



**CITY OF MILWAUKIE**  
*"Dogwood City of the West"*

**Ordinance No. 2081**

**An ordinance of the City Council of the City of Milwaukie, Oregon, granting to Astound Broadband, LLC, a Washington limited liability company, a franchise to construct, operate and maintain a telecommunications network within the City of Milwaukie, Oregon.**

**WHEREAS**, Astound Broadband, LLC, an Oregon limited liability company provides Telecommunications services within the City of Milwaukie, Oregon; and

**WHEREAS**, Astound has applied for a Telecommunications Franchise pursuant to local ordinances relating to Telecommunications located in the public rights of way, and the City of Milwaukie "City" has reviewed said application and has determined that it meets the requirements of the City's Ordinance subject to the terms and conditions stated herein.

**Now, Therefore, the City of Milwaukie does ordain as follows:**

Section 1. Council approves the Telecommunications Franchise attached to this Ordinance as Exhibit A and incorporated herein by this reference.

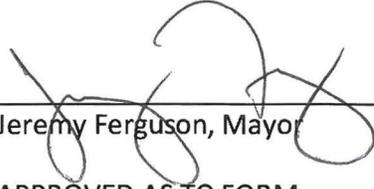
Section 2. Council authorizes the City Manager to sign the agreement attached to this ordinance as Exhibit A on behalf of the City of Milwaukie.

Section 3. This ordinance and the franchise attached as Exhibit A become effective 30 days after Council passage.

Read the first time on 7/15/14, and moved to second reading by 4:1 vote of the City Council.

Read the second time and adopted by the City Council on 8/5/14.

Signed by the Mayor on 8/5/14

  
\_\_\_\_\_  
Jeremy Ferguson, Mayor

APPROVED AS TO FORM:  
Jordan Ramis PC

ATTEST:

  
\_\_\_\_\_  
Pat DuVal, City Recorder

  
\_\_\_\_\_  
City Attorney

Ordinance No. 2081

Exhibit A

**TELECOMMUNICATIONS**

**FRANCHISE AGREEMENT**

**between**

**MILWAUKIE, OREGON**

**and**

**Astound Broadband, LLC**

**1. PURPOSE AND INTENT**

**1.1 Authorization**

The City of Milwaukie, Oregon (hereafter City or City) is authorized to grant a Franchise Agreement to Astound Broadband, LLC (hereafter Grantee) for a non-exclusive seven (7)-year Franchise to construct, operate and maintain a Telecommunications System in the City. This Franchise Agreement is subject to the general lawful police power of City affecting matters of local government concern and not merely existing contractual rights of Grantee. Nothing in this Franchise Agreement waives the requirements of the other codes and ordinances of general applicability enacted, or hereafter enacted, by City.

This Franchise Agreement shall not be interpreted to prevent the City from imposing lawful additional conditions, including additional compensation conditions for use of the Streets and Public Ways should Grantee provide service other than Telecommunications Service. Nothing herein shall be interpreted to prevent Grantee from challenging the lawfulness or enforceability of any provisions of applicable law.

**1.2 Purpose**

The purpose of this Franchise Agreement is to create a binding, enforceable contract between City and Grantee.

## **2. DEFINITIONS**

For the purposes of this Franchise Agreement and all exhibits attached hereto, the following terms, phrases, words and their derivations shall have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is always mandatory and not merely directory.

### **2.1 City**

means the City of Milwaukie, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

### **2.2 FCC**

means the Federal Communications Commission.

### **2.3 Franchise**

means the non-exclusive and revocable Telecommunications authorization or renewal thereof for the construction or operation of a Telecommunications System such as is granted by this Franchise Agreement, whether such authorization is designated as a Franchise, license, resolution, contract, certificate, agreement or otherwise.

### **2.4 Franchise Agreement**

means this agreement, including all referenced material, adopted in the appropriate manner by the City.

### **2.5 Franchise Area**

means all portions of the City of Milwaukie including any areas annexed to the City.

### **2.6 Grantee**

means Astound Broadband, LLC, and the lawful successors, transferees, or assignees thereof.

### **2.7 Gross Revenues**

means any and all revenues derived by Grantee for the provision of any and all products, services, or charges originating or terminating in the City of Milwaukie billed to a circuit, switch, or address in the City of Milwaukie, including revenues from dedicated private networks. Gross

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Revenues shall include any and all revenues from leases of Grantee's system in the City of Milwaukie. Gross Revenues may be adjusted for the net write-off of uncollectible amounts of such revenues.

