



ORDINANCE NO. 28359

1 AN ORDINANCE granting a non-exclusive franchise to Astound Broadband, LLC,
2 a Washington limited liability company, and wholly-owned subsidiary of
3 WaveDivision Holdings, LLC, a Delaware limited liability company d/b/a
4 Wave (“Wave”), to construct, operate, and repair a telecommunications
5 system in the City of Tacoma; setting forth provisions, terms and conditions
6 of the grant of franchise; specifically making such grant subject to the
7 provisions of Title 16B, Title 9 and Title 10 of the Tacoma Municipal Code,
8 as well as the Tacoma City Charter; providing for City regulation of the
9 Telecommunications System; prescribing liquidated damages and certain
10 other remedies for violation of franchise provisions in addition to those
11 specified pursuant to the Tacoma Municipal Code and Tacoma City Charter.

12 WHEREAS Astound Broadband, LLC, a Washington limited liability
13 company (“Astound” or “Franchisee”) is a telecommunications company currently
14 involved in the business of operating a telecommunications network utilizing fiber
15 optic technology, and

16 WHEREAS, as part of expanding such network, Astound desires to obtain a
17 franchise to operate a system of fiber optic cable in City of Tacoma right-of-way,
18 and

19 WHEREAS Astound has applied to the City to install and operate fiber optic
20 cable within the City streets and public rights-of-way, and

21 WHEREAS the City Council has determined to grant such a franchise to
22 Astound upon those certain terms and conditions which the Council deems
23 necessary due to the unique nature of fiber optic cable as set forth herein, and

24 WHEREAS this City of Tacoma Telecommunications Franchise Ordinance
25 contains the following sections:
26



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Now; Therefore,



BE IT ORDAINED BY THE CITY OF TACOMA:

1 Section 1. Definitions.

2 For the purposes of this Franchise, the following terms, phrases, words, and
3 their derivations shall have the meaning given herein; words not defined herein
4 which are defined in Title 16B, shall have the same meaning or be interpreted as
5 provided in Title 16B. Words not defined here or in Title 16B shall be construed
6 consistently with Title 47 of the United States Code, and if not therein, they shall
7 have their common and ordinary meaning. A reference to any Title of the Tacoma
8 Municipal Code ("TMC") or to the City's Charter refers to the same as may be
9 amended from time to time.
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12 1.1 "City" means the City of Tacoma, a municipal corporation of the
13 state of Washington, and all departments, divisions, and agencies thereof, including
14 Tacoma Public Utilities.

15 1.2 "City Manager" means the City Manager or the City Manager's
16 designee.
17

18 1.3 Intentionally Omitted.

19 1.4 "Communications system" refers to a telecommunications system.

20 1.5 "Construction, operation, or repair" and similar formulations of
21 this term mean the named actions interpreted broadly, encompassing, among
22 other things, installation, extension, maintenance, replacement, or components,
23 relocation, undergrounding, grading, site preparation, adjusting, testing,
24 make-ready, and excavation.
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1.6 "Customer" means any Person or entity who legally receives within the corporate limits of the City any one or more of the services provided by the Telecommunications System.

1.7 "Facilities" or "Installations" are and refer to and include, but are not limited to, plant, systems, improvements, and equipment owned, leased, or otherwise used by Franchisee, such as poles, fiber, wires, fixtures, equipment, underground circuits, and conduit in Public Rights-of-Way and other property necessary or convenient for the transmission and distribution of communications service where such facilities are located. "Facilities" or "Installations," when used without a modifier, shall be considered to encompass both Overhead Facilities/Installations and Underground Facilities/Installations.

1.8 "Franchise" means the rights granted by this Franchise and conditioned as set forth herein, and under the TMC and the City Charter.

1.9 "Franchise Area" means that area within the present and future corporate limits of Tacoma.

1.10 "Franchisee" is Astound Broadband, LLC, a Washington limited liability company, with its home office at 401 Kirkland Parkplace, Suite 500, Kirkland, WA 98033.

1.11 "Gross Receipts," for purposes of this Franchise, means any and all receipts or income received directly or indirectly by Franchisee, which is derived from the operation of its System in the City, minus uncollectibles. Gross Receipts shall include, by way of example and not limitation, revenues from its Telecommunications Service, all fees, late fees, installation and connection fees,



1 upgrade and downgrade fees, and rental fees. The term Gross Receipts shall not
2 include any taxes on Services furnished by Franchisee imposed by any
3 municipality, state, or other governmental unit and collected by Franchisee for such
4 governmental unit, nor shall the term include any wholesale services provided by
5 Franchisee upon which fees or taxes have already been levied within the City.

6 1.12 "Operator," when used with reference to a system, refers to a
7 Person (a) who provides service over a Communications System and directly or
8 through one or more affiliates owns a significant interest in such facility; or (b) who
9 otherwise controls or is responsible for, through any arrangement, the management
10 and operation of such a facility. A Person that operates under agreement of a
11 Telecommunications System or a specific portion of a Telecommunications System
12 to provide Telecommunications Services shall be treated as an Operator for
13 purposes of this Franchise.
14

15 1.13 "Overhead Facilities" refers to electric utility and
16 Communications Facilities located above the surface of the ground, including the
17 underground supports and foundations for such Facilities.
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19 1.14 "Person" includes any individual corporation, partnership,
20 association, joint stock company, trust, or any other legal entity, but not the City for
21 purposes hereof.
22

23 1.15 "Public Rights-of-Way" mean the public streets and easements
24 over which, under the City Charter, the TMC, City ordinances, and applicable laws,
25 the City has authority to grant Franchises, permits, or Licenses for use thereof or
26 has regulatory authority there over, but expressly excluding railroad



rights-of-way/crossings, airport, and harbor areas. Public Rights-of-Way, for the purpose of this Franchise, do not include buildings, parks, poles, conduits, or similar facilities or property owned by or leased to the City, including, by way of example and not limitation, structures in the Public Rights-of-Way such as utility poles and light poles.

1.16 "System" means the Telecommunications System.

1.17 "Telecommunications Service" or "Service" means the transmission for hire of information in electronic or optical form, including, but not limited to, voice, video, or data, whether or not the transmission medium is owned by the provider itself. Telecommunications Service includes telephone service but does not include cable TV or commercial video service or over-the-air broadcasts to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto.

1.18 "Telecommunications System" means a tangible facility that is used to provide one or more Telecommunications Services, any portion of which occupies Public Right-of-Way. The term Telecommunications System, by way of example and not limitation, includes wires, equipment cabinets, guys, conduit, radio transmitting towers, poles, other supporting structures, and associated and appurtenant facilities used to transmit telecommunications signals. The term Telecommunications System includes all devices mounted on light poles in the Public Rights-of-Way through which Telecommunications Services are originated or terminated. An Open Video System is not a Telecommunications System to the extent that it provides only video services; a Cable System is not a



1 Telecommunications System to the extent that it provides only Cable Service. The
2 term Telecommunications System includes any of the tangible components of a
3 Telecommunications System which occupies Public Rights-of-Way.

4 1.19 "Telephone Service" means the providing by any person of
5 access to a local telephone network, local telephone network switching service,
6 intrastate toll service, or coin telephone service, or providing telephonic, video,
7 data, or similar communication or transmission for hire via a local telephone
8 network, toll line, channel, cable, microwave, or similar communication or
9 transmission system. Telephone Service includes intrastate or interstate service,
10 including toll service, originating from, or received on, communications equipment
11 or apparatus in this State if the charge for the service is billed to a person in this
12 State. Telephone Service does not include the providing of competitive Telephone
13 Service as defined in TMC 6A.40.030, the providing of cable television service, or
14 the providing of broadcast services by radio or television stations.

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17 1.20 "Title," when used alone in the context of referring to this Title of
18 the TMC, shall mean Title 16 (and more specifically Title 16B) of the TMC.

19 1.21 "Underground Facilities" refers to electric utility and
20 Communications Facilities located under the surface of the ground, excluding the
21 underground foundations or supports for Overhead Facilities.

22
23 Section 2. Franchise.

24 2.1 Grant of Franchise. The City hereby grants to Franchisee a
25 non-exclusive Franchise which, once it becomes effective, shall authorize
26 Franchisee to use the City's Public Rights-of-Way within the Franchise Area to



1 construct, repair, and operate a fiber optic Telecommunication System to provide
2 Telecommunication Service and internet access service, and to use the City's
3 Public Rights-of-Way as authorized herein.

