis of the number and size of Franchisee's facilities being undergrounded in comparison to the total number and size of all other utility facilities being undergrounded.

Section 6. Maps and Records. After construction is complete, the Franchisee shall provide the City with accurate copies of as-built plans and maps in a form and content reasonably prescribed by the Public Works Director. These plans and maps shall be provided at no cost to the City, and shall include hard copies and digital files in Autocad, ArcGIS.MDB or other readable formats approved by the City of Bothell delivered on a DVD.

Section 7. Excavations. During any period of relocation, construction or maintenance, all work performed by Franchisee or its contractors shall be accomplished in a safe and workmanlike manner, so to minimize interference with the free passage of traffic and the free use of adjoining property, whether public or private. Franchisee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

Whenever Franchisee shall excavate in any public Rights-of-Way for the purpose of installation, construction, repair, maintenance, or relocation of its cable or equipment, it shall apply to the City for a permit to do so and, in addition, shall give the City at least five (5) working days prior notice of its intent to commence work in the public Rights-of-Way. In no case shall any work commence within any Rights-of-Way without a permit, except as otherwise provided in this franchise ordinance.

If either the City or Franchisee shall at any time plan to make excavations in any area covered by this franchise and as described in this Section, the party planning such

excavation shall afford the other, upon receipt of a written request to do so, an opportunity to share 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; and
- C. Either party may deny such request for safety reasons. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

Section 8. Restoration after Construction. Franchisee shall, after abandonment approved under Section 15 herein, or installation, construction, relocation, maintenance or repair of its facilities within the franchise area, restore the surface of the Rights-of-Way to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. The Public Works Director shall have final approval of the condition of such streets and public places after restoration. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. Franchisee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole costs and expense. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise.

Section 9. Emergency Work - Permit Waived. In the event of any emergency in which any of Franchisee's facilities located in or under any street breaks, becomes damaged, or if Franchisee's construction area is otherwise in such a condition as to immediately endanger the property, life, health or safety of any individual, Franchisee shall immediately take the proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve Franchisee from the requirement of obtaining any permits

necessary for this purpose, and Franchisee shall apply for all such permits not later than the next succeeding day during which the Bothell City Hall is open for business.

Section 10. Dangerous Conditions, Authority for City to Abate. Whenever the construction, installation or excavation of facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct Franchisee, at Franchisee's own expense, to take reasonable action to protect the public, adjacent public places, City property or street utilities, and such action may include compliance within a prescribed time.

In the event that Franchisee fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, before the City can timely contact Franchisee to request Franchisee effect the immediate repair, the City may enter upon the property and take such reasonable actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or reasonable actions regarded as necessary safety precautions, and Franchisee shall be liable to the City for the costs thereof. The provisions of this Section shall survive the expiration, revocation or termination of this franchise.

Section 11. Recovery of Costs. Franchisee shall pay a grant fee for the City's administrative, legal, and other costs incurred in drafting and processing this franchise agreement and all work related thereto. No construction permits shall be issued for the installation of facilities authorized hereby until such time as the City has received payment of the grant fee. Franchisee shall further be subject to all permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City. Where the City incurs costs and expenses for review, inspection or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, 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 cable and facilities.

Section 12. City's Reservation of Rights. Pursuant to Section 35.21.860 of the Revised Code of Washington (RCW), the City is precluded from imposing a franchise fee on a telephone business as defined in RCW 82.04.065, except for administrative expenses or any tax authorized by RCW 35.21.865. Franchisee hereby warrants that its operations as authorized under franchise are those of a telephone business as defined in RCW 82.04.065. As a result, the City will not impose a franchise fee under the terms of this ordinance, other than as described herein.

However, the City hereby reserves its right to impose a franchise fee on Franchisee for purposes other than to recover its administrative expenses, if Franchisee's operations as authorized by this franchise change so that not all uses of the franchise are those of a "telephone business" as defined in RCW 82.04.065; or, if statutory prohibitions on the imposition of such fees are removed. In either instance, the City also reserves its right to require that Franchisee obtain a separate franchise for its change in use, which franchise may include provisions intended to regulate Franchisee's operations, as allowed under applicable law. Nothing contained herein shall preclude Franchisee from challenging any such new fee or separate agreement under applicable Federal, State, or local laws.