**2.8 City Streets and Public Ways**

means the surface of and the space above and below any public street, sidewalk, alley, or other public way of any type whatsoever, now or hereafter existing as such within the Franchise Area, and any easements, rights of way, or other similar means of access to the extent City has the right to allow Grantee to use them, excluding parks and publicly owned land.

**2.9 Telecommunications**

means the transmission between and among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

**2.10 Telecommunications System**

means infrastructure owned by Grantee utilizing one or more facilities located within the City's Streets and Public Ways including all types of equipment and facilities necessary or convenient for providing Telecommunications Service or dark fiber services and all appurtenances thereto, including, without limitation, fiber optics, wires, cables, ducts, conduits, vaults, poles, anchors, cabinets, fixtures, and transformers.

**2.11 Telecommunications Service**

means telecommunications service as defined in 47 U.S.C. § 153(53).

**2.12 Year**

means a full twelve-month calendar year, unless designated otherwise, such as a "fiscal year."

**3. GRANT OF FRANCHISE**

**3.1 Grant**

City hereby grants to the Grantee a non-exclusive, revocable Telecommunications Franchise for a seven (7)-year period from and after the effective date hereof, revocable as provided herein, to construct, operate and maintain a Telecommunications System within the Franchise Area including without limitation the right to maintain, repair, replace, extend or remove the Telecommunications System during the term of this Franchise Agreement. This Franchise Agreement constitutes the authority, right, privilege and obligation to provide Telecommunications Services. This Franchise Agreement is subject to the laws of the United States and the State of Oregon, and to the general ordinances of the City affecting any matter and not merely existing contractual rights of Grantee, whether now existing or hereinafter enacted. The City shall, upon request, supply the Grantee with copies of any City laws or regulations affecting Grantee's operations.

**3.2 Use of Streets and Public Ways**

For the purpose of constructing, operating and maintaining a Telecommunications System in the Franchise Area, the Grantee may erect, install, audit, construct, repair, replace, reconstruct, and retain in, on, over, under, upon, across, and along the Streets and Public Ways within the Franchise Area such wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, pedestals, attachments, and other property and equipment as are necessary, convenient and appurtenant to the operation of the Telecommunications System. Prior to construction or alteration, however, the Grantee shall in each case file plans and obtain required permits as required with the appropriate agencies of City and in accordance with any agreements with utility providers and companies, pay applicable Telecommunications and permit fees, and receive approval as necessary before proceeding.

### **3.3 Duration and Effective Date of Franchise**

Except as otherwise provided herein for revocation, the term of this Franchise Agreement and all rights, privileges, obligations and restrictions pertaining thereto shall be seven (7) years from the effective date of this Franchise Agreement. Grantee may file an application to renew this Franchise no fewer than 180 days before expiration of this Franchise Agreement, in accordance with Milwaukie Municipal Code Section 3.13.060.

### **3.4 Franchise Nonexclusive**

This Franchise shall be nonexclusive, and is subject to all rights, interests, agreements, permits, easements or licenses granted by City to any person to use any street, right-of-way, easements not otherwise restricted, or property for any purpose whatsoever, including the right of City to use same for any purpose it deems fit, including the same or similar purposes allowed Grantee hereunder. City may, at any time, grant authorization to use the Streets and Public Ways for any purpose not incompatible with Grantee's authority under this Franchise Agreement, and for additional franchises for Telecommunications systems.

### **3.5 Franchise Non-Transferable**

This Franchise shall not be sold, leased, assigned or otherwise transferred, nor shall any of the rights or privileges herein granted or authorized be leased, assigned, mortgaged, sold or transferred, either in whole or in part, nor shall title hereto, either legal or equitable, or any right, interest or property herein, pass to or vest in any person, except the Grantee, either by act of the Grantee or by operation of law, without the consent of the City Council, which may be expressed by resolution or other appropriate instrument; provided, however, that the Grantee may freely assign this Franchise to an Affiliate without prior written notice as part of any corporate financing, reorganization or refinancing or to any person that purchases all or substantially all of the assets or ownership interests of Grantee or its parent company. The granting of such consent in one instance shall not render unnecessary any subsequent consent in another instance.

