ORDINANCE 2011-14

AN ORDINANCE OF THE TOWN OF EATONVILLE, WASHINGTON, GRANTING MASHELL TELECOM, INC. D/B/A RAINIER CONNECT, A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, INSTALL AND OPERATE, REPAIR, REPLACE AND MAINTAIN LINES, WIRES, COAXIAL CABLE AND APPURTENANCES FOR ORIGINATING, RECEIVING, DISTRIBUTING AND SUPPLYING RADIO, TELEVISION AND OTHER CABLE COMMUNICATION SERVICES ALONG, ACROSS AND UPON THE PUBLIC'S STREET, WAYS, ALLEYS AND PLACES WITHIN THE TOWN OF EATONVILLE, PROVIDING FOR SEVERABILITY, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the Town of Eatonville owns right of way within its borders and is entitled to require a franchise agreement with users of its right of way for the privilege of placing structures within its right of way; and

WHEREAS, under a franchise agreement the Town is authorized by federal law to impose a franchisee fee on the gross receipts of the earnings of a cable provider, and to regulate certain aspects of the provision of cable services by a cable provider to its customers; and

WHEREAS, the Town Council desires to enter into a franchise agreement with Mashell Telecom, Inc.,

NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF EATONVILLE DO ORDAIN AS FOLLOWS:

Section 1. **Authorization**. The Mayor or his designee is authorized to execute the franchise agreement between the Town of Eatonville and Mashell Telecom, Inc., d/b/a Rainier Connect, attached hereto as Exhibit A, entitled "Town of Eatonville Franchise Agreement with Mashell Telecom, Inc.," the terms of which are incorporated herein by reference as if fully set forth.

Section 2. **Acceptance Required**. This franchise agreement shall be accepted by Mashell Telecom, Inc within thirty (30) days of receipt of the franchise agreement, after its execution by the Town, by filing with the Town Clerk an unconditional written acceptance of all of the terms, provisions, and conditions of the franchise agreement. The failure of Mashell Telecom, Inc. to file such an acceptance maybe deemed a rejection by Mashell Telecom, Inc., and this franchise may then be voidable at the discretion of the Town.

Section 3. **Severability**. Should any section, paragraph, sentence, clause, or clause of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be preempted by state or federal law or regulation, such decision or preemption

shall not affect the validity or constitutionality of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 4. **Effective Date**. This ordinance shall take effect and be in full force five (5) days after adoption and publication subject to the provisions of Section 2, herein.

PASSED by the Council of the Town of Eatonville at a regular meeting held this _____ day of _____, 2011.

_____

Ray Harper, Mayor

ATTEST:

_____

Town Clerk

APPROVED AS TO FORM:

_____

Town Attorney

EXHIBIT A

FRANCHISE AGREEMENT BETWEEN TOWN OF EATONVILLE, WASHINGTON AND MASHELL TELECOM, INC.

This Franchise ("Franchise") is entered into in Eatonville, Washington, this _____ day of _____, 2011, by and between the Town of Eatonville, Washington, a municipal corporation, (hereinafter "Town" or "the Town") and Mashell Telecom, Inc., d/b/a Rainier Connect (hereinafter "Operator" or "Franchisee"). The Town and Operator are sometimes referred to hereinafter collectively as the "Parties."

Section 1: Purpose.

This Non-exclusive franchise shall constitute an agreement between the Town and Operator. The Operator promises to construct, maintain, and operate a cable television system for the distribution of television and other electronic signals pursuant to the terms of this franchise. The Town agrees to grant the Operator all necessary rights and other electronic signals pursuant to the terms of this franchise. The Town agrees to grant the Operator all necessary rights and privileges to use public rights of way necessary for a cable television system. This agreement shall, as of its effective date, if previously accepted by the Operator, supersede and replace all existing franchises relating to Cable television only, previously granted by the Town of Eatonville to the Operator, or any of its predecessors, subsidiaries or affiliated companies.

Section 2: Length of Franchise.

The length of this franchise shall be for a term of fifteen (15) years, beginning on August 2, 2011.

Section 3: Service Area.

The Operator's service area shall be the entire incorporated area of the Town of Eatonville, in its present incorporated form or in any later reorganized, consolidated, enlarged, or re-incorporated form.

Section 4: Franchise Fee:

The Operator shall pay the Town quarterly, on or before the thirtieth (30th) day of each January, April, July, and October, a sum equal to five percent (5%) of the Operator's gross receipts as defined in EMC 5.20.010(W), now and as hereafter amended, for the immediately preceding calendar quarter.

(a) Amendment. In the event federal law, including but not limited to, the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.*, as amended, is amended by to permit an increase or decrease in the five percent (5%) franchise fee ceiling, the Town may increase or decrease its franchise fee to such an amount so allowed.