Section 13. Indemnification. Franchisee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by Franchisee's own employees for which Franchisee might otherwise be immune under Title 51 RCW, for injury or death of any person or damage to property caused by or arising out of the negligent acts or omissions of Franchisee, its agents, servants, officers or employees in the performance of this franchise, and any rights granted hereunder.

Inspection or acceptance by the City of any work performed by Franchisee at the time of completion of construction shall not be grounds for avoidance by Franchisee of

any of its obligations under this Section. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised, with Franchisee's consent, prior to the culmination of any litigation or the institution of any litigation.

In the event that Franchisee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification provision contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Franchisee, the Franchisee shall pay all of the City's reasonable costs for defense of the action, included all expert witness fees, costs, and attorney's fees, including costs and fees incurred in recovering under this indemnification provision.

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Franchisee and the City, its officers, employees and agents, Franchisee's liability hereunder shall be only to the extent of Franchisee's negligence. It is further specifically and expressly understood that the indemnification provision provided herein constitutes Franchisee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

Section 14. Insurance. Franchisee shall procure and maintain for the duration of the franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of rights, privileges and authority granted hereunder to Franchisee, its agents representatives or employees. Franchisee shall provide a copy of a Certificate of Insurance to the City for its inspection prior to the adoption of this franchise ordinance, and such insurance certificate shall evidence a policy of insurance that includes:

- A. Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and
- B. Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; premises; operations; independent contractors; stop gap liability; personal injury; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.
- C. Professional Liability insurance with limits no less than \$1,000,000 per claim for all professional employed or retained Grantee to perform services under this Franchise.
- D. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

Any deductibles or self-insured retentions must be declared to and approved by the City. Payment of deductible or self-insured retention shall be the sole responsibility of Franchisee.

The insurance policies obtained by Franchisee shall name the City (its officers, officials, employees, agents, and volunteers,) as an additional insured with regard to activities performed by or on behalf of Franchisee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees or volunteers. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. Franchisee's insurance shall be primary insurance as respects the City, its officers, officials, employees, agents, and volunteers. Any insurance maintained by the City, its officers, officials, employees, agents, and volunteers shall be excess of Franchisee's insurance and shall not contribute with it. The insurance policy or policies required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by

either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

Section 15. Abandonment of Franchisee's Fiber Optic Cable Network. No cable, section of cable or other equipment laid in the street by Franchisee may be abandoned by Franchisee without written notice to the City. Any plan for abandonment or removal of Franchisee's cable and facilities must be first approved by the Public Works Director, and all necessary permits must be obtained prior to such work. The provisions of this Section shall survive the expiration, revocation or termination of this franchise agreement.

Section 16. Modification. The City and Franchisee hereby reserve the right to alter, amend, or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

Section 17. Forfeiture and Revocation. If Franchisee willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given Franchisee by the City under the provisions of this franchise, then Franchisee shall, at the election of the Bothell City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon notice to Franchisee.

Section 18. Remedies to Enforce Compliance. The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling Franchisee to comply with the provisions of the Ordinance and to recover damages and costs incurred by the City by reason of Franchisee's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force Franchisee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein. Provided, further, that by entering into this franchise, it is not the intention of the City or Franchisee to waive any other rights, remedies, or obligations as otherwise provided by law equity, or

otherwise, and nothing contained here shall be deemed or construed to effect any such waiver.

Section 19. City Ordinances and Regulations. Nothing herein shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to reasonably control by appropriate regulations the location, elevation, manner of construction and maintenance of any fiber optic cable or cable facilities by Franchisee, and Franchisee shall promptly conform with all such regulations, unless compliance would cause Franchisee to violate other requirements of law. In the event of a conflict between the provisions of this Franchise and any other ordinance(s) enacted under the City's police power authority, such other ordinance(s) shall take precedence over the provisions set forth herein.

Section 20. Cost of Publication. The cost of publication of this Ordinance shall be borne by Franchisee.

Section 21. Acceptance. This franchise may be accepted by Franchisee by its filing with the City Clerk an unconditional written acceptance in the form attached hereto as Exhibit "A." Failure of Franchisee to so accept this franchise shall be deemed a rejection thereof by Franchisee and the rights and privileges herein granted shall absolutely cease and determine.

