

CITY OF MARYSVILLE AGENDA BILL

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: July 22, 2019

AGENDA ITEM:	
Frontier Utility Relocation Agreement	
PREPARED BY:	DIRECTOR APPROVAL:
Burton Eggertsen	
DEPARTMENT:	
Legal/Public Works	
ATTACHMENTS:	
Proposed Agreement	
BUDGET CODE:	AMOUNT:
SUMMARY:	

Frontier Communications will be undergrounding its utility facilities during the State Avenue Widening Project. The proposed agreement sets forth responsibilities of the City and Frontier in this process, with the City constructing the joint utility trench, and Frontier relocating its facilities and removing currently-existing aboveground poles. Each party will be responsible for its own costs.

RECOMMENDED ACTION: Staff recommends Council consider authorizing the mayor to sign the proposed agreement.

**AGREEMENT BETWEEN CITY OF MARYSVILLE AND
FRONTIER COMMUNICATIONS GOVERNING THE
*State Avenue Corridor Widening Project (100th Street NE to 104th Street NE)***

THIS AGREEMENT ("Agreement") is made and entered into as of the last signature date set forth below, by and between the City of Marysville, a Washington municipal corporation ("City"), and Frontier Communications Northwest Inc., a Washington public utility corporation ("Frontier") (collectively, the "Parties") to coordinate the undergrounding of utilities for the City's *State Avenue Corridor Widening Project (100th Street NE to 104th Street NE)*.

PROJECT DESCRIPTION

The City has completed 90% design on its *State Avenue Corridor Widening Project (100th Street NE to 104th Street NE* (the "Project"), in Marysville, Washington and is now poised to achieve its goal of advertising the Project for construction in October 2019. The Project includes expansion of the road from three lanes to five. The City has determined that, as part of the Project, it will be necessary for utility agencies to relocate their existing overhead communication wires and poles located on the east side of State Avenue between 100th Street NE to 104th Street NE. In discussions with utility agencies, it has been determined that burying existing overhead communication wires and removing utility poles is the most practical and efficient method of relocating these utilities. The City's contractor on the Project ("City's Contractor") will install a joint utility trench (JUT) and vault system to accommodate Frontier, City, and other utility lines. Frontier shall supply and install all conductors, materials and equipment, including all connections and associated splicing, for a complete and operable underground utility system. The City will supply vaults and conduit material. Frontier will cut-over and transfer existing customers to the new underground utility system and remove their existing overhead wires/conductors and service connections (including poles) within the State Avenue right-of-way corridor. Frontier will install four service poles that will be used to connect the new underground system to existing customers. The parties acknowledge that Frontier's costs to underground its utility facilities as contemplated by this Agreement would be the same or less than its costs to aerially relocate the same.

1. PLANS AND SPECIFICATIONS. The 90 percent design plans and specifications will be provided to Frontier in July 2019. The final plans and specifications are scheduled to be completed and provided to Frontier by October 2019:

State Avenue Corridor Widening Project (100th Street NE to 104th Street NE) Plans, Specifications and Contract Documents (Contract Documents).

The plans currently being prepared will depict in detail the location of the joint utility trench and the quantity, size and type of vaults and conduits for each joint trench.

2. WORK SCHEDULE. Subject to the timeline required in the City's Contract Documents for the Project, the City's Contractor shall prepare a schedule of work in accordance with the plans

and specifications for City review (the “Work Schedule”). The City will provide the Work Schedule to Frontier for Frontier’s review. Frontier shall provide any written comments to the City within five (5) days of receipt of the Work Schedule from the City. Upon receipt of any comments from Frontier, the City will provide the comments to the City’s Contractor, who may, at the sole discretion of the Contractor, incorporate the changes into the proposed Work Schedule. The proposed Work Schedule will become binding upon the parties upon acceptance by the City.

3. RESPONSIBILITIES OF CITY OF MARYSVILLE.

3.1. CONTRACTOR DUTIES. The City's Contractor shall excavate and install the joint utility trench, accommodate and coordinate the installation of City utilities, procure and install all associated JUT vaults and conduits, clear all conduits of debris, furnish and install bedding material, backfill and compact the trench, and perform any surface restoration up to the JUT vaults required by the City within the right-of-way.

3.2. WEEKLY CONSTRUCTION MEETINGS. Facilitate weekly (or as otherwise agreed by the City and Frontier) construction coordination meetings (including Pre-construction meeting) to include all relevant parties participating in the joint utility trench, including City's Contractor.

3.3. TRAFFIC CONTROL. Provide flagging and traffic control as required for all work performed by the City.

3.4. CITY REPRESENTATIVE. The City will designate a representative who will be the City’s point of contact with Frontier during the construction stage of the Project (the “City’s Representative”), as identified in Section 8.1. The City may change its representative according to the procedure identified in Section 8.2.