Within thirty (30) days of any transfer or sale, if approved or deemed granted by the City, Grantee shall file with the City a copy of the deed, agreement, lease or other written instrument evidencing such sale or transfer of ownership or control, certified and sworn to as correct by Grantee and the transferee. City shall invoice Grantee for the time and materials costs incurred by the City in considering the request to transfer this Franchise Agreement.

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Every such transfer as heretofore described, whether voluntary or involuntary, shall be deemed void and of no effect unless Grantee shall within thirty (30) days after the same shall have been made, file such certified copy as is required.

The requirements of this section shall not be deemed to prohibit the use of the Grantee's property as collateral for security in financing the construction or acquisition of all or part of a Telecommunications System of the Grantee or any affiliate of the Grantee. However, the Telecommunications System franchised hereunder, including portions thereof used as collateral, shall at all times continue to be subject to the provisions of this Franchise Agreement.

The requirements of this section shall not be deemed to prohibit sale of tangible assets of the Telecommunications System in the ordinary conduct of the Grantee's business without the consent of the City. The requirements of this section shall not be deemed to prohibit, without the consent of the City, a transfer to a transferee whose primary business is Telecommunications System operation and having a majority of its beneficial ownership held by the Grantee, a parent of the Grantee, or an affiliate a majority of whose beneficial ownership is held by a parent of the Grantee.

**3.6 Franchise Agreement Acceptance**

After City Council approves this Franchise Agreement, the City Manager shall promptly tender it to Grantee. Within sixty (60) days after Council approval, Grantee must file a written acceptance with the City Manager. An adequate form of acceptance is annexed to this Franchise Agreement. The Council-approved Franchise Agreement will lapse if Grantee fails to accept the Franchise Agreement in accordance with this section.

**4. CONSTRUCTION, MAINTENANCE, AND REPAIR OF INFRASTRUCTURE**

**4.1** Grantee may make all reasonably necessary excavations in any Street or Public Way for the purpose of placing, erecting, laying, maintaining, or repairing Grantee's infrastructure, and shall repair, renew, or replace the same as reasonably possible to the condition that existed prior to such excavation. Grantee shall obtain all necessary City of Milwaukie permits for such excavation and construction and pay all applicable fees. Such work shall be done only in accordance with plans or designs submitted to, and approved by, the City. Such plans shall (1) be evaluated by the most current public works standards at the time of receiving the permit application for construction within the Streets and Public Ways in the City, and (2) be maintained by the City as confidential and exempt from public disclosure to the maximum extent allowed by law, this provision constituting an official request for such confidentiality under Oregon's public records laws.

**4.2** Such work shall be performed in a good and workmanlike manner and in compliance with all rules, regulations, bonding requirements, and ordinances that may, during the term of this Franchise, be adopted or imposed from time to time by the City, or any other authority having jurisdiction over Streets and Public Ways.

**4.3** Prior to commencing excavation or construction Grantee shall give appropriate notice to other franchisees, licensees, or permittees of the City owning or maintaining facilities that may be affected by Grantee's proposed excavation or construction.

**4.4** If emergency repairs are necessary for Grantee's facilities, Grantee may immediately initiate such emergency repairs. Grantee shall notify the City's Engineering Department by telephone, e-mail, or other means reasonably calculated to provide prompt and effective notification as soon as practicable after commencement of work performed under emergency conditions. Grantee shall make such repairs in compliance with applicable ordinances and regulations. Grantee shall apply for any necessary permits no later than the business day next following the discovery of the need for such repairs.

**4.5** Grantee shall construct and maintain its Telecommunications System in such a manner as to not interfere with City sewer or water systems, or other City facilities.

**4.6 Relocation**

**4.6.A Permanent Relocation - General**

In accordance with ORS 221.420 and Milwaukie Municipal Code Section 3.13.050, City may, by written order, require Grantee to move any facility in the Streets and Public

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Ways. If the relocation is the result of a public project, Grantee shall be responsible for the costs of relocation. If the relocation is required to accommodate a private party development or project, Grantee shall have the right to seek reimbursement from the private party. In such event, the City shall not be responsible for the costs of relocation of any of Grantee's facilities.