4 Such grant is subject to and must be exercised in strict accordance
5 with this Franchise Agreement, Title 16B and other applicable provisions of the
6 TMC, and the Tacoma City Charter, including, but not limited to, the provisions set
7 forth in Article VIII of the Charter, and this Franchise may be revoked under
8 Section 2.5 if it is not so exercised. The exercise of any rights pursuant to this
9 Franchise is subject to the exercise of the City's police powers, and other regulatory
10 powers as the City may have or obtain in the future, and all rights granted herein
11 must be exercised in strict accordance with applicable laws, including, by way of
12 example and not limitation, zoning codes and permitting requirements. No rights
13 shall pass to Franchisee by implication. This Franchise shall constitute both a right
14 and an obligation to provide the services of the Telecommunications System as
15 required by the provisions of this Franchise.
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18 The grant of this Franchise is limited to the purpose of Franchisee
19 providing Telecommunications Service and internet access service. This Franchise
20 does not include permission to provide cable service, as defined in 47 U.S.C. § 522,
21 multichannel video programming, open video systems, or uses other than
22 Telecommunications Service.
23

24 Notwithstanding the above grant to use Public Rights-of-Way, no
25 Public Rights-of-Way shall be used by Franchisee if the City, in its opinion,
26 determines that such use is inconsistent with the terms, conditions or provisions by



1 which such Public Right-of-Way was created or dedicated, or presently used under
2 applicable laws.

3 In the event of any conflict between a provision in this Franchise and
4 any provision of the City Charter, which Charter is incorporated herein by reference,
5 the applicable provision of the Charter shall control over any inconsistent provision
6 of this Franchise.

7 2.2 Franchise Term. The term of the Franchise shall be ten years
8 unless terminated sooner in accordance with this Franchise, Title 16B, or the City
9 Charter. At the expiration of the term, Franchisee may apply to extend or renew the
10 Franchise as provided in TMC 16B.02.100.

11 2.3 Franchise Non-Exclusive. The Franchise granted herein shall be
12 non-exclusive.

13 2.4 Transfers, Generally.

14 A. Any transfer of this Franchise, as the term "Transfer" is
15 defined in TMC 16B.01.030.Y., shall be accomplished in accordance with
16 TMC 16B.02.120. Any Transfer not made in accordance with TMC 16B.02.120,
17 may be considered a substantial violation of this Franchise by the City and may
18 subject the Franchise to termination proceedings by the City as provided herein and
19 in Title 16B.

20 B. Applications for approval of any Transfer shall be filed in
21 accordance with procedures set out in Title 16B.

22 C. Franchisee shall, within 60 days of the closing date of any
23 Transfer, file with the City Clerk a copy of the deed, agreement, contract, mortgage,
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1 lease, SEC filing, or other written instrument evidencing such sale, lease,
2 contractual agreement, mortgage, assignment or Transfer, certified and sworn to as
3 correct by Franchisee, subject to any confidentiality provisions in any such
4 document. Every such Transfer, whether voluntary or involuntary, may be deemed
5 void and of no effect as to the effectiveness of this Franchise by the City unless
6 Franchisee files the required copy within the 60-day period.

7 D. The requirements of this section shall not be deemed to
8 prohibit the use of Franchisee's property as collateral for security in financing the
9 construction or acquisition of all or part of the Telecommunications System
10 franchised hereunder, provided that no such security shall purport to attach to the
11 City's real property interest in the Public Right-of-Way. In addition, no such
12 arrangement may be made if it would in any respect under any condition prevent
13 the Operator or any successor from complying with the Franchise and applicable
14 law. Any mortgage, pledge or lease shall be subject to and subordinate to the
15 rights of the City under this Franchise, and other applicable law.

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18 2.5 Revocation. In addition to any rights set out elsewhere in this
19 Franchise, the City Charter, or Title 16, subject to the notice and cure provisions
20 contained in TMC 16B.05.100, the City reserves the right to declare a forfeiture or
21 otherwise revoke this Franchise, and all rights and privileges pertaining thereto, as
22 provided in Title 16B or in the event that:

23
24 A. Franchisee is in non-compliance with a material provision
25 of this Franchise; or
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1 B. Franchisee is found to have engaged in any actual or
attempted fraud or deceit upon the City, Persons, or Customers in the City; or

2 C. Franchisee fails to obtain and maintain any permit required
3 by any federal or state regulatory body or by the City, relating to the construction,
4 repair and operation of the Facilities within the Public Rights-of-Way within the
5 Franchise Area; or

6 D. At any time during the term of the Franchise, Franchisee
7 fails to provide and maintain all of the securities required under this Franchise,
8 including, but not limited to, the performance bond required under this Franchise;
9 fails to maintain the insurance required by this Franchise; or fails to satisfy the
10 indemnity set out in this Franchise; or if any guarantor of Franchisee revokes its
11 guarantee or fails to satisfy or becomes unable to satisfy its obligations under such
12 guarantee.

13 E. The procedures for revocation and forfeiture shall be
14 governed by TMC 16B.05.100. Before the Franchise is revoked, Franchisee shall
15 be given notice and opportunity to cure at least equivalent to that required by
16 Title 16B as of the effective date of this Franchise (except in those cases where
17 notice and opportunity to cure are not required or would be futile), and shall be
18 accorded at least an opportunity to be heard that provides at least the due process
19 protections required by Title 16B as of the effective date of this Franchise, which
20 opportunities and protections are set out in Section 2.5.F., below.

21 F. (1) Where, after notice and providing Franchisee an
22 opportunity to be heard (if such opportunity is requested by Franchisee), the City
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1 finds that there has been an act or omission that would justify revocation of the
2 Franchise, the City may make an appropriate reduction in the remaining term of the
3 Franchise or revoke the Franchise. However, the Franchise may only be revoked if
4 Franchisee (a) was given written notice of the default; and (b) 30 days to cure the
5 default; and (c) Franchisee failed to cure the default, or to propose a schedule for
6 curing the default acceptable to the City where it is impossible to cure the default in
7 30 days. The required written notice shall be given before the City conducts the
8 proceeding required by this paragraph. No opportunity to cure is required for
9 repeated violations of material provisions of the Franchise, and fraud shall be
10 deemed incurable.
11

12 (2) Notwithstanding the foregoing, the City may declare
13 a Franchise forfeited without opportunity to cure when Franchisee: (a) fails to begin
14 to exercise its rights hereunder within 45 days of Franchisee's acceptance of this
15 Franchise; (b) stops providing all Service it is required to provide under the
16 Franchise; (c) Transfers without the prior consent of the City as and when required
17 in the Franchise; or (d) is found by a court or regulatory body with appropriate
18 jurisdiction to have defrauded or attempted to defraud the City or Franchisee's
19 customers within the City. Notwithstanding the provisions of TMC 16B.05.100C.2.,
20 if Franchisee fails to timely pay any undisputed Franchise application/administrative
21 fees or other fees owed hereunder or under Title 16B, before the City can initiate
22 any termination or forfeiture rights, Franchisee shall be provided with ten (10)
23 business days' prior written notice and an opportunity to cure the failure to pay.
24 However, Franchisee shall have the right to receive 30 days' prior notice of an
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1 intent to declare a Franchise forfeited, and shall have the opportunity to show cause
2 why the Franchise should not be forfeited.

3 (3) Notwithstanding the foregoing and only to the extent
4 permitted by applicable law, the Franchise will automatically terminate by force of
5 law 120 calendar days after an assignment for the benefit of creditors or the
6 appointment of a receiver or trustee to take over the business of Franchisee,
7 whether in a receivership, reorganization, bankruptcy assignment for the benefit of
8 creditors, or other action or proceeding. However, the Franchise may be reinstated
9 within that 120-day period, if: (a) such assignment, receivership or trusteeship has
10 been vacated; or (b) such assignee, receiver or trustee has fully complied with the
11 terms and conditions of Title 16B and this Franchise and has executed an
12 agreement, approved by any court having jurisdiction, assuming and agreeing to be
13 bound by the terms and conditions of Title 16B and this Franchise. However, in the
14 event of foreclosure or other judicial sale of any of the facilities, equipment, or
15 property of Franchisee, the City may revoke this Franchise, following a public
16 hearing before the City Council, by serving notice upon Franchisee and the
17 successful bidder at the sale, in which event the Franchise and all rights and
18 privileges of this Franchise will be revoked and will terminate 30 calendar days after
19 serving such notice, unless: (a) the City has approved the Transfer of the
20 Franchise to the successful bidder; and (b) the successful bidder has covenanted
21 and agreed with the City to assume and be bound by the terms and conditions of
22 this Franchise and Title 16B.
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2.6 Continuity of Service and Right to Purchase the System.