4. RESPONSIBILITIES OF FRONTIER.

4.1. PRE-CONSTRUCTION PHASE. Frontier will provide the City’s Representative underground engineering design plans for the installation of Frontier facilities in the joint utility trench area according to the timelines of Section 1.

4.2. CONSTRUCTION PHASE. Frontier will underground its existing overhead utility facilities, remove remaining above-ground poles and other facilities, and install new above-ground service poles. Frontier shall maintain continued coordination with the City's Representative regarding installation of Frontier's utility facilities and removal of overhead facilities. Frontier’s responsibilities shall include, but not be limited, to the following:

- a. Frontier shall attend the Preconstruction Meeting as scheduled by the City.
- b. Frontier shall complete its work in accordance with the Work Schedule.

c. Frontier will provide an inspector on-site, upon one (1) working days' advance notice, to inspect the installation and placement of any vault and conduit installation work. Frontier's inspector shall not direct the City's Contractor in any manner whatsoever; the Frontier inspector shall communicate all requests to the City's Representative.

d. Frontier shall provide the City with written and telephonic notification of any deficiencies in any installation work or written and telephonic notification of acceptance within one (1) day of Frontier's inspection. The City's Contractor will correct the deficiencies upon approval by the City of the requested work. If Frontier does not provide the notification as required by this Section, then the conduit and vault system shall be considered complete and accepted by Frontier. For the purpose of this Section, electronic mail shall be considered written notification.

e. All sections of vault and conduit installation shall be completed by the City and upon acceptance by Frontier, the City will issue a Notice to Proceed to Frontier to commence installation of the conductors and equipment, and installation of the four new above-ground service poles. Frontier or its contractor's crews may need to accommodate another utility that is trying to work in the same area. Frontier, or its contractor, will complete installation of the conductors and equipment and service poles in accordance with the approved Work Schedule; provided that reasonable access to the project is given by the City's Contractor or a subcontractor in the area where the City is requesting Frontier to begin work. Frontier shall notify the City in writing when the new underground system is energized. Frontier will coordinate its conductor, equipment, and service pole installation such that Frontier, or its contractor, will install as much of this equipment as possible prior to completion of the entire vault and conduit system by the City's Contractor.

f. Frontier shall be responsible for plant installation and wreck-out work associated with the undergrounding. This work shall include but not be limited to furnishing and installing all cables, conductors, and electrical equipment for the conversion to underground, for the removal of other equipment no longer necessary, and for splicing.

g. The four new service poles as contemplated by this Agreement will be placed in a location mutually agreeable to Marysville and Frontier and be of a size mutually agreeable to Marysville and Frontier, with the understanding that the service poles will be placed between new light poles and the adjacent property line to the greatest extent practicable, which placement may adjusted as reasonably required by the Project design. The purpose of these poles is to allow an above-ground connection from the new underground system to Frontier customers.

h. Frontier, or its contractor, will perform cut-over and transfer of existing customers and facilities to the new underground system where applicable. Frontier or its contractor will notify such customers 48 hours in advance of the pending outage.

i. Upon transfer of existing customers and facilities to the underground system, Frontier, or its contractor, shall remove all overhead systems (other than the four new service poles contemplated by this Agreement), including without limitation all poles and communications wires, in accordance with the Work Schedule.

j. Frontier will perform all work contemplated by this Agreement in accordance with the Work Schedule, with the understanding that Frontier will be provided at least thirty (30) workdays to perform said work.

k. Frontier will not be responsible for any delay that is a result of natural catastrophe or other disaster that requires Frontier to pull its crews from the Project to perform restoral of services work in response to such natural catastrophe or disaster.

4.3. TRAFFIC CONTROL. Frontier or its contractor will provide traffic control and flaggers for installation of new underground conductor and devices and facilities along with overhead construction and removal when required. Frontier will coordinate its traffic control with other utilities, the City's Contractor, and the City. In the event that lane closures are necessary for performance of work, Frontier shall be limited to working between the hours of 8AM to 3PM (excluding weekends and holidays) by keeping at least one lane open, in each direction, for flagger operation. Traffic control plans must be approved ten (10) working days in advance by the City before implementation by Frontier.

4.4. OTHER OBLIGATIONS.

Frontier shall maintain its utility facilities (including without limitation the conduits and vaults) constructed and installed under this Agreement from the date of acceptance of the facilities by Frontier. The cost of any future improvements and / or maintenance, repairs, or corrections to any utility facilities covered under the terms of this Agreement shall be the exclusive responsibility of Frontier.

5. COST ALLOCATION.

5.1. PARTY RESPONSIBILITIES. The City and Frontier agree that each party shall be responsible for the costs associated with their respective obligations as described in this Agreement, including without limitation the undergrounding of utilities, provision of materials, and removal of overhead facilities. Along with the costs contemplated in this Section, the City will be responsible for its costs as described in Section 3 and Frontier will be responsible for its costs as described in Section 4.

