

02/16/99

Introduced by:

Jane Hague
Greg Nickels

eb
2/17/99 Clerk

Proposed No.:

1999-0020

ORDINANCE NO. **13409**

AN ORDINANCE approving subject to conditions the change of control of the franchises and commitments held by TCI Cablevision of Washington, Inc. under Franchise 12132 and Tele-vue Systems, Inc. d/b/a TCI of Washington and TCI Pacific, Inc. under Franchise 11680 to AT&T Corp. and declaring an emergency.

SECTION 1. King County is granted authority under federal, state and county law and the terms of existing franchises to grant permission for a transfer of control of the cable Franchises 12132 and 11680.

SECTION 2. For the reasons set forth in this ordinance the proposed change of control is in the public interest if the conditions set forth in this ordinance are fully satisfied.

SECTION 3. Findings of fact. The council hereby finds the following facts:

A. TCI Cablevision of Washington, Inc., and Tele-vue Systems, Inc. d/b/a/ TCI of Washington (together, for the purposes of this ordinance, "franchisees"), subsidiary corporations of Tele-Communications, Inc. (for the purposes of this ordinance, "TCI"), provide cable television service in unincorporated King County pursuant to franchises 12132 and 11680, as amended (for the purposes of this ordinance, "franchise agreements").

B. TCI has entered into a merger agreement with AT&T Corp. (for the purposes of this ordinance, "AT&T") that may, if approved, result in a change of control of TCI and, indirectly, of franchisees.

C. TCI and AT&T have filed with the county FCC Form 394, and given notice

1 of the proposed change of control pursuant to the franchise agreements; and AT&T and
2 TCI state their intent to cause the franchisees to comply fully with K.C.C. chapter 6.27A
3 and rules promulgated thereunder, and all franchise agreement provisions and other
4 contractual obligations with the county, including without limitation the lease agreement
5 between the county and the franchisees, as amended, the construction and performance
6 bonds and the payment bond related thereto and all applicable laws.

7 D. The proposed change of control would constitute a transfer of the franchise
8 and is subject to the county's permission pursuant to Franchise 12132, paragraph 4,
9 Franchise 11680, paragraph 4, K.C.C. 6.27A.030 and K.C.C. 6.27A.050. Franchisees TCI
10 and AT&T have asserted that King County must act on or before February 16, 1999 on the
11 proposed change of control or face an automatic approval of the transfer under federal law.
12 King County does not concede that it is required to act by such date but takes action in this
13 ordinance to remove any ambiguity that a final decision has been rendered under 42 USC
14 section 537. The county has requested from the franchisees, TCI and AT&T, both orally
15 and in writing, copies of contracts between TCI and @Home necessary to understand the
16 anticompetitive effects of the terms of @Home service and the companies have not timely
17 provided such contracts. The county is not required to render a final decision until one
18 hundred twenty days has run from the submittal of all requested information.

19 E. The U.S. Congress by passage of the Telecommunications Act of 1996 has
20 determined that national telecommunications policy should favor competition over the
21 monopolistic provision of telecommunications and cable services. The county agrees that
22 competition in the provision of telecommunications and cable services is in the interest of
23 King County.

1 F. In K.C.C. 6.27A.035, the county has determined that anticompetitive and
2 monopolistic acts on the part of a cable system operator, subsidiary or affiliates are
3 prohibited.

4 G. The franchisees and TCI under the ultimate ownership of AT&T intend to
5 provide local telephone services to the public in competition with existing providers, which
6 the county finds to be in the public interest.

7 H. The county has received public comment and public testimony from TCI,
8 AT&T, Internet service providers, other technical experts and members of the public
9 regarding the legal, technical, financial and public policy issues raised by the proposed
10 transfer.

11 I. The franchisees are providing, or plan to provide, cable system subscribers
12 with Internet access exclusively through @Home, a high speed cable modem Internet access
13 service which combines access to the Internet with selected content and control features
14 provided by @Home for a single price. AT&T plans, through the franchisees, to continue
15 and expand this service if its acquisition of TCI is completed.