1 A. In the event the City has declared a forfeiture for cause or
2 otherwise validly revoked this Franchise as provided herein, or in the event of
3 expiration of the initial term of this Franchise without this Franchise being renewed
4 or extended as provided in Section 2.2 (referred to below collectively as a
5 “termination”), Franchisee shall remove its Facilities from the Public Rights-of-Way
6 under Section 2.7, unless the City elects to purchase the Facilities as provided in
7 Section 2.6.B.
8

9 B. In the event the City has declared a forfeiture for cause or
10 otherwise validly revoked this Franchise as provided herein, or in the event of
11 expiration of the initial term of this Franchise without this Franchise being renewed
12 or extended as provided in Section 2.2 (referred to below collectively as a
13 “termination”), the City shall have an option upon termination of the Franchise to
14 purchase that portion of the Telecommunications System located in the
15 Right-of-Way owned by Franchisee, whether termination is, or is not, for cause.
16 This option requires Franchisee to convey the Telecommunications System or such
17 portion thereof as the City may choose to purchase, provided, that nothing herein
18 shall require the City to accept or pay for any contract that it does not wish to
19 assume. Franchisee is not required to convey portions of the Telecommunications
20 System not located in the Right-of-Way, located outside the City, or that are leased
21 or used (but not owned) by Franchisee from a third party pursuant to a tariff or
22 contract. The foregoing option also requires Franchisee to sell the
23 Telecommunications System owned by Franchisee and located in the
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1 Right-of-Way, or such portion thereof as the City may choose to purchase at a fair
2 market price, if the Franchise is terminated for cause. If Franchisee's request for a
3 Franchise renewal is denied, the option requires Franchisee to sell the
4 Telecommunications System owned by the Franchisee and located in the
5 Right-of-Way, or such portion thereof as the City may choose to purchase, at fair
6 market value, determined on the basis of the value of the Telecommunications
7 System as a going concern (taking into account such property used and useful in
8 providing service within the City that is not to be conveyed) and with no value
9 allocated to the Franchise itself.
10

11 C. The City may exercise its Section 2.6.B. option rights in the
12 following manner: the City will have up to 180 days after receiving the inventory
13 required by Section 2.6.A. to notify Franchisee that it intends to exercise its right to
14 purchase the Telecommunications System or a portion of the Telecommunications
15 System. Within 90 days of the date the City notifies Franchisee of its intent to
16 exercise the option, or by such other time as the parties may separately agree, the
17 parties shall meet to establish a price that comports with the requirements of
18 Section 2.6.B. If the parties are unable to agree to a price within 180 days after the
19 City notifies Franchisee that the City intends to exercise its purchase option, either
20 party may require the price to be set by appraisal by sending the other party notice
21 that it wishes to have the price set by appraisal. Within 45 days of the date that
22 notice is submitted, each party may appoint one appraiser. If each party appoints
23 an appraiser, the two appraisers shall appoint a third appraiser; if only a single
24 appraiser is appointed (whether by mutual agreement or because of the failure of a
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1 To acquire by purchase or condemnation, for the use of the
2 City itself or its inhabitants, all of the property of the grantee
3 within the public streets, alleys, or places at a fair and just
4 value, which shall not include any valuation of the franchise,
5 right, or privilege, which shall thereupon be terminated.

6 (2) Likewise, nothing in this section or in any other
7 section of this Franchise shall be read to limit the City's right to acquire the
8 Telecommunications System through exercise of any right of eminent domain under
9 state law.

10 (3) Nothing in this section shall be read to limit the City's
11 right to acquire the Telecommunications System as a result of abandonment.

12 E. In the event the City purchases, acquires, takes over, or
13 holds all or parts of the System, the City shall have the right without limitation to
14 assign, sell, lease, or otherwise transfer its interest in all or parts of such System to
15 any other Person or entity, including any other Franchisee of a Telecommunications
16 System, on whatever terms the City deems appropriate.

17 2.7 Right to Require Removal of Property/Right to Remove Property.

18 A. Upon termination of this Franchise, Franchisee may be
19 required to remove its property from any Public Rights-of-Way, and restore such
20 Rights-of-Way to the condition required by the TMC and City's Right-of-Way
21 Restoration Policy, subject to any rights Franchisee may have to abandon property
22 in place, as set out in Title 16B. If Franchisee fails to remove property that the City
23 requires it to remove, the City may perform the work and collect the actual cost
24 thereof from Franchisee. The actual cost thereof, including direct and indirect
25 administrative costs, shall be a lien upon all plant and property of Franchisee
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1 effective upon filing of the lien with the Pierce County Auditor. In the event that
2 Franchisee is permitted to abandon its Facilities in place, the City acknowledges
3 that any ownership it takes in the Facilities thereafter is taken on an AS-IS,
4 WHERE-IS basis.

5 B. To the extent any portion of the System in the Public
6 Rights-of-Way or on any other public property of the City is not removed by the
7 Operator within 12 months of the end of the Franchise term, the property will be
8 deemed abandoned in its AS-IS, WHERE-IS condition and shall become the
9 property of the City if the City wishes to own it.

10 C. Any order by the City issued pursuant to Section 2.7.A. to
11 remove Facilities shall be sent by registered or certified mail, postage prepaid,
12 return receipt requested, to Franchisee not later than 24 months following the date
13 of Franchise termination. Removal shall be completed (except with respect to
14 property that Franchisee is permitted to abandon in place) not later than 12 months
15 following the date of notification to remove the Facilities.

16 D. Franchisee shall file a written removal plan with the City not
17 later than 30 calendar days following the date of the receipt of any orders directing
18 removal, or any consent to removal describing the work that will be performed, the
19 manner in which it will be performed, and a schedule for removal by location. The
20 removal plan shall be subject to approval and regulation by the City, including,
21 without limitation, the City's Right-of-Way Restoration Policy. The affected property
22 must be restored in compliance with the City's Right-of-Way Restoration Policy; and
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any damage caused by Franchisee's removal must be addressed/compensated to
1 the reasonable satisfaction of the City.

2 E. The purchase option provided for in Section 2.6 does not
3 affect the City's authority to require Franchisee to remove any portion of its
4 Telecommunications System that the City will not purchase upon Franchise
5 termination, as provided in this section and Title 16B, nor does it affect the City's
6 right to assume ownership of any portion of the Telecommunications System that is
7 abandoned. Within 60 days of a request by the City, Franchisee shall execute such
8 documents as may be required to convey such abandoned property to the City free
9 and clear of all encumbrances.
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12 2.8 Customers' Right to Obtain Service. It shall be the right of all
13 Customers to receive all available services insofar as their financial and other
14 obligations to Franchisee are honored during the term of the Franchise. In addition
15 to the obligations established under the other provisions of this Franchise, in the
16 event that Franchisee elects to overbuild, rebuild, modify, or sell the System,
17 Franchisee shall make its best effort to ensure that all Customers receive service
18 subject to the terms and conditions of the service contract then in effect between
19 the respective Customer and Franchisee.
20

21 2.9 Responsibility for Costs. Except as expressly provided otherwise,
22 any act that Franchisee is required to perform under this Franchise shall be
23 performed at its cost. If Franchisee fails to perform work that it is required to
24 perform within the time provided for performance, the City, after first providing
25 notice and an opportunity to cure as herein provided, may perform the work and bill
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1 Franchisee the actual cost thereof. Franchisee shall pay the amounts billed within
2 30 days of receipt of an itemized bill. The parties agree that any amounts paid
3 pursuant to this section or Title 16B are not franchise fees.

4 2.10 Work of Contractors and Subcontractors. Work by contractors
5 and subcontractors is subject to the same restrictions, limitations, and conditions as
6 if the work were performed by Franchisee. Franchisee shall be responsible for all
7 work performed by its contractors and subcontractors, and others performing work
8 on its behalf as if the work were performed by it, and shall ensure that all such work
9 is performed in compliance with this Franchise and Title 16B, and other applicable
10 laws, including, without limitation, the City's Right-of-Way Restoration Policy. A
11 copy of the presently effective policy has been provided to Franchisee, and the City
12 agrees to provide a current copy of the policy upon subsequent request from
13 Franchisee. Franchisee and its contractors and subcontractors shall be jointly and
14 severally liable for all damages and correcting all damages caused by them. It is
15 Franchisee's responsibility to ensure that contractors, subcontractors, or other
16 Person(s) performing work on Franchisee's behalf are familiar with the
17 requirements of this Franchise, Title 16B, the City's Right-of-Way Restoration
18 Policy, and other applicable laws governing the work performed by them.