5.2. ADDITIONAL COSTS BY CITY'S CONTRACTOR. Design changes to the joint utility trench requested by Frontier during the construction phase shall be submitted to the City prior to the start of construction of the joint utility trench. The City will submit the change request to the City's Contractor to obtain a price to perform the work, and notify Frontier of this price. Frontier shall have forty-eight (48) hours to accept the pricing and authorize the work or

withdraw the change request. Frontier will be responsible for any increase in cost to the Project, and shall pay the City for the extra costs incurred to perform the additional work requested by Frontier.

5.3. CLAIMS BY CITY'S CONTRACTOR. Frontier agrees to pay the entire cost of any claims made by the City's Contractor that are determined by the City to be caused by Frontier. These claims may include, but are not limited to, claims for delays caused by untimely installation of Frontier facilities, delays caused by Frontier's untimely removal of overhead facilities, delays caused by Frontier's failure to timely procure and provide materials, or any other claims caused by Frontier based upon disputes between the City's Contractor and Frontier, Frontier's contractor or Frontier's inspector. Frontier will not be held liable for any delays in the schedule created by the City's Contractor, or due to delays caused by natural disaster/catastrophes as contemplated by Section 4.2.k.

6. HOLD HARMLESS & INDEMNITY.

6.1. Frontier shall hold harmless, indemnify and defend the City, its officers, appointed and elected officials, employees and agents, from and against any and all claims, actions, suits, liability, loss, expenses, damages and judgments of any nature whatsoever, including costs and attorney's fees in defense thereof, for injury, sickness, liability or death to persons or damage to property, caused by or arising out of Frontier's negligent or intentional acts, errors or omissions in the performance of this Agreement. PROVIDED, that in the event of the concurrent negligence of the Parties, Frontier's obligations hereunder shall apply only to the percentage of fault attributable to Frontier, its officers, officials, employees or agents.

6.2. Frontier shall hold harmless, indemnify and defend the City, its officers, appointed and elected officials, employees and agents from and against any and all claims, costs, expenses, actions, suits, liability, loss, damages and judgments of any nature whatsoever, including costs and attorney's fees in defense thereof, caused by or relating to Frontier's or its contractor's failure to timely complete its work, except that Frontier will not be liable for delays caused by natural disasters/catastrophes as contemplated by Section 4.2.k.

6.3. The City shall hold harmless, indemnify and defend Frontier, its officers, employees and agents, from and against any and all claims, actions, suits, liability, loss, expenses, damages and judgments of any nature whatsoever, including costs and attorney's fees in defense thereof, for injury, sickness, liability or death to persons or damage to property, caused by or arising out of the City's negligent or intentional acts, errors or omissions in the performance of this Agreement and arising by reason of the City participation in the City's project. PROVIDED, that in the event of the concurrent negligence of the Parties, the City's obligations hereunder shall apply only to the percentage of fault attributable to the City, its officers, officials, employees or agents.

6.4. The foregoing indemnity provisions are specifically and expressly intended to constitute a waiver of each Party's immunity under Washington Industrial Insurance Act, Title 51, with respect to the other Party only, and only to the extent necessary to provide each party with a

full and complete indemnity of claims made by the other Party's employees. The Parties acknowledge that these provisions were specifically negotiated and agreed upon by them.

7. INSURANCE.

Frontier shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of this Agreement. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII. Frontier's maintenance of insurance as required by this Agreement shall not be construed to limit Frontier's liability to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity. Frontier shall obtain, at a minimum, a Commercial General Liability policy with coverage limits of not less than \$1,000,000 each occurrence, \$2,000,000 general aggregate, \$2,000,000 product liability aggregate limit, and \$1,000,000 automobile liability combined single limit each accident. The insurance policies are to contain, or be endorsed to contain, the following provisions for Commercial General Liability insurance:

7.1. Frontier's insurance coverage shall be primary insurance as respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be in excess of Frontier's insurance and shall not contribute with it.

7.2. Frontier's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice has been given to the City.

7.3. For Commercial General Liability insurance coverage, the required additional insured endorsements shall include coverage for ongoing and completed operations.

7.4. The Commercial General Liability insurance shall be endorsed to provide a per project general aggregate limit.

Frontier shall furnish the City with certificates and a copy of any amendatory endorsements evidencing Frontier's insurance requirements before the commencement of Frontier's obligations under this Agreement.