(b) Late Payment. Any quarterly franchise fee not paid by Operator within thirty (30) days of the end of a quarter shall bear interest at the rate of twelve percent (12%) per annum of the amount due, from the date due, accruing monthly, until paid.

(c) Financial Reports. Each franchise fee payment shall be accompanied by a financial report showing the basis for the Operator's computation separately showing revenues received by Operator within the Town from basic service, pay TV service, other applicable sources of revenue, and such other information directly related to confirming the amount of the Operator's gross receipts as may be reasonably required by the Town.

(d) Audit by Town. The Town shall have the right, upon written notice of not less than seven (7) days, to inspect the books and records of Operator, during normal business hours, for the purpose of ascertaining the actual gross receipts collected by Operator in the Town. In the event such audit shall disclose a discrepancy of more than ten percent (10%) between the financial report submitted by Operator with a quarterly payment, and the actual gross receipts collected by Operator, Operator agrees to pay to the Town the reasonable costs of such audit. In the event the audit results are disputed by the Operator, the Operator shall be entitled to a hearing before an Arbitrator, selected by both parties. Time is of the essence in resolving audit disputes and both parties agree to act within thirty (30) days of the date of the final audit report and the audit report should be issued within sixty (60) days from the time the audit was completed. In the event that such audit results in a determination that additional franchise fees are due the Town, the Operator further agrees to pay twelve percent (12%) interest per annum on such additional franchise fees computed from the date on which such additional franchise fees were due and payable.

(e) Nonwaiver. No acceptance of any franchise fee payment by the Town shall be construed as an agreement by the Town that the franchise fee paid is in fact the correct amount, nor shall its acceptance of payment be construed as a release or waiver of any claim the Town may have for further or additional sums payable under the provisions of this franchise agreement.

(f) Taxes. Nothing in this agreement shall limit the Operator's obligation to pay applicable local, state, or federal taxes. Operator agrees to pay any applicable amusement taxes, utility and property taxes.

Section 5: Independent Contractors.

This agreement shall not be construed to render the Operator as the agent or legal representative of the Town for any purpose whatsoever. Operator is not granted any express or implied right or authority to assume or create any obligation or responsibility on behalf of or in the name of the Town or to bind the Town in any manner or thing whatsoever.

Section 6: Entire Agreement:

This agreement, including the exhibits attached hereto and forming a part hereof (if any, which are hereby incorporated herein by reference) are all of the covenants, promises, agreements, and conditions, either oral or written, between the parties. This agreement is subject to the conditions set forth in the Eatonville Municipal Code, including but not limited to chapter 5.20 EMC, the provisions of which are incorporated herein by reference.

Section 7. Successors or Assignees.

Any successor(s) or assignee(s) of the Franchisee will comply with all sections of this franchise agreement, the Master Cable Ordinance or the Town of Eatonville, including the exhibits and addenda attached and forming a part hereof, the covenants, promises, agreements, and conditions, either oral or written, between the original signatory(s) and the town.

Section 8. Acceptance.

This grant of franchise and its terms and provisions shall be accepted by the Operator by the submission of the attached written instrument, executed and sworn to by a corporate officer of the Operator before a Notary Public, and filed with the Town Clerk within thirty (30) days after the effective date of this franchise agreement. Such instrument will constitute the unconditional acceptance of this franchise and the promise to comply with and abide by all of its provisions, terms and conditions.

Section 9. Counterpart Signatures.

The parties agree that this Agreement may be executed in counterparts. The parties further agree that a copy or facsimile reproduction of a signature shall have the same force and effect and be deemed the equivalent to an original.

Section 10. Notice.

Written notices shall be deemed to have been duly served if delivered in person to the individual or entity for whom it was intended, or if delivered at or sent by registered or certified United States mail to the last business address known to him who gives the notice.

All notices and requests shall be addressed to the Town of Eatonville and the Franchisee as follows:

Town: Town Clerk
Town of Eatonville
P. O. Box 309
Eatonville, Washington, 98328

Franchisee: Mashell Telecom, Inc. d/b/a Rainier Connect
Attn: Mark Carrier, Regulatory & Compliance Manager
P. O. Box 683
Centralia, Washington 98531

With a Copy to:
Mashell Telecom, Inc. d/b/a Rainier Connect
Attn: Brian Haynes, CEO / President
2516 Holgate St.
Tacoma, Washington 98402

FOR THE TOWN OF EATONVILLE:

_____
Ray Harper, Mayor

ATTEST

_____
Town Clerk

APPROVED AS TO FORM:

_____
Town Attorney

FOR MASHELL TELECOM, INC.

_____
By:_____
Title:_____