19 2.11 Survival of Terms. Upon the termination or forfeiture of the
20 Franchise, Franchisee shall no longer have the right to occupy the Public
21 Rights-of-Way for the purpose of providing Telecommunications Service. However,
22 Franchisee's obligations to the City (other than the obligation to provide service to
23 Customers) survive the expiration of these rights according to their terms. By way
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1 of illustration and not limitation, Sections 2.6, 2.7, 2.9, 2.10, and 4 of this Franchise
2 shall continue in effect as to Franchisee notwithstanding any expiration, forfeiture,
3 or revocation of the Franchise, except to the extent that a City-approved Transfer,
4 sale, or assignment of the Telecommunications System is completed, and another
5 entity has assumed full and complete responsibility for the Telecommunications
6 System or for the relevant acts or omissions.

7 Section 3. Operation In Streets and Rights-Of-Way.

8 3.1 Use of Public Rights-of-Way. Franchisee may, subject to the
9 terms of this Franchise and Title 16B, the City's Right-of-Way Restoration Policy,
10 and other applicable laws, construct, operate, and maintain a fiber optic
11 Telecommunications System in Public Rights-of-Way within the Franchise Area, to
12 provide Telecommunications Services and internet access services. Without
13 limiting the foregoing, Franchisee expressly agrees that it will construct, operate,
14 and maintain its System in compliance with the requirements of Title 16B, including
15 those governing the placement of its Telecommunications System, and with other
16 applicable City codes; and will obtain and maintain all bonds and billable work
17 orders required by the same.
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20 3.2 Construction, Operation, or Repair. Franchisee shall, in all cases,
21 comply with all lawful City ordinances and regulations now in effect or hereinafter
22 enacted regarding the acquisition of permits and such other items as may be
23 required by the City in connection with the construction, operation, or repair of the
24 Telecommunications System, including, without limitation, the City's Right-of-Way
25 Restoration Policy.
26



1 Without limiting the foregoing, Franchisee agrees that it shall, in the course
2 of constructing, operating, and maintaining its Telecommunications System, comply
3 with the requirements of Title 16B and among other things:

4 A. (1) Franchisee shall, by a time specified by the City,
5 protect, support, temporarily disconnect, relocate, or remove any of its property
6 when required by the City by reason of traffic conditions; public safety; Public
7 Rights-of-Way construction; Public Rights-of-Way repair (including resurfacing or
8 widening); change of Public Rights-of-Way grade; construction, installation or repair
9 of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of
10 government-owned Communications System, public work, public project, public
11 facility, or improvement or any government-owned utility; Public Rights-of-Way
12 vacation; or for any other purpose where the work involved would be aided by the
13 removal or relocation of the Telecommunications System. Collectively, such
14 matters are referred to below as the "public work."
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16
17 (2) In the event of an emergency, or where the
18 Telecommunications System creates or is contributing to an imminent danger to
19 health, safety, or property, the City may protect, support, temporarily disconnect,
20 remove, or relocate any or all parts of the Telecommunications System without
21 prior notice, and charge Franchisee for actual costs incurred.
22

23 (3) In the case of non-public work, if any Person that is
24 authorized to place Facilities in the Rights-of-Way requests Franchisee to protect,
25 support, temporarily disconnect, remove, or relocate Franchisee's facilities to
26 accommodate the construction, operation, or repair of the facilities of such other



1 Person, Franchisee shall, after 30 days' advance written notice, take action to effect
2 the necessary changes requested. In the case of non-public work or non-public
3 projects, unless, and to the extent, the matter is governed by a valid contract
4 between Franchisee and such Person requesting Franchisee to take action under
5 this subsection (3) or governed by a valid state or federal law or regulation, or
6 unless Franchisee's Telecommunications System was not properly installed, the
7 reasonable cost of the same shall be borne by the Person requesting the
8 protection, support, temporary disconnection, removal, or relocation and at no
9 charge to the City, even if the City makes the request for such action.
10

11 (4) Franchisee shall, on the request of any Person
12 holding a valid permit issued by a governmental authority, temporarily raise or lower
13 its wires to permit the moving of buildings or other objects. The expense of such
14 temporary removal or raising or lowering of wires shall be paid by the Person
15 requesting the same.
16

17 B. Franchisee's obligation to construct, operate, and repair its
18 Telecommunications System in compliance with all applicable laws, ordinances,
19 departmental rules and regulations, and published or otherwise readily available
20 practices affecting such System, includes, by way of example and not limitation, the
21 obligation to construct, operate, and repair in accordance with zoning codes, safety
22 codes, and City construction standards, including the most current version of the
23 Standard Specifications for Road, Bridge and Municipal Construction, as prepared
24 by the Washington State Department of Transportation ("WSDOT") and the
25 Washington State Chapter of American Public Works Association ("APWA");
26



1 the most current version of the APWA Amendments to Division One, and the most
2 current version of the City Amendments thereto. In addition, the construction,
3 operation, and repair shall be performed in a manner consistent with industry
4 standards. Franchisee shall exercise reasonable care in the performance of all its
5 activities and shall use commonly accepted methods and devices for preventing
6 failures and accidents that are likely to cause damage, injury, or nuisance to the
7 public or to property. In the event that Franchisee's work or other use of the Public
8 Right-of-Way causes damage to any City facility, Franchisee shall bear the cost of
9 repairing, or replacing as necessary, such City facility.
10

11 C. Franchisee's construction, operation, or repair of its
12 Telecommunications System shall not commence until all required permits have
13 been properly filed for and obtained from the proper City officials and all required
14 permits and associated fees paid. In any permit so issued, the City may impose, as
15 a condition of the granting of the permit, such conditions and regulations as may be
16 necessary to the management of the Public Rights-of-Way, including, by way of
17 example and not limitation, for the purpose of protecting any structures in the Public
18 Rights-of-Way, maintaining proper distance from other utilities, for the proper
19 restoration of such Public Rights-of-Way and structures, and for the protection of
20 the City and the public and the continuity of pedestrian and vehicular traffic.
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23 D. Franchisee must follow City-established requirements for
24 placement of Facilities in Public Rights-of-Way, including the specific location of
25 Facilities in the Public Rights-of-Way, and must in any event install Facilities in a
26 manner that minimizes interference with the use of the Public Rights-of-Way by



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others, including others that may be installing Communications Facilities. The City may require that Facilities be installed at a particular time, at a specific place, or in a particular manner as a condition of access to a particular Public Right-of-Way area; may deny access if Franchisee is not willing to comply with the City's requirements; and may remove, or require removal of, any Facility that is not installed in compliance with the requirements established by the City, or which is installed without prior City approval of the time, place, or manner of installation and charge Franchisee for all the costs associated with removal; and may require Franchisee to cooperate with others to minimize adverse impacts on the Public Rights-of-Way through joint trenching and other arrangements consistent with requirements the City imposes on other similarly situated franchisees or users of the Public Rights-of-Way.

E. Franchisee agrees that, as a condition of a permit for installation of conduit, the City may require it to install conduit in excess of its reasonably foreseeable requirements for the purpose of accommodating the City where the City Manager determines it is appropriate to do so to minimize disruption of public passage or infrastructure, to forestall or relieve exhaustion of Right-of-Way capacity, or to protect environmentally sensitive areas; provided that the City will be responsible for the additional costs, including material and labor, associated with installing such excess conduit; and provided further that City's use of any such excess conduit is limited to non-commercial, governmental uses.



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F. To the extent possible and technically and operationally feasible, Franchisee shall use conduit existing at the time of permitting in installing its System.

G. Whenever all existing utilities are located underground in an area in the City, the Franchisee must also locate its Telecommunication System underground, including Telecommunication System Facilities, such as drops, which cross private property.

(1) Whenever the owners of poles locate or relocate underground within an area of the City, Franchisee shall concurrently relocate its Facilities underground at its own cost.

(2) Whenever an electric utility opens a trench for the purpose of installing or relocating Facilities underground, Franchisee shall concurrently relocate its Facilities underground and, if it uses the same trench, be responsible for its pro-rated share of the cost.

(3) The City Manager may, for good cause shown, exempt a particular portion of the Telecommunication System from the obligation to locate or relocate Facilities underground, where relocation is impractical, or where the interest in protecting against visual blight can be protected in another manner. Nothing in this Section 3.2.G. prevents the City from ordering Franchisee to locate or relocate its Telecommunication System underground in areas where other existing utilities are ordered to locate or relocate their facilities underground under other provisions of the TMC, it being the intent that the number and extent of



1 Overhead Facilities and the visual pollution resulting therefrom will, over time, be
2 reduced and eventually, to the extent feasible, be eliminated.