16 J. The county has received public comment from experts familiar with the
17 structure and operation of the Internet and the current forms of access to the Internet and
18 Internet service provision which evidences that cable modem service promises to be
19 superior to other forms of Internet access for residential users and could achieve a dominant
20 position in the county market as the preferred form of Internet access.

21 K. AT&T claims that there are competitive alternatives to cable modem service,
22 but admits that cable modem service provides significantly faster transmission speeds than
23 any other data service available now or in the near future in the King County market to

1 residential cable subscribers

2 L. The contractual relationship between @Home and TCI is exclusive in TCI
3 markets and prohibits the cable operator from obtaining high speed (described as greater
4 than 128 kilobits per second) residential access from any source other than @Home until
5 June 4, 2002 as described in Securities and Exchange Commission filings submitted by @
6 Home corporation.

7 M. Nondiscriminatory access to cable modem network is consistent with K.C.C.
8 6.27A.035 and in the public interest. For purposes of this ordinance, nondiscriminatory
9 access means access to the cable modem platform that is offered on a competitively neutral
10 basis to both affiliated and nonaffiliated Internet service providers. The effect of
11 nondiscriminatory access policy is that consumers seeking access to the Internet via the
12 cable system will be able to connect with the Internet service provider of their choice at
13 market driven rates. A nondiscriminatory access policy promotes consumer choice and
14 competition in the provision of Internet services.

15 N. Implementation of a nondiscriminatory access policy for the cable
16 modem platform requires resolution of significant technological and economic issues. A
17 further study of the issues of competition and open access should be completed by October
18 8, 1999 and reported to the council.

19 O. Video cable services are of primary concern to the citizens of King
20 County. High among citizen complaints received during the transfer of control process is
21 the perception that provision of expanded basic video packaging is being eroded.
22 Consumers fear the video programming decisions on the part of AT&T, TCI and
23 franchisees, if the transfer is approved, will force expanded basic video subscribers to

1 migrate to the more expensive digital cable service, which many cannot afford, in order to
2 retain services they previously were offered under the less expensive expanded basic
3 service. Further, it appears that consumers with expanded basic service must pay more for
4 pay per view movies than consumers with digital cable services.

5 SECTION 4. King County hereby approves the transfer of control of TCI to
6 AT&T, subject to the following conditions:

7 A. AT&T and TCI shall confirm in writing that they shall cause the franchisees
8 to comply, and that franchisees agree to comply, fully with K.C.C. chapter 6.27A and rules
9 promulgated thereunder, and with all the franchisees' franchise agreement provisions and
10 other contractual obligations with the county, including without limitation the lease
11 agreement between the county and the franchisees, as amended, the construction and
12 performance bonds and the payment bond related thereto and all other applicable laws.

13 B. AT&T, TCI and franchisees shall confirm in writing that the franchisees shall
14 remain responsible for the obligations and liabilities of the franchisees, known or unknown,
15 under their respective franchise agreements and contracts with the county and under
16 applicable law, before and after the effective date of the change of control.

17 C. AT&T, TCI, franchisees and the applicable bonding company shall confirm
18 in writing that the construction and performance bonds and the payment bond presently
19 filed with the county in connection with the franchisees' franchise agreements and
20 contractual obligations shall remain in full force and effect before and after the effective date
21 of the change of control.

22 D. AT&T, TCI and franchisees shall confirm in writing that approval by the
23 county of the transfer shall not constitute a waiver or release of any rights of the county

1 under the franchise agreements or applicable law, before or after the effective date of the
2 change of control.

3 E. Franchisees, AT&T and TCI, directly or indirectly through one or
4 more affiliates, shall not engage in unfair methods of competition in connection with the
5 operation of the cable system, or the delivery of services over that system, in violation of
6 K.C.C. 6.27A.035. The franchise agreements require the franchisees to provide two way
7 interactive service by March 1, 2000. Modifications to the franchises established milestones
8 for the system upgrade and construction of the Institutional Network. The county
9 acknowledges the ability of TCI/AT&T to expedite the provision of two way interactive
10 services at a date earlier than required by the franchise but provision of such services are
11 subject to K.C.C. 6.27A.035.