**4.6.B Permanent Relocation - Undergrounding**

As permitted by law, administrative rule, or regulation, the City may require Grantee to remove any overhead facilities and replace those facilities with underground facilities at the same or different locations subject to Grantee's engineering and safety standards. The expense of such a conversion shall be paid by Grantee, and Grantee shall recover its costs from its customers in accordance with state law, administrative rule, or regulation. Nothing in this paragraph prevents the City and Grantee from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis.

**4.6.C Temporary Relocation at Request of Third Parties**

Whenever it is necessary to temporarily relocate or rearrange any facility of Grantee to permit the passage of any building, machinery or other object, Grantee shall perform the work on thirty (30) business days' written notice from the persons desiring to move the building, machinery or other object. The notice shall: (1) bear the approval of the City Engineer; (2) detail the route of movement of the building, machinery, or other object; (3) provide that the person requesting the temporary relocation shall be responsible for Grantee's costs; (4) provide that the requestor shall indemnify and hold harmless the City and Grantee from any and all damages or claims resulting either from the moving of the building, machinery or other object or from the temporary relocation of Grantee's facilities; and (5) be accompanied by a cash deposit or other security acceptable to Grantee for the costs of relocation. Grantee, in its sole discretion, may waive the security. The cash deposit or other security shall be in an amount reasonably calculated by Grantee to cover Grantee's costs of temporary relocation and restoration.

**4.6.D Temporary Relocation at Request of the City**

In accordance with ORS 221.420 and Milwaukie Municipal Code Section 3.13.050, the City may require the Grantee to remove and relocate facilities maintained by the Grantee in any Streets or Public Ways, property or place of the City by giving notice to Grantee. Prior to such relocation, the City agrees to attempt to provide a

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suitable alternate location for Grantee's facilities with the Streets and Public Ways, which includes a minimum or maximum square footage set by the Grantee. The cost of removal or relocation of its facilities for public projects shall be paid by the Grantee; however when the City requires more than one temporary relocation and both the initial and subsequent relocations are for public projects and not at the request of or to accommodate a private party, the initial relocation shall be at the expense of the Grantee and subsequent relocations occurring less than two (2) years after the initial relocation shall be at the expense of the City. In the event that any relocation is requested by or is to accommodate a private party, Grantee shall seek reimbursement from the private party and not from the City. The City and the Grantee agree to cooperate to minimize the economic impact of such temporary relocation on each party.

**4.6.E Notice**

The notice required by Section 4.6 (A), (B), (C) and (D) shall be in writing and shall be provided at least thirty (30) business days before the date that Grantee is required to move its facilities. The City will endeavor to provide as much notice as possible. The notice shall specify the date by which the existing facilities must be removed. Nothing in this provision shall prevent the City and Grantee from agreeing, either before or after notice is provided, to a schedule for relocation. In the event that Grantee fails to comply with a notice to relocate and the City and Grantee have not reached agreement on a schedule for relocation, the City may remove or relocate Grantee's facilities that were the subject of the relocation notice at Grantee's expense.

**4.6.F Location for Relocation Facilities**

The City shall attempt to provide Grantee with a suitable location in existing Streets and Public Ways sufficient to maintain service for all facilities required to be relocated pursuant to Section 4.6 (A), (B), and (D). If an alternate location for Grantee's facilities is unavailable, City will make its project management personnel available to meet with affected property owners and explain City project needs in support of Grantee's efforts to secure an alternate location on private property.

**5. GENERAL FINANCIAL AND INSURANCE PROVISIONS**

**5.1 Compensation**

**5.1.A Franchise Fee**

As compensation for the Franchise Agreement to be granted, and in consideration of permission to use the Streets and Public Ways of the City for the construction, operation, and maintenance of a Telecommunications System within the Franchise Area, the Grantee shall pay to City an amount equal to seven percent (7%) of the Gross Revenues derived from 1) the operation of Grantee's Telecommunications System to provide Telecommunications Services within the Franchise Area; and 2) the sale of any other good or service within the Franchise Area. In the event any law or valid rule or regulation applicable to this Franchise Agreement limits franchise fees below the seven percent (7%) of Gross Revenues required herein, the Grantee agrees to and shall pay the maximum permissible amount and, if such law or valid rule or regulation is later repealed or amended to allow a higher permissible franchise fee, then Grantee shall pay the higher franchise fee up to the maximum allowable by law, not to exceed seven percent (7%).

Any bad debts or other accrued amounts deducted under Oregon law in the calculation of Gross Revenues shall be included in Gross Revenues at such time as they are actually collected.

**5.1.B Payment of Franchise Fees**

- 1) Payments due under this provision shall be computed and paid quarterly, for the preceding quarter, as of March 31, June 30, September 30, and December 31. Each quarterly payment shall be due and payable no later than forty-five (45) days after the dates listed in the previous sentence. A quarterly report shall be made as hereinafter provided which shall contain the relevant facts necessary for the City to verify the amounts of franchise fee payments.
- 2) No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim City may have for further or additional sums payable under the provisions of this Franchise Agreement. All amounts paid shall be subject to audit and recomputation by City.

## **5.2 Faithful Performance Bond**

### **5.2.A Posting of Bond**

Upon the effective date of this Franchise Agreement, the Grantee shall furnish proof of the posting of a faithful performance bond running to the City in a form and with good and sufficient surety approved by the City, in the penal sum of Twenty-Five Thousand Dollars (\$25,000.00), conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition of this Franchise Agreement. Such bond shall be maintained by the Grantee throughout the term of this Franchise Agreement, but may be terminated upon the completion of upgrade construction according to the terms of this Franchise Agreement.

### **5.2.B Duration of Bond**

Grantee shall pay all premiums charged for any bond required under Section 5.2.A, and unless City specifically directs otherwise, shall keep the same in full force and effect at all times through the later of either:

- 1) The remaining term of this Franchise Agreement; or
- 2) If required by the City, the removal of all of Grantee's system installed in the City's Streets and Public Ways.

### **5.2.C Conditions**

The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days written notice first being given to the City. The bond shall be subject to the approval of City as to its adequacy under the requirements of this Section. During the term of the bond, Grantee shall file with the City a duplicate copy of the bond along with written evidence of payment of the required premiums unless the bond otherwise provides that the bond shall not expire or be terminated without 30 days prior written notice to the City.

## **5.3 Indemnification**

Grantee shall defend, indemnify, and hold City and its officers, officials, agents, employees, and volunteers harmless from any and all costs, injuries, damages, losses, suits, or liabilities of any nature including attorneys' fees in connection with any claims arising out of failures to act, or misconduct of Grantee or its affiliates, officers, employees, agents, contractors, or subcontractors, in the construction, operation, maintenance, repair, or removal of its Telecommunications facilities, and in providing or

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offering Telecommunications Services over the facilities or network, whether such acts or omissions are authorized, allowed, or prohibited by this Franchise or by laws or regulations.

Grantee agrees to forever indemnify City, its officers, employees, agents, and representatives, from and against any claims, costs, and expenses of any kind, whether direct or indirect, pursuant to any state or federal law, statute, regulation, or order, for the removal or remediation of any leaks, spills, contamination, or residues of hazardous substances, directly attributable to Grantee's facilities. Hazardous substances has the meaning given by ORS 465.200.

**5.4 Liability Insurance**

**5.4.A Insurance Required**

Grantee shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by Grantee, its agents, representatives, or employees in the amounts and types set forth below:

- 1) Automobile Liability insurance covering all owned, hired, and leased vehicles with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.
- 2) Commercial General Liability insurance with limits no less than \$1,000,000 each occurrence, and an aggregate limit of not less than \$3,000,000. Coverage shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, and personal injury and advertising injury and liability assumed under an insured contract. City shall be named as an additional insured under Grantee's Commercial General Liability insurance policy with respect to the work performed under this Franchise.

Any insurance carrier shall have an A.M. Best rating of A VII or better, and be admitted to do business in the State of Oregon.

**5.4.B Additional Insureds**

The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, duly authorized or actual agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued

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to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy.

**5.4.C Cancellation**

The insurance shall provide that the insurance shall not be canceled or materially altered so as to be out of compliance with the requirements of this Section without thirty (30) days written notice first being given to the City. If the insurance is canceled or materially altered so as to be out of compliance with the requirements of this Section within the term of this Franchise Agreement, Grantee shall provide a replacement policy. Grantee agrees to maintain continuous uninterrupted insurance coverage, in the amounts required, for the duration of this Franchise Agreement.

**5.4.D Certificate**

Grantee shall maintain on file with the City a certificate of insurance certifying the coverage required above and an endorsement naming City as an additional insured, which certificate shall be subject to City's approvals to the adequacy of the certificate and of the insurance certified under the requirements of this section.