3 H. Franchisee shall participate in conversion to underground
4 Local Improvement Districts ("LIDs") at the same time as other utilities are required
5 to participate in conversion to underground LIDs. Franchisee, at no cost to the City
6 or abutting property owners, shall share fairly with other utilities the cost of
7 undergrounding when done through the LID process. As part of its obligations
8 under the TMC, Franchisee shall provide the preliminary cost estimate, facility
9 conversion designs, and final cost estimates to any LID project coordinator in a
10 timely manner. At the request of an LID project coordinator, Franchisee shall
11 perform underground construction and movement of Customer connections
12 underground (overhead reclaim), in coordination with the undergrounding services
13 provided by other LID utilities, at no cost to the City or abutting property owners.

14 I. Franchisee shall promptly repair any and all Public
15 Rights-of-Way, public property, or private property that is disturbed or damaged
16 during the construction, operation, or repair of its Telecommunications System.
17 Public property and Public Rights-of-Way must be restored in conformance with the
18 City's Right-of-Way Restoration Policy.

19 J. No tree trimming shall be performed without the permission
20 of the City and other affected authorities, and any tree trimming must be performed
21 in strict accordance with the TMC. Even if tree trimming is authorized by the City,
22 Franchisee is liable for any damage it causes during the course of tree trimming.
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1 K. In any dispute over the adequacy of a restoration relative to
2 this section, the City's Director of Public Works shall, in his/her sole discretion,
3 make the final determination.

4 L. Franchisee shall not remove any Facilities except as
5 hereinafter provided.

6 (1) Franchisee shall not remove any Facilities which
7 require trenching or other opening of the Rights-of-Way along the extension of the
8 Facilities to be removed without the express permission of the City, which
9 permission shall not be unreasonably withheld, conditioned, or delayed.
10 Franchisee must request permission from the City to remove the Facilities at least
11 30 days in advance of the date Franchisee proposes to begin removal.

12 (2) Franchisee shall remove such Facilities as the City
13 orders it to remove; provided, that the City may not order removal where such
14 removal is primarily to give economic benefit or advantage to a competing provider
15 of Telecommunications Service.

16 (3) Where trenching or other opening of the
17 Rights-of-Way along the extension of Facilities to be removed is required,
18 Franchisee must post bonds as the City may require to ensure that the property is
19 promptly removed, with minimum disruption. Franchisee must restore the affected
20 property in conformance with the City's Right-of-Way Restoration Policy; and
21 Franchisee must compensate those whose property it damages for the damage.

22 (4) Subject to the City's rights to purchase the
23 Telecommunications System under Section 2, Franchisee may voluntarily remove
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any Facilities from the streets which have been installed in such a manner that they can be removed without trenching or other opening of the Rights-of-Way.

3.3 Right To Inspect and Order Corrections. The City may inspect the Telecommunications System at any time reasonable under the circumstances to ensure compliance with this Franchise and applicable law, including to ensure that Franchisee's Telecommunications System is constructed and maintained in a safe condition. If Franchisee's representatives are not on-site performing work on the Telecommunications System, whenever feasible, the City shall give reasonable advance notice of its intent to inspect so that Franchisee may have a representative present during the inspection. If an unsafe condition is found to exist, the City, in addition to taking any other action permitted under applicable law, may order Franchisee, in writing, to make the necessary repairs and alterations specified therein forthwith to correct the unsafe condition on a time table established by the City which is reasonable in light of the unsafe condition. The City has the right to correct, inspect, administer, and repair the unsafe condition if Franchisee fails to do so in a timely manner, and to charge Franchisee therefor.

3.4 Information Regarding Ongoing Work. In addition to providing notice to the public of ongoing work as may be required under applicable law, Franchisee shall make available information regarding any ongoing construction, operation or installation of its Telecommunications System sufficient to show (1) the nature of the work being performed; (2) where it is performed; (3) its estimated completion date; and (4) progress to completion.



Section 4. Regulatory Provisions.

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4.1 Intent. The City shall have the right to administer and regulate activities of this Franchise up to the fullest extent of the law. The failure to reserve a particular right to regulate, or reference a particular regulation, shall not be interpreted by negative implication or otherwise to prevent the application of a regulation to Franchisee.

4.2 Remedies for Franchise Violations. The City has the right to exercise any and all of the following remedies, singly or in combination, in the event Franchisee violates any provision of this Franchise:

A. Draw upon the performance bond or other security provided under this Franchise; provided, however, such drawing shall be only in such a manner and in such amount as the City reasonably determines is necessary to remedy the default. Should the City take this action, Franchisee shall be responsible for all direct and actual costs related to such action, including, but not limited to, actual legal and administrative costs:

B. Commencing an action at law for monetary damages;

C. Commencing an action for equitable or other relief;

D. Declaring the Franchise to be revoked; and/or

E. Seeking specific performance of any provision, which reasonably lends itself to such remedy.

In determining which remedy or remedies for Franchisee's violation are appropriate, the City may take into consideration the nature and extent of the violation, the remedy needed to prevent such violations in the future, whether



1 Franchisee has a history of previous violations of the same or similar kind, and such
2 other considerations as are appropriate under the circumstances. Remedies are
3 cumulative; the exercise of one shall not foreclose the exercise of others.

4 4.3 Procedure for Remediating Franchise Violations. Before imposing
5 liquidated damages, or drawing upon the performance bond, or any other security
6 set out in Section 6, the City shall follow the procedure below.

7 A. Notice of Violation. In the event that the City believes that
8 Franchisee has not complied with the terms of this Franchise, the City shall notify
9 Franchisee in writing, by certified mail, of the nature of the alleged noncompliance.
10

11 B. Franchisee's Right to Cure or Respond. Except as provided
12 in Section 4.3.D., Franchisee shall have 30 days from the receipt of notice
13 described above to (1) respond to the City contesting the assertion of
14 noncompliance, or (2) to cure such default or, in the event that by the nature of the
15 default such default cannot be cured within the 30-day period, initiate steps to
16 remedy such default as promptly as possible and complete the cure within a
17 reasonable time. The duty to cure includes the duty to cure all harms caused by
18 the acts or omissions of Franchisee which gave rise to the alleged non-compliance.
19 At the end of the 30-day period, Franchisee shall notify the City, in writing, of the
20 steps it has taken to cure the default, if any; if the cure is not complete, the reason it
21 is not complete and the projected date for completion; and if the default is disputed,
22 the complete basis for that contention.
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24 C. Public Hearing. The City may schedule a public hearing to
25 investigate any alleged default. The City shall give Franchisee 20 calendar days'
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notice of the time and place of the hearing and provide Franchisee with an
1 opportunity to be heard.

2 D. Action after Hearing. If the City determines after such
3 hearing that Franchisee did not timely cure, or initiate steps to cure the default in a
4 timely manner satisfactory to the City, after the notice required by Section 4.3.A.
5 was provided, then the City may draw upon any performance bond, security fund,
6 or other security, including requiring performance under the guarantee; and impose
7 liquidated damages. However, notice and opportunity to cure are not required for
8 repeat violations, or for a failure to correct a default where Franchisee knew or
9 should have known it was in default; in such cases, the performance bond, letter of
10 credit, or other security may be drawn upon, the guarantor required to perform and
11 liquidated damages imposed after the hearing required by Section 4.3.C.

12 E. Liquidated Damage Amounts. Because any material failure
13 to comply with the provisions of this Franchise by Franchisee will result in injury to
14 the City, and because it may be difficult to estimate the extent of each such injury,
15 Franchisee and the City agree to the following liquidated damages, which
16 provisions represent the best estimate of the damages resulting from injuries of
17 specific types. The amounts of the liquidated damages set forth in this Franchise
18 are in 2016 dollars and shall be increased each year by the increase in the
19 U. S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for
20 Pacific Cities and U. S. City Average for the greater Seattle area. The amount of
21 liquidated damages for all material violations of this Franchise for which actual
22 damages may not be ascertainable shall be \$500 per day for each violation for
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1 each day the violation continues. It is provided, however, that the City shall allow
2 Franchisee a minimum of 30 days after notice to Franchisee of such neglect,
3 failure, or refusal to comply within which to meet compliance or correct
4 performance, prior to the assessment of any liquidated damages.

5 4.4 Failure to Enforce. Franchisee shall not be relieved of any of its
6 obligations to comply promptly with any provision of this Franchise by reason of any
7 failure of the City to enforce prompt compliance, and the City's failure to enforce
8 shall not constitute a waiver of rights or acquiescence in Franchisee's conduct.