12 F. AT&T and TCI shall cause franchisees to interconnect the county I-
13 Net to the public switched telephone network in the same physical and technical manner
14 that franchisees make telephone services by means of the cable system available to cable
15 subscribers within the county. This interconnection will be at no cost to the county and
16 capable of ensuring quality of service between networks and will be made available no later
17 than one year after such telephone services are made available to five percent of the cable
18 subscribers anywhere within the county. This interconnection will also be enabled to freely
19 exchange Internet traffic through such network, and the county will thereby be able to use
20 this interconnection to provide Internet services. The county I-Net shall only utilize the
21 preceding interconnection and services for noncommercial purposes such as public agencies
22 or not-for-profit organizations, although equipment costs of the county may be recovered
23 from I-Net users.

1 G. AT&T, TCI and franchisees shall make the @Home service
2 interconnection available to all Internet service providers (ISPs) and online service
3 providers (OSPs) through a local interconnection point on terms and conditions that are
4 customary in the data networking industry without discrimination, degradation or blockage
5 of the content or carriage of data from such an interconnected ISP or OSP.

6 H. AT&T, TCI and the franchisees shall confirm in writing that the
7 @Home service will be interoperable with all generally available Internet protocol
8 applications and will not restrict services that can be provided by providers of online
9 services. AT&T, TCI and franchisees shall confirm in writing that customers of @Home
10 service will be able to access other ISPs or OSPs on the Internet without having a view
11 content provided by @Home, if a customer so chooses.

12 I. AT&T, TCI and franchisees shall notify the county that the merger
13 has been completed within five days of the date that TCI becomes a subsidiary of AT&T.

14 J. AT&T, TCI and the franchisees shall confirm in writing that for a
15 period of twenty-four months, commencing for each subscriber when the level of service
16 required to provide high speed cable modem services is made available in the subscriber's
17 service area. King County @Home subscribers will be charged no more than the lower of
18 (i) \$39.95 per month or (ii) the lowest price per month for which @Home service is offered
19 to residential customers in any other AT&T cable system in the United States, subject only
20 to exceptions for temporary promotional offers in other systems.

21 K. In addition to the other provisions of this ordinance, AT&T, TCI and
22 franchisees shall confirm in writing that if at any time during the term of the franchise there
23 is a controlling federal judicial ruling or federal regulatory action confirming the power of

1 local franchising authorities to require open and nondiscriminatory access to Internet
2 services over cable modem networks, then the county may immediately require the
3 franchisees to promptly comply with such conditions consistent with K.C.C. 6.27A.020E
4 and Section 1 of the franchise agreements.

5 SECTION 5. AT&T, TCI and the franchisees have agreed to keep the council
6 informed of issues relative to the franchises. Through the expiration of the franchise, on at
7 least a quarterly basis, a representative from AT&T, TCI and franchisees, shall attend the
8 budget and fiscal management committee of the council at dates that are mutually agreeable
9 to the council and the representatives described herein. The representatives shall provide an
10 update regarding the franchises, including cable video packaging, system upgrades and local
11 phone service among other contemporary items related to the franchise.

12 SECTION 6. AT&T, TCI and the franchises and the county have discussed that the
13 potential impact of the franchisees' high speed Internet access service on (1) consumer
14 choice of Internet and online services and (2) of the competitive impact on other providers
15 of Internet and online services in the unincorporated areas of King County need further
16 study. AT&T, TCI, and the franchises shall confirm in writing that they will agree to
17 support an expert analysis in the county's review of issues raised in the request for transfer
18 by an Expert Review Panel (ERP). The ERP will be composed of regulatory economists
19 and engineers who are considered experts in the industry appointed by the council. The
20 ERP will issue a report with findings to the council by October 8, 1999 addressing any
21 anticompetitive implications of rolling out bundled high speed cable modem Internet
22 services including legal, technical, and economic considerations as well as subscriber
23 privacy issues. The ERP will report to the budget and fiscal management committee of the

1 council.

2 AT&T, TCI and franchisees recognize that additional or different conditions
3 regarding nondiscriminatory access and subscriber privacy may be imposed by the county
4 after completion of the study but prior to March 1, 2000. AT&T, TCI and franchisees shall
5 confirm in writing that such additional or different conditions shall be subject to a standstill
6 and tolling agreement to include the following:

7 1. The county may impose additional or different conditions which shall
8 be considered as if imposed on the date of enactment of this ordinance.