Section 22. Survival. All of the provisions, conditions, and requirements of Sections 4, Relocation of Telecommunication Facilities; 5, Undergrounding of Facilities; 7 Excavation; 8 Restoration after Construction; 10, Dangerous Conditions; 13, Indemnification; and 15, Abandonment of Franchisee's Facilities, of this franchise shall be in addition to any and all other obligations and liabilities Franchisee may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to Franchisee for the use of the areas mentioned in Section 1 herein, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements

contained in this franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of Franchisee and all privileges, as well as all obligations and liabilities of Franchisee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned where Franchisee is named herein.

Section 23. Assignment. This agreement may not be assigned or transferred without the written approval of the City, which approval shall not be unreasonably withheld, except Franchisee may freely assign this Franchise in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. Franchisee shall provide prompt, written notice to the City of any such assignment.

Franchisee may, without the prior written consent of the City: (i) Lease the Facilities, or any portion thereof, to another entity; (ii) Grant an Indefeasible Right of User Interest in the Facilities, or any portion thereof, to another entity; or (iii) offer or provide capacity or bandwidth from the Facilities to another Person, PROVIDED THAT: Franchisee at all times retains exclusive control over the Facilities and remains responsible for locating, servicing, repairing, relocating, or removing its facilities pursuant to the terms and conditions of this Franchise.

Section 24. Notice. Any Notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise specified:

CITY OF BOTHELL
Public Works Director
18305 101st Ave. N.E.
Bothell, WA 98011

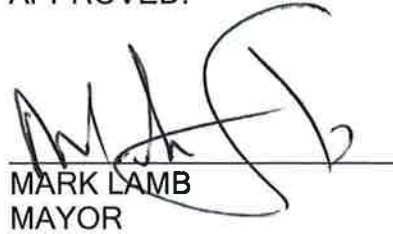
SPECTRUM NETWORKS, INC.
Bill Bartlow, Chief Financial Officer
Spectrum Networks, Inc.
2200 6th Ave, Suite 905
Seattle, WA 98121

Section 25. Severability. If any section, sentence, clause or phrase of this ordinance 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 ordinance unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations hereunder, in which event either party may request renegotiation of those remaining terms of this franchise materially affected by such court's ruling.

Section 26. Effective Date. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect (5) days after passage and publication of an approved summary thereof consisting of the title.

Section 27. CORRECTIONS. The City Clerk and the codifiers of this ordinance are authorized to make necessary corrections to this ordinance including, but not limited to, the correction of scrivener's/clerical errors, references, ordinance numbering, section/subsection numbers and any references thereto.

APPROVED:



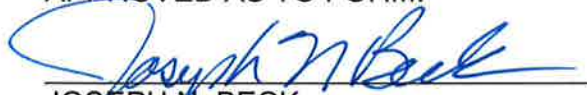
MARK LAMB
MAYOR

ATTEST/AUTHENTICATED:



JOANNE TRUDEL
CITY CLERK

APPROVED AS TO FORM:



JOSEPH N. BECK
CITY ATTORNEY

FILED WITH THE CITY CLERK: April 26, 2011
PASSED BY THE CITY COUNCIL: May 3, 2011
PUBLISHED: May 9, 2011
EFFECTIVE DATE: May 14, 2011
ORDINANCE NO.: 2066 (2011)

SUMMARY OF ORDINANCE NO. 2066 (2011)

City of Bothell, Washington

On the 3rd day of May, 2011, the City Council of the City of Bothell passed Ordinance No. 2066 (2011). A summary of the content of said Ordinance, consisting of the title, is provided as follows:

AN ORDINANCE OF THE CITY OF BOTHELL, WASHINGTON, GRANTING TO SPECTRUM NETWORKS, INC., AND ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR TEN YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A FIBER OPTIC CABLE NETWORK, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF BOTHELL, WASHINGTON

The full text of this Ordinance will be mailed upon request.



JOANNE TRUDEL
CITY CLERK

FILED WITH THE CITY CLERK: April 26, 2011
PASSED BY THE CITY COUNCIL: May 3, 2011
PUBLISHED: May 9, 2011
EFFECTIVE DATE: May 14, 2011
ORDINANCE NO.: 2066 (2011)