9 4.5 Force Majeure. Franchisee shall not be deemed in default with
10 provisions of this Franchise where performance was rendered impossible by war or
11 riots, civil disturbances, floods, or other natural catastrophes beyond Franchisee's
12 control; the unforeseeable unavailability of labor or materials; or power outages
13 exceeding back-up power supplies. The acts or omissions of affiliates shall not be
14 deemed to be beyond Franchisee's control, and the knowledge of affiliates shall be
15 imputed to Franchisee. This Franchise shall not be revoked or Franchisee
16 penalized for such noncompliance, provided that Franchisee takes immediate and
17 diligent steps to bring itself back into compliance and to comply as soon as possible
18 under the circumstances with this Franchise without unduly endangering the health,
19 safety, and integrity of Franchisee's employees or property, or the health, safety,
20 and integrity of the public, Public Rights-of-Way, public property, or private property.

21 4.6 Alternative Remedies. No provision of this Franchise shall be
22 deemed to bar the right of the City or Franchisee to seek or obtain judicial relief
23 from a violation of any provision of the Ordinance or any rule, regulation,
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1 requirement, or directive promulgated thereunder. Neither the existence of other
2 remedies identified in this Franchise nor the exercise thereof shall be deemed to
3 bar or otherwise limit the right of the City or Franchisee to recover monetary
4 damages for such violation by Franchisee, or to seek and obtain judicial
5 enforcement of Franchisee's or the City's obligations by means of specific
6 performance, injunctive relief or mandate, or any other judicial remedy at law or in
7 equity.

8 4.7 Compliance with the Laws. Franchisee shall comply with all
9 applicable federal and state laws and regulations, including regulations of any
10 administrative agency thereof, as well as all applicable City ordinances, resolutions,
11 rules, policies, and regulations heretofore or hereafter adopted or established
12 during the entire term of the Franchise; provided that, nothing herein shall prevent
13 Franchisee from challenging a provision of laws that applies only to it as an
14 impairment of contract. Nothing in this Franchise shall limit the City's right of
15 eminent domain under state law. Nothing in this Franchise shall be deemed to
16 waive the requirements of any lawful code or resolution of the City regarding
17 permits, fees to be paid, or manner of construction.

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20 Section 5. Reporting Requirements.

21 5.1 Quarterly Reports. Within 30 days after the end of each of
22 Franchisee's fiscal quarters, Franchisee shall submit a written report to the City,
23 which shall contain a listing of all categories Gross Receipts collected by
24 Franchisee for its business activities as identified in Section 2.1, which are
25 activities specifically taxable as a telephone business under TMC Title 6. Said
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1 written report shall be in sufficient detail and with sufficient explanation to enable
2 the City to understand the report and to verify the accuracy of the report. In
3 addition, Franchisee shall provide such other reports as may be required by
4 Title 16B.

5 5.2 Annual Report. In the event that changes in applicable laws allow
6 the City to require a franchise fee as referenced at Section 6 below, then no later
7 than 120 days following the end of Franchisee's fiscal year each year after the
8 imposition of franchise fees, Franchisee shall present a written report to the City
9 which shall include:

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11 A. Audited financial statements for (1) Franchisee and (2) any
12 affiliate which is involved in any way with the operation or ownership of the System;
13 and a financial statement for Franchisee that includes Gross Receipts from all
14 sources, gross Subscriber revenues from each category of service, as well as an
15 income statement and a balance sheet. In the event any audited financial report
16 has not been published by the date due under this section, then the audited
17 financial report shall be deemed presented on time if presented within 30 days after
18 publication.
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20 All financial reports required under this section shall be
21 presented to the City accompanied by such notes and explanations as are required
22 to fully understand the reports. Such notes and explanations shall include, but not
23 be limited to, an explanation of any and all deductions made from Gross Receipts
24 for the calculation of Fees or taxes to be paid to the City, as well as:
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1 1. A summary of the previous year's activities for the
2 Franchise Area, including, but not limited to, the total number of Customers, miles
3 of Facilities, any services added or dropped, and any technological changes
4 occurring in the system;

5 2. Plans for the future; and

6 3. Such other information as is required by Title 16B.

7 5.3 Additional Reports. Franchisee shall prepare and furnish to the
8 City within 60 days of written request, to the person and address specified in the
9 City's request, in a form reasonably prescribed by the City, such additional reports
10 with respect to Franchisee's operation, affairs, transactions, or property, as may be
11 reasonably necessary and appropriate to ensure compliance with the material
12 provisions of this Franchise, or to permit the performance of any of the rights,
13 functions, or duties of the City in connection with the Franchise.
14

15 5.4 Preservation of Confidential Information. Trade secrets and
16 confidential information designated as such by Franchisee shall be subject to such
17 protection as provided in Title 16B or under Chapter 42.56 RCW, or as otherwise
18 provided by applicable laws. Franchisee shall be responsible for clearly and
19 conspicuously identifying the work as confidential or proprietary, and shall provide a
20 brief written explanation regarding its position on the protected status of the
21 information under State or federal law. In the event that the City receives a public
22 records request under Chapter 42.56 RCW or similar law for the disclosure of
23 information Franchisee has designated as confidential, trade secret, or proprietary,
24 the City shall promptly provide notice of such disclosure so that Franchisee can
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1 take appropriate steps to protect its interests. Nothing in this section prohibits the
2 City from complying with Chapter 42.56 RCW, or any other applicable law or court
3 order requiring the release of public records, and the City shall not be liable to
4 Franchisee for compliance with any law or court order requiring the release of
5 public records. The City shall comply with any injunction or court order obtained by
6 Franchisee which prohibits the disclosure of any such confidential records.

7 Section 6. Compensation and Financial Provisions.

8 6.1 Fees; Taxes.

9 A. State Prohibition of Franchise Fee. The parties understand
10 that RCW 35.21.860 currently prohibits a municipal franchise fee. Franchisee
11 agrees that if this statutory prohibition is removed, the City may assess a
12 reasonable franchise fee, to be agreed to by the parties if the statutory prohibition is
13 removed. The parties agree that this Section 6.1.A. does not limit the right of the
14 Franchisee to challenge the franchise fee pursuant to 47 USC § 253.

15 B. Franchisee Subject to the City Telephone Business Tax.

16 Franchisee agrees that its activities in the City of Tacoma identified in Section 2.1,
17 but excluding internet access service, are activities specifically taxable as a
18 telephone business under TMC Chapter 6A, and are taxable at the 6 percent rate
19 specified in TMC 6A.40.050.D. now in effect or as amended, which at the time of
20 the execution of this Franchise agreement is 6 percent of Franchisee's Gross
21 Receipts but excluding any Gross Receipts from the provision of internet access
22 service. It is agreed that the amount of Gross Receipts to be taxed will include the
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1 amount of tax imposed on Franchisee by City ordinance. This Franchise does not
2 limit the City's power of taxation.

3 C. Franchisee Obligated to Pay Administrative Costs. In
4 accord with RCW 35.21.860 as presently effective, and as it may be later amended,
5 Franchisee must pay the City an amount sufficient to recover administration
6 expenses incurred in receiving and approving this Franchise, including, but not
7 limited to, the reasonable costs of outside consultants retained by the City to assist
8 in the City's consideration and processing of this Franchise application. The first
9 \$5,000 of said expenses will be covered by the \$5,000 application fee deposited
10 with the City. To the extent allowed by RCW 35.21.860 or other applicable laws,
11 Franchisee may be required to pay other costs applicable to this Franchise and
12 Franchisee's activities hereunder. The amount of payment to be made by
13 Franchisee to cover these administrative costs is an amount determined to be
14 reasonable by the Franchise Services Manager. Such obligation further includes
15 municipal fees related to receiving and approving permits or licenses, inspecting
16 plans and construction, or relating to the preparation of a detailed statement pursuant
17 to Chapter 43.21C RCW. Said fees must be paid within 30 days of receipt of the
18 City's billing therefor.
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21 D. Manner of Payment; Audit. Franchisee will pay the City
22 Telephone Business Tax specified in Section 6.1.B. on a monthly basis accompanied
23 by Franchisee's standard remittance form which specifies the net taxable charges, the
24 local tax rate, and the local tax due, plus penalties and/or interest, if any is due.
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26 Franchisee shall make all other required fee payments in the form, at the intervals,



1 and in the manner requested by the City Treasurer, and furnish him/her any
2 information related to his/her revenue collection functions reasonably requested. In
3 case of audit, the City Treasurer may require Franchisee to furnish a verified
4 statement of compliance with Franchisee's obligations or in response to any
5 questions. Said certificate may be required from an independent, certified public
6 accountant, at Franchisee's expense. All audits will take place on Franchisee's
7 premises or offices furnished by Franchisee, which shall be a location within the City
8 of Tacoma or other mutually agreeable place; however, Franchisee must agree to pay
9 the associated costs. Franchisee agrees, within 30 days of written request of the City
10 Treasurer, to provide, to the person and address specified in the City Treasurer's
11 request, copies of all documents filed with any federal, state, or local regulatory
12 agency, to be mailed to the City Treasurer on the same day as filed, postage prepaid,
13 affecting any of Franchisee's Facilities or business operations in the City of Tacoma.