**5.4.E Failure to Maintain Insurance**

Failure to maintain adequate insurance as required under this Section shall be cause for immediate termination of this Franchise Agreement by the City.

**5.4.F Additional Indemnification**

The Grantee shall also indemnify, defend and hold harmless the City and its officers, agents and employees for any and all claims for damages or personal injury which exceed the limits of insurance provided for in this Section.

**6. RIGHTS RESERVED TO CITY**

**6.1 Plans, Records and Maps**

**6.1.A** Grantee shall at all times maintain and allow City, with reasonable notice, access and the right to review a full and complete set of plans, records and "as built" maps showing the exact location of all Telecommunications System equipment installed or in use in the Franchise Area. These maps shall be maintained in a standard format and medium agreed upon by the City and the Grantee. City's review of the plans, records, and as-built maps, provided for herein, shall occur at Milwaukie City Hall.

**6.1.B** The ability for City to obtain records and information from Grantee is critical to the administration of this Franchise Agreement and the requirements herein. Therefore, Grantee's failure to comply with the requirements of this Section constitutes a material breach of this Franchise Agreement.

**6.2 Right to Perform Franchise Fee Audit or Review**

The City shall have the right to perform, or cause to have performed, a formal audit or a professional review of the Grantee's books and records and, for the specific purposes determining the Gross Revenues derived from the operation of the Telecommunications System to provide Telecommunications Services within the Franchise Area, to determine the accuracy of amounts paid as franchise fees to the City by the Grantee, provided that any audit or review must be commenced not later than three (3) years after the date on which franchise fees for any period being audited or reviewed were due. The cost of any such audit or review shall be borne by the City, except that if it is established that the Grantee has made underpayment of 3% or more in franchise fees than required by this Franchise Agreement, then the Grantee shall, within thirty (30) days of being requested to do so by the City, reimburse the City for the reasonable cost of the audit or review.

**6.3 Right of Inspection of Construction**

The City or its representatives shall have the right to inspect all construction or installation work performed pursuant to the provision of this Franchise Agreement and to make such tests as it shall find necessary to ensure compliance with the terms of this Franchise Agreement and other pertinent provisions of law.

**6.4 Right to Require Removal of Property**

At the expiration of the term for which the Franchise Agreement is granted, providing no renewal is granted, or upon its forfeiture or revocation, as provided for in this Franchise Agreement, the City may require the Grantee to remove, at Grantee's own expense, all or any part of the Telecommunications System from all Streets And Public Ways within the Franchise Area. If the Grantee fails to remove such equipment, the City may perform the work and collect the cost thereof from the Grantee. Notwithstanding the other provisions of this section, the Grantee, by written notice to the City, may elect to abandon underground Telecommunications equipment in place, in which event the Grantee shall have no further obligation hereunder as to the abandoned equipment; except that the City may nevertheless, with 60-days' notice, require the Grantee to remove or otherwise properly abandon such equipment.

## **7. TERMINATION AND EXPIRATION**

### **7.1 Revocation**

In addition to any rights set out elsewhere in this document, the City reserves the right to declare a forfeiture or otherwise revoke this Franchise Agreement, and all rights and privileges pertaining thereto, in the event that: (a) the Grantee is in violation of any material provision of the Franchise Agreement and fails to correct the violation after written notice of the violation and proposed forfeiture, and a reasonable opportunity thereafter to correct the violation; (b) the Grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged a bankrupt; (c) the Grantee is found to have engaged in fraud or deceit upon the City, persons or subscribers; (d) the Grantee fails to obtain and maintain any permit required by any federal or state regulatory body, relating to the construction, maintenance and operation of the system; provided, however, that the Grantee shall be allowed a reasonable time to cure failure to obtain any permit; (e) the Grantee fails to maintain the full amount of its insurance or to post a performance bond, and letter of credit, as required under the terms of this Franchise Agreement; or (f) any other grounds exist for revocation as set forth in Milwaukie Municipal Code Section 3.13.060 (N).

Upon the occurrence of one of the events set out above, following thirty (30) days written notice to Grantee of the occurrence and the proposed forfeiture and an opportunity for Grantee to be heard before City Council, the City may by resolution declare a forfeiture.