9 AT&T, TCI and franchisees shall treat such conditions as if they were timely
10 imposed within the 120-day time period authorized for review of the transfer
11 of control as described in 42 USC Sec. 537.

12 2. AT&T, TCI and franchisees and King County have not waived any
13 rights, obligations, claims, defenses or remedies regarding the county's
14 authority to impose such conditions.

15 SECTION 7. Where this ordinance requires submittal of written confirmation by
16 AT&T, TCI, and franchisees, the confirmation shall be filed with the clerk of the council on
17 or before March 1, 1999. If these or any other of the conditions for approval are not
18 satisfied, approval shall be deemed to have been denied as of the enactment of this
19 ordinance. The executive is hereby authorized to execute written amendments to the
20 franchise agreements incorporating in substantial form the conditions set forth in this
21 ordinance.

22 SECTION 8. Notwithstanding any other provision of this ordinance, if the clerk of
23 the metropolitan King County council has not received notice required by section 4I of this

1 ordinance by July 1, 1999, then the approval granted by this ordinance expires, and the
2 request for approval of the transaction shall be deemed to have been denied as of the date of
3 enactment of this ordinance.

4 SECTION 9. If the transaction that is the subject of this ordinance is not
5 completed or does not reach final closure for any reason, or if the closure is reached on
6 terms substantially and materially different to the terms described in the FCC Form 394
7 including subsequent information provided by AT&T, TCI or franchisees and relied upon by
8 the county, then the approval granted in this ordinance is null and void and the approval of
9 the transaction shall be deemed to have been denied as of the enactment date of this
10 ordinance.

11 SECTION 10. If the merger between AT&T, TCI and franchisees, indirectly, is
12 upon terms that are substantially and materially different from the terms described in the
13 FCC Form 394 including subsequent information provided by AT&T, TCI and franchisees,
14 then AT&T, TCI and franchisees shall resubmit a request for a change in control in order to
15 comply with Franchise 12132 and Franchise 11680.

16 SECTION 11. The executive is requested to review consumer concerns regarding
17 the erosion of consumer choice within the expanded basic service offering upon the
18 introduction of digital video services and report back to the council no later than May 1,
19 1999. The executive is further requested to provide a written report to the budget and
20 fiscal management committee regarding the status of TCI/AT&T franchise compliance on a
21 quarterly basis.

22 SECTION 12. AT&T, TCI and franchisees, jointly or separately, shall deposit with
23 the King County Department of Finance, the sum of two hundred thousand dollars in

1 accordance with K.C.C. 6.27A.100. The county may draw against this fund to carry out
2 administrative review and oversight functions of the transfer and not for litigation. The
3 county shall provide an annual accounting of the fund. The funds identified in this section
4 shall not be charged back to subscribers by AT&T, TCI and/or franchisees.

5 SECTION 13. The franchisees, TCI and AT&T assert that the limited time
6 provided under federal law for review of a proposed transfer of a cable franchise, with the
7 short time extension agreed to by TCI and AT&T, requires final action by the county on or
8 before February 16, 1999. Failure to take final action by within the time limits required by
9 federal law creates a risk of automatic approval of the transfer under federal law. Although
10 as set forth in Section 2 C of this ordinance the county does not concede that it is required
11 to act by such date, adoption of this ordinance is appropriate to remove any ambiguity on
12 the necessary date for rendering a final decision under 42 USC Section 537. To ensure that

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the franchisees, TCI and AT&T cannot argue that the county has waived its ability to make a final determination on the proposed transfer it is necessary to adopt this ordinance as an emergency ordinance. The council finds as a fact and declares that an emergency exists and that the enactment of this ordinance as an emergency ordinance is necessary for the immediate preservation of public peace, health or safety or for the support of county government and its existing public institutions.

INTRODUCED AND READ for the first time this 11th day of January, 1999.

PASSED by a vote of 11 to 1 this 16th day of February, 1999.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Donna Miller
Chair

ATTEST:

[Signature]
Clerk of the Council

APPROVED this _____ day of _____, 19__.

King County Executive

Attachments: None