14
15 E. No Other Deductions. No deductions, including current or
16 previously paid fees, shall be subtracted from the Gross Receipts amount, except
17 as allowed under state or federal law, upon which payments are calculated and due
18 for any period, nor shall copyright fees or other license fees paid by Franchisee be
19 subtracted from Gross Receipts for purposes of calculating payments.
20

21
22 F. Late Payments. Any fees owing which remain unpaid more
23 than 10 days after the dates specified herein shall be delinquent and shall thereafter
24 accrue interest at the maximum allowable rate pursuant to RCW 19.52.020.

25
26 G. Period of Limitations. The period for commencing an action for
the recovery of any fee payable hereunder shall be six years from the date on



1 which payment by Franchisee is due, subject to tolling as provided as a matter of
2 law or equity. Unless within six years from and after the due date for a particular
3 payment, the City makes written request to review Franchisee's records with
4 respect to such fee payment (either individually or as part of a broader request)
5 recovery shall be barred with respect to such payment and the Franchising
6 Authority shall be estopped from asserting any claims whatsoever against
7 Franchisee relating to any alleged deficiencies in that particular payment.

8 6.2 Auditing and Financial Records. Franchisee shall manage all of
9 its operations in accordance with a policy of keeping books and records open and
10 accessible to the City. Without limiting its obligations under this Franchise,
11 Franchisee agrees that it will collect and make books and records available for
12 inspection and non-confidential books and records for copying by the City in
13 accordance with Title 16B. Franchisee shall be responsible for collecting the
14 information and producing it. Books and records shall be made available for
15 inspection to the City at the Tacoma Municipal Building, or such other location as
16 the parties may agree. Notwithstanding any provision of Title 16B or this Franchise,
17 if documents are too voluminous or for security reasons cannot be produced at the
18 Tacoma Municipal Building or mutually agreeable location within the City, then
19 Franchisee may produce the material at another central location, provided it also
20 agrees to pay the additional reasonable costs incurred by the City in reviewing the
21 materials.
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25 Franchisee shall take all steps reasonably required, if any, to ensure
26 that it is able to provide the City all information which must be provided or may be



1 requested under Title 16B or this Franchise, including by providing appropriate
2 Subscriber privacy notices. Nothing in this section shall be read to require
3 Franchisee to violate 47 U.S.C. §§ 222 or 551 or to disclose or make available to
4 the City any books and records protected from disclosure under other applicable
5 law. Franchisee shall be responsible for redacting any data that federal law
6 prevents it from providing to the City. Records shall be kept for at least six years.
7 In addition to maintaining all records as required by Title 16B, Franchisee shall
8 maintain records sufficient to show its compliance with the requirements of this
9 Franchise, and shall produce those records within 30 days of a City request.
10

11 Franchisee agrees to meet with a representative of the City upon
12 request to review its methodology of record-keeping, financial reporting, computing
13 fee obligations, and other procedures, the understanding of which the City deems
14 necessary for understanding the meaning of reports and records.
15

16 The City agrees to request access to only those books and records, in
17 exercising its rights under this section, which it deems reasonably necessary as
18 part of a bona fide exercise of its authority over the Telecommunications System
19 under this Franchise, Title 16B, or other applicable law. The City further agrees
20 that it will withhold from public disclosure those books and records made available
21 to it pursuant to this Section 6.2, but only to the extent that the City believes that it
22 has the discretion to do so under state law. The City will, however, provide notice
23 to Franchisee of any request for such books and records so that Franchisee can
24 engage whatever protective measures are available to it.
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1 6.3 Performance Bond. At the same time it provides its Franchise
2 acceptance to the City, Franchisee shall provide a performance bond to ensure the
3 faithful performance of its responsibilities under this Franchise and applicable law,
4 including, by way of example and not limitation, its obligations to relocate and
5 remove its facilities, and to restore City Rights-of-Way and other property. The
6 initial amount of the performance bond shall be \$250,000. The amount of the bond
7 may be changed from time to time to reflect changed risks to the City or to the
8 public. Franchisee may be required to obtain additional bonds in accordance with
9 the City's ordinary practices and/or pursuant to applicable TMC provisions. The
10 bond shall be in a form and with a surety (authorized to do business in the state of
11 Washington) reasonably acceptable to the City's Risk Manager and in a form
12 reasonably acceptable to the City Attorney. Franchisee shall pay all premiums or
13 costs associated with maintaining the bond, and shall keep the same in full force
14 and effect at all times during the Franchise Term.
15

16 6.4 Indemnification by Franchisee.

17 A. Franchisee, by accepting this Franchise, agrees to release
18 the City from and against any and all liability and responsibility in or arising out of,
19 or by reason of, or resulting from or of the negligent acts, errors, or omissions of
20 Franchisee during the construction, operation, or maintenance of the
21 Telecommunications System, and, without limiting the provisions of Section 7.4,
22 agrees not to sue or seek any money or damages from the City, except to the
23 extent Franchisee's Telecommunication System is damaged by the negligent acts
24 or omissions or willful misconduct of the City or its agents.
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B. Franchisee agrees to indemnify and hold harmless the City, its trustees, elected and appointed officers, agents, and employees, from and against any and all claims, demands, or causes of action of whatever kind or nature, and the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities, damages, orders, judgments, or decrees, sustained by any third party arising out of, or by reason of, or resulting from or of the acts, errors, or omissions of Franchisee, or its agents, independent contractors, or employees related to or in any way arising out of the construction, operation, repair, or relocation of the Telecommunications System. Franchisee waives immunity under Title 51 RCW and affirms that the City and Franchisee have specifically negotiated this provision, as required by RCW 4.24.115, to the extent it may apply.

C. Franchisee agrees that the covenants and representations relating to the indemnity provided in Sections A and B above shall survive the term/expiration/termination of this Franchise and continue in full force and effect as to Franchisee's responsibility to indemnify.

6.5 Franchisee Insurance.

A. Franchisee shall maintain, throughout the term of the Franchise, adequate insurance to protect the City, its trustees, elected and appointed officers, agents, and employees against claims and damages that may arise as a result of the construction, operation, or repair of the Telecommunications System.



B. General Requirements.

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1. The insurance must be provided by an insurer with a rating of A [-] VII or higher in A.M. Best's Key Rating Guide and pursuant to RCW 48, licensed to do business in the state of Washington (or issued as a surplus line by a Washington Surplus lines broker). The City reserves the right to approve or reject the insurance provided, based upon the insurer (including financial condition), terms and coverage, the Certificate of Insurance, and/or endorsements.

2. Franchisee shall keep this insurance in force during the entire term of the contract and for 30 days after completion of all work required by the Contract, unless otherwise provided herein.

3. The liability insurance policies required by this section shall contain a "severability of insureds," "separation of interest," or "cross liability" provision.

4. The insurance required by the section shall be primary and non-contributory insurance to any insurance coverage or self-insurance program the City may maintain. The General Liability and Automobile Liability insurance must contain a Waiver of Subrogation endorsement in favor of the City.

5. Franchisee shall provide the City not less than 30 days' notice of any cancellation or non-renewal of this required insurance.

6. Upon request, Franchisee shall forward to the City a full and certified copy of the insurance policy(s) and endorsements required by this section.



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7. Franchisee shall not begin work under the Contract

until the required insurance has been obtained and approved by the City.

8. Failure on the part of Franchisee to obtain and

maintain the insurance as required by this section shall constitute a material default of the Franchise, upon which the City may revoke the Franchise in accordance with Section 2.5.

9. Franchisee shall be required to maintain insurance

at least in the following amounts:

(a) Commercial General Liability Insurance

Services Office ("ISO") Form CG0001(04-13) or its equivalent. A policy of

Commercial General Liability Insurance ("CGL"), shall be written on an

"occurrence," not "claims made," basis, and shall include the following coverage:

- A per project aggregate
- Products Hazard/Completed Operations - Shall be maintained for a period of six years after the termination of the Franchise or License (in the case of the communication System owner or operator) or completion of the work for the Communications System Owner or Operator (in the case of contractor or subcontractor).
- Personal/Advertising Injury
- Contractual Liability
- Explosion, Collapse, or Underground Property Damage
- Blasting (only required when Franchisee's work under this Contract includes exposures to which this specified coverage responds)
- If Franchisee is performing work within 50 feet of a railroad right-of-way, the General Liability policy shall be endorsed to eliminate the Contractual Liability exclusion pertaining to work within 50 feet of a railroad right-of-way using ISO Form CG2417(10-01) or the equivalent.



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- The City of Tacoma, its trustees, elected and appointed officers, agents, and employees shall be included as an additional insured for both ongoing and completed operation using ISO Forms CG2026(04-13) and CG 2037(04-13) or the equivalent.
- Primary and Non-Contributory with any insurance or self-insurance maintained by the City.
- Waiver of Subrogation in favor of the City.

(b) Workers' Compensation insurance shall be maintained during the life of this contract to comply with statutory limits for all employees, and in the case any work is sublet, Franchisee shall require its contractors and subcontractors similarly to provide workers' compensation insurance for all the latter's employees unless such employees are covered by the protection afforded by Franchisee. Franchisee shall also maintain during the life of this policy employers liability insurance. The following minimum limits must be maintained:

(i) Workers' Compensation	Statutory
(ii) Employer's Liability	\$1,000,000 per occurrence

(c) Commercial Automobile Liability Coverage using Insurance Services Office form CA0001 or the equivalent and shall include all owned (if any), hired, and non-owned vehicles, with a limit not less than \$1,000,000 each accident for bodily injury and property damage. Such insurance shall be Primary and Non-Contributory with any insurance or self-insurance maintained by the City and shall contain a Waiver of Subrogation in favor of the City.

(d) A Commercial Umbrella Liability or Excess Liability policy with limits not less than \$5,000,000 each occurrence and \$5,000,000



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aggregate. Such policy must provide coverage in excess of the above required Commercial General Liability, Commercial Automobile Liability, and Employer's Liability policies.

C. The required insurance must be obtained and maintained for the entire period Franchisee has facilities in the Public Rights-of-Way, and for six years thereafter. If Franchisee, its contractors, or subcontractors do not have the required insurance, the City may order such entities to stop operations until the insurance is obtained and approved.

D. Certificates of insurance, reflecting evidence of the required insurance and naming the City as an additional insured with all required endorsements on the General Liability and Automotive policies described above, shall be filed with the City's Risk Manager. The certificate shall be filed with the acceptance of the Franchise, and annually thereafter, and as provided in Section E below.

E. Policies shall be issued by companies authorized to do business under the laws of the state of Washington. Financial Ratings must be no less than A [-] VII in the latest edition of A.M. Best's Key Rating Guide.

F. In the event that the insurance certificate provided indicates that the insurance shall terminate or lapse during the period of the Franchise, Franchisee shall furnish, at least 30 days prior to the expiration of the date of such insurance, a renewed certificate of insurance as proof that equal and like coverage has been or will be obtained prior to any such lapse or termination during the balance of the period of the Franchise.



1 G. The City shall reserve the right to require any other
2 insurance coverage it deems necessary during the term of the Franchise,
3 depending upon the exposures.

4 H. It is Franchisee's responsibility to ensure that each
5 subcontractor obtains and maintains adequate liability insurance coverage, and
6 upon request of the City, Franchisee shall provide evidence of such insurance.

7 6.6 Security Fund. Franchisee shall establish a cash security fund or
8 provide the City an irrevocable letter of credit or assignment of funds in the amount
9 of \$50,000 to secure the payment of fees owed, to secure any other performance
10 promised in this Franchise, and to pay any taxes, fees, or liens owed to the City.
11 The letter of credit shall be in a form and with an institution acceptable to the City's
12 Director of Finance and in a form acceptable to the City Attorney. Should the City
13 draw upon the cash security fund or letter of credit or assignment of funds, it shall
14 promptly notify Franchisee, and Franchisee shall promptly restore the fund or the
15 letter of credit or assignment of funds to the full required amount. The City may
16 from time to time change the amount of the required security fund/letter of
17 credit/assignment of funds to reflect changes in the risks to the City and to the
18 public, including delinquencies in taxes or other payments to the City.
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22 Section 7. Miscellaneous Provisions.

23 7.1 Posting and Publication. Franchisee shall assume the cost of
24 posting and publication of this Franchise as such posting and publication is required
25 by law and such is payable upon Franchisee's filing of acceptance of the Franchise.
26



1 7.2 Guarantee of Performance. Franchisee acknowledges that it
2 enters into the Franchise voluntarily in order to secure and in consideration of the
3 grant from the City of a ten-year Franchise. Performance pursuant to the terms
4 and conditions of this Franchise agreement is guaranteed by Franchisee.

5 7.3 Governing Law and Venue. The Franchise shall be governed
6 by and construed in accordance with the laws of the state of Washington without
7 recourse to any principles of Conflicts of Laws, except that where federal law
8 applies it shall control. Any litigation between the City and Franchisee arising
9 under or regarding this Franchise shall occur, if in the state courts, in the Superior
10 Court of Pierce County, and if in the federal courts, in the United State District
11 Court for the Western District of Washington.
12

13 7.4 No Recourse. Without limiting such immunities as the City or
14 other Persons may have under applicable law, Franchisee shall have no monetary
15 recourse whatsoever against the City or its officials, boards, commissions, agents,
16 or employees for any loss, costs, expense, or damage arising out of any provision
17 or requirement of Title 16B or because of the enforcement of Title 16B or the City's
18 exercise of its authority pursuant to Title 16B, this Franchise, or other applicable
19 law, except to the extent Franchisee's Telecommunication System is damaged by
20 the negligent acts or omissions or willful misconduct of the City or its
21 representatives.
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24 7.5 Notice. Unless expressly otherwise agreed between the parties,
25 every notice, billing, or response required by this Franchise to be served upon the
26 City or Franchisee shall be in writing, and shall be deemed to have been duly given



1 to the required recipient upon actual receipt or refusal of delivery and shall be sent
2 by a nationally recognized overnight courier or by U.S. certified mail, return receipt
3 requested, postage prepaid. The notices or responses to the City shall be
4 addressed as follows:

5 City of Tacoma
6 Municipal Services Building
7 1224 MLK Jr Way
8 Tacoma, WA 98405
9 Attn: Franchise Services Manager

10 The notices or responses to Franchisee shall be addressed as follows:

11 Astound Broadband, LLC
12 Attn: Bryon Springer, Executive Vice President – Legal and Business Affairs
13 401 Kirkland Parkplace, Suite 500
14 Kirkland, WA 98033

15 With copies to:

16 Astound Broadband, LLC
17 Attn: James A. Penney, General Counsel
18 401 Kirkland Parkplace, Suite 500
19 Kirkland, WA 98033

20 Cinnamon Mueller
21 Attn: Jake Baldwin, Outside Counsel
22 307 N. Michigan Ave., Suite 1020
23 Chicago, IL 60601

24 The City and Franchisee may designate such other address from time
25 to time, by giving written notice to the other, but notice cannot be required to more
26 than two addresses.

7.6 Execution. Franchisee shall execute and return to the City three
original countersigned copies of this Ordinance and a signed acceptance of the
Franchise granted hereunder within 30 days after the date of passage of the



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Ordinance by the City Council. The acceptance shall be submitted in the form attached hereto or other form acceptable to the City Attorney and in accepting the Franchise, Franchisee warrants that it has carefully read the terms and conditions of this Franchise and unconditionally accepts all of the terms and conditions of this Franchise and agrees to abide by the same, and acknowledges that it has relied upon its own investigation of all relevant facts, that it has had the assistance of counsel, that it was not induced to accept a Franchise, that this Franchise represents the entire agreement between Franchisee and the City, and that Franchisee accepts all risks related to the interpretation of this Franchise. The countersigned Ordinance and acceptance shall be returned to the City accompanied by: evidence of insurance; a payment for publication costs; billable work order deposit; the security fund deposit; and the performance bond.

The Franchise rights granted herein shall not become effective until all of the foregoing is received in acceptable form. In the event Franchisee fails to submit the countersigned Ordinance and acceptance as provided for



1 herein, or fails to provide the required accompanying documents and payments,
2 within the time limits set forth in this section, the grant of the Franchise shall be
3 null and void.

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5 Passed _____

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7 _____
Mayor

8 Attest:
9 _____
City Clerk

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11 Approved as to form:
12 _____
13 Deputy City Attorney

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ACCEPTANCE OF CITY FRANCHISE

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Ordinance No. _____, effective _____, 2016.

I, _____, am the _____ of Astound
Broadband, LLC a Washington limited liability company, and wholly-owned
subsidiary of WaveDivision, Holdings LLC, sole member and am the authorized
representative to accept the above referenced City franchise ordinance on behalf of
Astound Broadband, LLC.

I certify that this franchise and all terms and conditions thereof are accepted
by Astound Broadband, LLC.

DATED this _____ day of _____, 2016.

Astound Broadband, LLC
by: WaveDivision Holdings LLC., its sole member

By _____

Its _____