### **7.2 Receivership**

In addition to its other rights and remedies as set forth in this Franchise Agreement, the City shall have the right, subject to federal law, to declare a forfeiture of this Franchise Agreement one hundred and twenty (120) days after the appointment of a receiver or trustee to take over and conduct the Grantee's business, whether in receivership, reorganization, bankruptcy or other similar action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred and twenty (120) days, or unless: (a) Within one hundred and twenty (120) days after such appointment, the receiver or trustee shall have fully complied with all provisions of this Franchise Agreement and remedied any and all violations or defaults, as approved by a City Council resolution; and (b) Within said one hundred and twenty (120) days, such receiver or trustee shall have executed an agreement with the City, duly approved by the City and the court having competent jurisdiction, in which such receiver or trustee assumes and agrees to be bound by each and every provision of this Franchise Agreement.

**7.3 Expiration**

Upon expiration of the Franchise Agreement, in the event there is no forfeiture or revocation of the Franchise Agreement, and if the Grantee desires to renew the Franchise Agreement, both the Grantee and the City shall discuss renewal in good faith under the requirements of Milwaukie Municipal Code Section 3.13.060.

**7.4 Survival of Terms**

Upon the termination without renewal, or forfeiture of the Franchise, Grantee's obligations to restore Streets and Public Ways under Section 6 and maintain insurance coverage under Section 5 shall survive. These obligations shall continue notwithstanding any expiration, forfeiture, or revocation of the Franchise, except to the extent that a City-approved Transfer of the Telecommunications System is completed, and another entity has assumed full and complete responsibility for the Telecommunications System and for any relevant acts or omissions.

**8. MISCELLANEOUS PROVISIONS**

**8.1 No Limitation of City Authority**

**8.1.A** Nothing in this Franchise Agreement shall in any way be construed or interpreted to prevent, or in any way limit, City from modifying or performing any work in the Streets and Public Ways, or granting other franchises for use of Streets and Public Ways, or of adopting general ordinances regulating use of or activities in the Streets and Public Ways, or of otherwise abrogating or limiting any rights, privileges, or property interest City now has in the Streets and Public Ways, whether under an interest or obligation existing now or acquired later.

**8.1.B** This Franchise Agreement does not give the Grantee any credit or exemption from any nondiscriminatory, generally-applicable business tax, or other tax now or hereafter levied upon Grantee's taxable real or personal property, or against any permit fees or inspection fees required as a condition of construction of any improvements upon Grantee's real property and imposed under a generally-applicable ordinance or resolution.

**8.2 Compliance with Laws**

The Grantee shall comply with applicable federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all generally applicable ordinances, resolutions, rules and regulations of the City heretofore or hereafter adopted or established during the entire term of this Franchise Agreement, provided that any such ordinances, resolutions, rules and regulations of the City hereafter adopted or established shall not conflict or interfere with the existing rights of the Grantee hereunder. Upon request, the City shall make a good faith effort to provide copies to the Grantee of all general ordinances, resolutions, rules, regulations, and codes, and any amendments thereto, to which the Grantee is subject under this Franchise Agreement.

**8.3 Extension of City Limits**

Upon annexation of any territory to the City, the rights granted herein shall extend to the annexed territory to the extent the City has such authority. All Telecommunications facilities owned, maintained, or operated by Grantee located within any Streets and Public Ways of the annexed territory shall be subject to all terms of this Franchise Agreement.

#### **8.4 Limitation of Liability**

City and Grantee agree that neither shall be liable to the other for any indirect, special, or consequential damages, or any lost profits, arising out of any provision or requirement contained herein, or, in the event this Franchise Agreement, or any part hereof, is determined or declared to be invalid.

#### **8.5 Waiver**

The City is vested with the power and authority to reasonably regulate and manage its Streets and Public Ways in a competitively-neutral and non-discriminatory manner, and in the public interest. Grantee shall not be relieved of its obligations to comply with any provision of this Franchise Agreement by reason of the failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise Agreement by reason of such failure or neglect.

#### **8.6 Severability**

If any section, subsection, sentence, clause, phrase or word of the Franchise Agreement is held to be invalid or unconstitutional by any court of competent jurisdiction or pre-empted by federal or state regulations or law, such section, subsection, sentence, clause, phrase or word shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining provisions hereof.

#### **8.7 Captions**

The captions to sections throughout this Franchise Agreement are intended solely to facilitate reading and reference to the sections and provisions contained herein. Such captions shall not affect the meaning or interpretation of this Franchise Agreement.

#### **8.8 Nonenforcement by City**

The Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise Agreement by reason of any failure of the City to enforce prompt compliance.

#### **8.9 Force Majeure**

If by reason of force majeure the Grantee is unable in whole or in part to carry out its obligations hereunder, the Grantee shall not be deemed in violation or default during the continuance of such inability. The term "force majeure" as used herein shall mean the following: acts of God; strikes, lockouts or other industrial disturbances; acts of public enemies;

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orders of the government of the United States of America, or of the State of Oregon, or their departments, agencies, political subdivisions, or officials; acts of any civil or military authority; insurrections; riots; epidemics; landslides; earthquakes; lightning; fires; hurricanes; volcanic activity; storms; floods; washouts; droughts; restraint of government and people; civil disturbances; explosions; partial or entire failure of utilities; and similar occurrences outside the control of the Grantee. The Grantee agrees, however to give its best efforts to remedy as soon as possible, under the circumstances, the cause or causes preventing Grantee from carrying out its responsibilities and duties under this Franchise Agreement.

**8.10 Entire Agreement**

This Franchise Agreement contains the entire agreement between the parties, supersedes all prior agreements or proposals except as specifically set forth herein, and cannot be changed orally but only by an instrument in writing executed by the parties and approved by City Council resolution.

**8.11 Consent**

Wherever the consent or approval of either the Grantee or the City is specifically required in this Franchise Agreement, such consent or approval shall not be unreasonably withheld.

**8.12 Notices and Time Limit for Grantee Communications**

All communications with the City by the Grantee referred to in this Franchise Agreement shall be made through the Office of the City Manager of City of Milwaukie, unless otherwise specified in this Franchise Agreement. Grantee shall provide any written communication required by this Franchise Agreement within sixty (60) days of being requested to do so by the City, in each case in which no other specific minimum time limit for a communication is identified in the Franchise Agreement.

**8.13 Franchise Review**

Either the City or the Grantee may request the other party to participate in good faith negotiations, no more often than once per year beginning six months after the effective date of this Franchise Agreement, for a period not to exceed six (6) months, to consider adoption of amendments to the Franchise Agreement. There shall be no obligation for either party to enter negotiations.

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Following negotiations, amendments to the Franchise Agreement may be presented to the City Council for adoption. Nothing in this section requires either the City or the Grantee to agree to any amendment to the Franchise Agreement, and any amendment to the Franchise Agreement must be formally accepted by both parties.

**8.14 Grantee Responsibility for Documentation**

It shall be the responsibility of the Grantee to maintain all management information and record-keeping systems which will permit the clear, complete, and rapid documentation of compliance with the requirements of this Franchise Agreement. Such documentation shall be provided to the City by the Grantee upon request, no later than ten (10) days following such request.

**8.15 Grantee Responsible for Costs of Complying with Franchise Agreement**

Unless otherwise specifically stated in this Franchise Agreement, it shall be the responsibility of the Grantee to bear the cost of complying with all of the terms of the Franchise Agreement.

**8.16 Notice**

Any notice provided for under this Franchise Agreement shall be sufficient if in writing and delivered personally to the following addressee or deposited in the United States mail, postage prepaid, certified mail, return receipt requested, addressed as follows, or to such address as the receiving party specifies in writing:

If to the City: City Manager

City of Milwaukie  
10722 SE Main Street  
Milwaukie, OR 97222

If to the Grantee: Astound Broadband, LLC  
Attn: James A. Penney, EVP  
401 Kirkland Parkplace  
Suite 500  
Kirkland, WA 98033

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End of document

**ACCEPTANCE AND GUARANTEE**

City Manager  
City of Milwaukie, City Hall  
10722 SE Main Street  
Milwaukie, OR 97222

This is to advise the City of Milwaukie, Oregon (the "City") that Astound Broadband, LLC (the "Grantee") hereby accepts the terms and provisions of Ordinance No. 2081, passed by the City Council on July 15, 2014 (the Franchise Agreement) granting a Franchise. The Grantee agrees to abide by all provisions, terms and conditions of the Franchise Agreement subject to applicable federal, state and local law.

Astound Broadband, LLC

BY:



TITLE: Executive Vice President

DATE:

August 15, 2014