8. NOTICES.

8.1. Any and all notices required by this Agreement must be in writing (except those described in Section 4.2.c and 4.2.d, which may also be made telephonically), and will be deemed to have been made either (1) when delivered personally to the party to whom it is delivered, (2) upon delivering it by electronic mail on a non-holiday workday and properly addressed to the party, or (3) upon being deposited in the United States' mail, postage prepaid, return receipt requested, and properly addressed to the party. A communication by electronic mail that is sent on a holiday or non-workday will be deemed to be delivered on the following workday. A communication will be deemed to be properly addressed if sent to the following addresses:

- a. City: Pat Gruenhagen, Senior Project Manager
City of Marysville, Public Works Department
80 Columbia Avenue
Marysville, WA 98270
Phone: 360-363-8100
Email: pgruenhagen@marysvillewa.gov

- b. Frontier:

8.2. CHANGE IN ADDRESS. A party may change its contact information by providing notice to the other party as described by Section 8.1.

9. DISPUTE RESOLUTION.

9.1. DISPUTE NOTICE. In the event of any dispute, claim, or controversy arising out of or related to this Agreement or otherwise relating to the Project, the complaining party shall provide a written notice to the other party of the issue in dispute (the “Dispute Notice”). The Dispute Notice shall describe the facts surrounding the dispute in sufficient detail to apprise the other party of the nature of the issue.

9.2. GOOD-FAITH NEGOTIATION. The City Frontier will attempt to resolve all disputes through good-faith negotiation. To this effect, the parties will conduct at least one face-to-face meeting between the party representatives identified in Section 9 to resolve the dispute and reach a solution that is satisfactory to both the parties. Such meeting shall take place within seven (7) calendar days following delivery of the Dispute Notice.

9.3. LEGAL REMEDIES. If the parties are unable to resolve a dispute in accordance with this Section 9, then either party exercise any and all rights and remedies available to it in law or equity to resolve said dispute, claim, or controversy. The prevailing party shall be entitled to recover reasonable attorney’s fees together with costs.

10. OTHER RIGHTS AND DUTIES CONTROLLED BY FRANCHISE.

All other rights and duties of Frontier and the City concerning this Agreement are governed by the franchise between Frontier and the City of Marysville, as it presently exists and as it may be hereafter amended. In the event of a conflict between the provisions of this Agreement and the franchise, then the provisions of this Agreement shall take precedence over the conflicting franchise provisions.

11. MISCELLANEOUS.

11.1. EXPIRATION. This Agreement expires upon the completion of all utility relocation as contemplated by this Agreement, and completion of the Project and the City's acceptance of the same.

11.2. NO WAIVER. Failure of either party at any time to require performance of any provision of this Agreement will not limit such party's right to enforce the provision, nor will any waiver of any breach of any provision of this Agreement constitute a waiver of any succeeding breach of the provision or a waiver of the provision itself.

11.3. VENUE. Jurisdiction and venue for this Agreement lie exclusively in Snohomish County, Washington.

11.4. ENTIRE AGREEMENT. This Agreement contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Agreement and no prior agreements shall be effective for any purpose. All attachments and addendum, and the above "Project Description", are incorporated herein by this reference, and shall be a part of this Agreement.

11.5. MODIFICATION. No provisions of the Agreement may be amended, modified, or an additional obligation assumed by either Party except by written agreement signed by the Parties.

11.6. FULL FORCE AND EFFECT. Any section or provision of this Agreement which is adjudicated invalid or illegal shall in no way affect or invalidate any other section or provision hereof and such other sections or provisions shall remain in full force and effect.

11.7. PERFORMANCE. Time is of the essence of this Agreement in each and all of its provisions in which performance is a factor.

11.8. REMEDIES CUMULATIVE. Any remedies provided for under the terms of this Agreement are not intended to be exclusive, but shall be cumulative with all other remedies available at law or in equity.

11.9. NO THIRD PARTY BENEFICIARY. It is the specific intent of the Parties, and all parties agree, that this Agreement shall not confer third party beneficiary status on any non-party.

11.10. NO JOINT VENTURE. This Agreement does not create a partnership or joint venture, and in carrying out this Agreement, the Parties shall act in their individual capacities and not as agents, employees, or partners of one another.

11.11. INTERPRETATION. This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the Parties, and the language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the Parties hereto. The captions and headings in this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement.

11.12. NO ASSIGNMENT. This Agreement shall not be assigned, either in whole or in part, by either Party without the express written consent of the other Party, which may be granted or withheld in such Party's sole discretion. Any attempt to assign this Agreement in violation of this provision shall be null and void.

11.13. SURVIVAL. The provisions of Sections 5.3 and 6 shall survive the expiration or termination of this Agreement.

[SIGNATURES ON FOLLOWING PAGE]

CITY OF MARYSVILLE:

Jon Nehring, Mayor

Date

Attest/Authenticated:

Approved as to form:

Tina Brock, Deputy City Clerk

Jon Walker, City Attorney

FRONTIER COMMUNICATIONS NORTHWEST INC.:

By:

Date

Its: