

CITY OF MAPLE VALLEY, WASHINGTON

ORDINANCE NO. O-15-574

**AN ORDINANCE OF THE CITY OF MAPLE VALLEY, WASHINGTON
ADOPTING AND AUTHORIZING THE CITY MANAGER TO EXECUTE
A TELECOMMUNICATIONS AGREEMENT WITH ASTOUND
BROADBAND, LLC D/B/A WAVE BROADBAND**

WHEREAS, in order to maintain control over the use of City of Maple Valley right-of-ways by fiber optic and telecommunications providers operating within the City of Maple Valley, it is appropriate to enter into franchise agreements with such telecommunications providers; and

WHEREAS, Astound Broadband, LLC, a competitive local exchange carrier (CLEC), has negotiated this Telecommunications Franchise Agreement with the City of Maple Valley and this Franchise is acceptable to both parties; NOW THEREFORE;

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MAPLE VALLEY, WASHINGTON, AS FOLLOWS:

Section 1. Adoption and Authorization. The City adopts and the City Manager or his designee is authorized and directed to execute on behalf of the City the Telecommunications Franchise Agreement with Astound Broadband, LLC, attached hereto and incorporated herewith as Exhibit A, which shall be identified by Clerk’s Receiving No. _____.

PASSED BY THE CITY COUNCIL OF THE CITY OF MAPLE VALLEY, WASHINGTON, AT A REGULAR MEETING THEREOF THIS ____ DAY OF _____, 2015.

William “Bill” Allison, Mayor

ATTEST:

Shaunna Lee-Rice, City Clerk

EXHIBIT A

TELECOMMUNICATIONS FRANCHISE AGREEMENT BETWEEN ASTOUND BROADBAND, LLC AND THE CITY OF MAPLE VALLEY, WASHINGTON

THIS TELECOMMUNICATIONS FRANCHISE AGREEMENT is entered into by and between Astound Broadband, LLC d/b/a Wave Broadband (“Grantee”), a Washington Limited Liability Company, and the City of Maple Valley, Washington (the “City”).

Recitals.

1. In order to maintain control over the use of City of Maple Valley right-of-ways by fiber optic and telecommunications providers operating within the City of Maple Valley, it is appropriate to enter into franchise agreements with such telecommunications providers.

2. Astound Broadband, LLC, a competitive local exchange carrier (CLEC), has negotiated this Franchise Agreement with the City of Maple Valley, and this Franchise is acceptable to both parties.

Section 1. Definitions. The Definitions contained in MVCC 5.30.020 are incorporated herein by reference. Where used in this Telecommunications Franchise Agreement, the following terms shall mean:

A. “Affiliate” means an entity which owns or controls, is owned or controlled by, or is under common ownership with Grantee.

B. “City” means the City of Maple Valley, a municipal corporation of the State of Washington.

C. “Emergency Situation” means an emergency involving likely loss of life or substantial property damage as determined by City in good faith.

D. “Facilities” means Grantee’s fiber optic cable system constructed and operated within the City’s Rights-of-Way, and shall include all cables, wires, conduits, ducts, pedestals and any associated converter, equipment or other facilities within the City’s Rights-of-Way, designed and constructed for the purpose of providing Telecommunications Service and other lawful services not prohibited by this Ordinance.

E. “Franchise” means the authorization granted pursuant to this Telecommunications Franchise Agreement

F. “Franchise Area” means the present municipal boundaries of the City, and shall include any additions thereto by annexation or other legal means.

G. “Grantee” means Astound Broadband, LLC, a Washington Limited Liability Company, and its respective successors and assigns. Grantee is a “Service Provider” as that term is defined in MVMC 5.30.020.

H. “Person” means an individual, partnership, association, joint stock company, trust, corporation, limited liability company or governmental entity.

I. “Rights-of-Way” means land acquired by or dedicated to the City for public roads and streets, but does not include:

1. State highways;
2. Land dedicated for roads, streets, and highways not opened and not improved for motor vehicle use by the public;
3. Structures, including poles and conduits, located within the right-of-way;
4. Federally granted trust lands or forest board trust lands;
5. Lands owned or managed by the State Parks and Recreation Commission; or
6. Federally granted railroad rights-of-way acquired under 43 USC 912 and related provisions of federal law that are not open for motor vehicle use.

J. “Telecommunications Service” means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means for hire, sale, or resale to the general public. For the purpose of this subsection, “information” means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols. For the purpose of this chapter, telecommunications service excludes the over-the-air transmission of broadcast television or broadcast radio signals.

Section 2. Franchise Area and Authority Granted.

A. Facilities within Franchise Area. Subject to the provisions of Chapter 5.30 MVMC, the City does hereby grant to Grantee the right, privilege, authority and franchise to construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across Rights-of-Way in the Franchise Area for purposes of providing Telecommunications Service as defined in MVMC 5.30.020 and RCW 82.04.065. The City reserves the right to require a separate authorization to provide Internet or information services, or to provide services other than Telecommunications Services, such as cable services, to the extent allowed by applicable law. This grant is non-exclusive. This grant does not convey any right, title or interest in the right-of-way, but shall be deemed a Master Permit only to use and occupy the right-of-way for the limited purposes and term stated in the grant. Further, no Master Permit shall be construed as any warranty of title.

B. Permission Required to Enter Onto Other City Property. Nothing contained in this Ordinance is to be construed as granting permission to Grantee to go upon any other public place other than Rights-of-Way within the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by the City must be sought on a case by case basis from the City.

C. Compliance with WUTC Regulations. At all times during the term of the Franchise, Grantee shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission.

D. Fees and Charges. Subject to the limitations under federal and State law, the City reserves the right to require compensation for use of the right-of-way as a condition of granting permission to use and occupy the right-of-way or other permitted areas. The City may impose on the service provider all fees, taxes, and requirements authorized by RCW 35.21.860, as written or hereafter amended. This Franchise Agreement is subject to the City's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid as reimbursement for the City's costs in connection with reviewing, inspecting and supervising the use and occupancy of the right-of-way on behalf of the public and existing or future users. Grantee shall, within 30 days after written demand, reimburse the City for all direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of this Master Permit when such is requested by the service provider. In addition, Grantee shall, within 30 days after written demand, reimburse the City for any and all costs the City reasonably incurs in response to any Emergency Situation involving Grantee's facilities. Within 30 days after written demand, Grantee shall reimburse the City for Grantee's proportionate share of all actual, identified expenses incurred by the City in planning, constructing, installing, repairing or altering any municipal infrastructure as a result of the presence in the right-of-way of the service provider's facilities.

Section 3. Construction and Maintenance.

A. Grantee's Facilities shall be located, relocated and maintained within the Rights-of-Way in accordance with Maple Valley Municipal Code ("MVMC") Chapters 5.30 and 12.15 and so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington. Whenever it is necessary for Grantee, in the exercise of its rights under the Franchise, to make any excavation in the Rights-of-Way, Grantee shall obtain prior approval from the City of Maple Valley Public Works Department, pay the applicable permit fees, and obtain any necessary permits for the excavation work pursuant to MVMC Chapters 5.30 and 12.15. Upon completion of such excavation, Grantee shall restore the surface of the Rights-of-Way to the specifications established within the Maple Valley Municipal Code and City of Maple Valley Public Works Policies and Standards. If Grantee should fail to leave any portion of the excavation in a condition that meets the City's specifications per the MVMC and Public Works Policies and Standards, the City may, on five (5) days' notice to Grantee, which notice shall not be required in case of an Emergency Situation, cause all work necessary to restore the excavation to a safe condition. Grantee shall pay to the City the reasonable cost of such work; which shall include, among other things, the City's overhead in obtaining completion of said work (provided that in no event shall such overhead exceed 5% of the total costs, fees and expenses of third parties).

B. Any surface or subsurface failure occurring during the term of this Agreement caused by any excavation by Grantee shall be repaired to the City's specifications, within thirty (30) days, or, upon five (5) days written notice to Grantee, the City may order all work necessary to restore the damaged area to a safe and acceptable condition and Grantee shall pay the reasonable costs of such work to the City, including City overhead (provided that in no event shall such overhead exceed 5% of the total costs, fees and expenses of third parties).

C. In the event of an Emergency Situation, Grantee may commence such emergency and repair work as required under the circumstances, provided that Grantee shall notify the City Public Works Director in writing as promptly as possible before such repair or emergency work commences, or as soon thereafter as possible, if advanced notice is not reasonably possible. The City may act, at any time, without prior written notice in the case of an Emergency Situation, but shall notify Grantee in writing as promptly as possible under the circumstances.

D. Grantee agrees that if any of its actions under the Franchise materially impair or damage any City property, survey monument, or property owned by a third-party, Grantee will restore, at its own cost and expense, the impaired or damaged property to the same condition as existed prior to such action. Such repair work shall be performed and completed to the reasonable satisfaction of the Public Works Director.

Section 4. Location and Relocation of Facilities.

A. Grantee shall place any new Facilities underground where existing telecommunications and cable facilities are located underground. Any new Facilities to be located above-ground shall be placed on existing utility poles. No new utility poles shall be installed in connection with placement of new above-ground Facilities.

B. Grantee recognizes the need for the City to maintain adequate width for installation and maintenance of sanitary sewer, water and storm drainage utilities owned by the City and other public utility providers. Thus, the City reserves the right to maintain clear zones within the public right-of-way for installation and maintenance of said utilities. The clear zones for each Right-of-Way segment shall be noted and conditioned with the issuance of each Right-of-Way permit. If adequate clear zones are unable to be achieved on a particular Right-of-Way, Grantee shall locate in an alternate Right-of-Way, obtain easements from private property owners, or propose alternate construction methods which maintain and/or enhance the existing clear zones.

C. Grantee shall relocate its facilities in accordance with MVMC 5.30.220.

I. In the event of an unforeseen Emergency Situation that creates a threat to public safety, health or welfare, the City may require the Grantee to relocate its Facilities at its own expense, any other portion of this Section notwithstanding.

Section 5. Indemnification.

A. Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its elected and appointed officials, officers, employees, agents, representatives, engineers, and consultants from any and all claims, costs, judgments, awards, or liability to any person, including claims by Grantee's own employees to which Grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property of which the acts or omissions of Grantee, its agents, servants, officers, or employees in performing under this authorization or lease are the proximate cause. Grantee further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its elected and appointed officials, officers, employees, agents, representatives, engineers, and

consultants from any and all claims, costs, judgments, awards, or liability to any person including claims by Grantee's own employees, including those claims to which Grantee might otherwise have immunity under Title 51 RCW, arising against the City solely by virtue of (1) the City's ownership or control of the rights-of-way or other public properties, (2) Grantee's exercise of the rights granted herein, or (3) the City's permitting Grantee's use of the City's rights-of-way or other public property, or (4) based upon the City's inspection or lack of inspection of work performed by Grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this authorization or lease, or pursuant to any other permit or approval issued in connection with this authorization or lease. This covenant of indemnification shall include, but not be limited by this reference, claims against the City arising as a result of the negligent acts or omissions of Grantee, its agents, servants, officers, or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work in any public right-of-way or other public place in performance of work or services permitted under this authorization or lease.

B. Inspection or acceptance by the City of any work performed by Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims that are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

C. In the event that Grantee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Grantee, then Grantee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fees of recovering under this indemnification clause.

D. In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Grantee, and the City, its officers, employees and agents, Grantee's liability hereunder shall be only to the extent of Grantee's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes Grantee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

E. The provisions of this section shall survive the expiration or termination of this Franchise.

F. Notwithstanding any other provisions of this section, Grantee assumes the risk of damage to its facilities located in the City's public rights-of-way, easements, and property from activities conducted by the City, its officers, agents, employees, and contractors. Grantee releases and waives any and all claims against the City, its officers, agents, employees, or contractors for damage to or destruction of Grantee's facilities caused by or arising out of activities conducted by the City, its officers, agents, employees, and contractors, in the public rights-of-way,

easements, or property subject to this authorization or lease, except to the extent any such damage or destruction is caused by or arises from the sole negligence or willful or malicious action on the part of the City, its officers, agents, employees, or contractors. Grantee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of Grantee's facilities as the result of any interruption of service due to damage or destruction of the user's facilities caused by or arising out of activities conducted by the City, its officers, agents, employees, or contractors, except to the extent any such damage or destruction is caused by or arises from the sole negligence or willful or malicious actions on the part of the City, its officers, agents, employees, or contractors.

Section 6. Default.

A. In the event of a default, the Parties shall follow the Dispute Resolution of MVMC 5.30.270.

Section 7. Nonexclusive Franchise. The Franchise granted by this Ordinance is not and shall not be deemed to be an exclusive franchise. The Franchise granted by this Ordinance shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area. The Franchise granted by this Ordinance shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

Section 8. Franchise Term.

A. The Franchise is and shall remain in full force and effect for a period of five (5) years from and after the effective date of this Ordinance.

B. If the City and Grantee fail to formally renew the Franchise prior to the expiration of its term or any extension thereof, the Franchise shall automatically continue in full force and effect until renewed or until either party gives written notice at least one hundred eighty (180) days in advance of intent not to renew the Franchise.

Section 9. Compliance with Codes and Regulations.

A. The rights, privileges and authority herein granted are subject to and governed by this Ordinance, the applicable laws of the State of Washington and the applicable laws of the United States, and all other applicable ordinances and codes of the City of Maple Valley, as they now exist or may hereafter be amended. Nothing in this ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by Grantee shall be performed by Grantee in accordance with applicable federal, state and city rules and regulations, including the City's Municipal Code, Public Works Policies and Standard Plans, and any required permits, licenses or posted fees, and applicable safety standards then in effect.

B. In the event that any territory served by Grantee is annexed to the City after the effective date of the Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

Section 10. Undergrounding. New Facilities shall be installed underground pursuant to Section 4 of the Franchise. Grantee acknowledges the City's policy of undergrounding of Facilities within the Franchise Area. Grantee will cooperate with the City in the undergrounding of Grantee's existing Facilities within the Franchise Area. If during the term of the Franchise, the City shall direct Grantee to underground Facilities within any Franchise Area, such undergrounding shall be at no cost to the City except as may be provided in RCW Chapter 35.99. Grantee shall comply with all federal, state, and City regulations on undergrounding. If the City undertakes any street improvement which would otherwise require relocation of Grantee's above-ground Facilities, the City may, by written notice to Grantee, direct that Grantee convert any such Facilities to underground Facilities.

Section 11. Record of Installations and Service.

A. With respect to excavations by Grantee and the City within the Franchise Area, Grantee and the City shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state or federal law.

B. Upon written request of the City, Grantee shall provide the City with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

C. As-built drawings and maps of the precise location of any Facilities placed by Grantee in any Rights-of-Way shall be made available by Grantee to the City within ten (10) working days of the City's written request. These plans and maps shall be provided at no cost to the City and shall include hard copies and/or digital copies in a format commonly used in the telecommunications industry.

Section 12. Shared Use of Excavations and Trenches.

A. If either the City or Grantee shall at any time after installation of the Facilities plan to make excavations in the area covered by the Franchise and as described in this Section, the party planning such excavation shall afford the other, upon receipt of written request to do so, an opportunity to share such an excavation, *provided that*: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs; (2) such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. In addition, pursuant to RCW 35.99.070, the City may request that Grantee install additional conduit, ducts and related access structures for the City pursuant to contract, under which Grantee shall recover its incremental costs of providing such facilities to the City.

B. The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. Grantee shall be given written notice at least ninety (90) days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five (5) year street trenching moratoriums.

C. The City reserves the right to require Grantee to joint trench with other franchisees if both entities are anticipating trenching within the same franchise area and provided that the terms of this Section are met.

Section 13. Insurance.

A. Grantee shall procure and maintain for the duration of the Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of work under the Franchise by Grantee, its agents, representatives or employees in the amounts and types set forth in MVMC 12.15.565.

B. Grantee shall provide a performance bond guarantying Grantee's performance with this Franchise in the amount of \$25,000 in a form acceptable to the City upon the effective date of this Franchise. The performance bond shall be written by a corporate surety acceptable to the City.

Section 14. Assignment.

A. All of the provisions, conditions, and requirements herein contained shall be binding upon Grantee, and no right, privilege, license or authorization granted to Grantee hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold. Notwithstanding the foregoing, Grantee, without the consent of, but upon notice to the City, may assign this agreement in whole or in part to: (a) an Affiliate (as defined in this Franchise); or (b) a lender for security purposes only.

B. Grantee may lease the Facilities or any portion thereof to another or provide capacity or bandwidth in its Facilities to another, *provided that*: Grantee at all times retains exclusive control over such Facilities and remains responsible for complying with this Franchise in all respects.

Section 15. Abandonment and Removal of Facilities. Upon the expiration, termination, or revocation of the rights granted under the Franchise, the Grantee shall remove all of its Facilities from the Rights-of-Way of the City within ninety (90) days of receiving notice from the City's Public Works Director; *provided however*, that the City may permit the Grantee's improvements to be abandoned in a place and in such a manner as the City may prescribe. Upon permanent abandonment, and Grantee's agreement to transfer ownership of the Facilities to the City, the Grantee shall submit to the City a proposal and instruments for transferring ownership to the City. Any such Facilities which are not permitted to be abandoned in place which are not removed within ninety (90) days of receipt of said notice shall automatically become the property of the City; *provided however*, that nothing contained within this Section shall prevent

the City from compelling the Grantee to remove any such Facilities through judicial action when the City has not permitted the Grantee to abandon said Facilities in place.

Section 16. Miscellaneous.

A. If any term, provision, condition or portion of this Ordinance shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Ordinance which shall continue in full force and effect. The headings of sections and paragraphs of this Ordinance are for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs. In the event of any conflict between this Franchise and the MVMC, the MVMC shall control.

B. Grantee shall pay for the City's reasonable administrative costs in drafting and processing this Ordinance and all work related thereto, which payment shall not exceed \$2,500. Grantee shall further be subject to all published permit fees associated with activities and the provisions of any such permit, approval, license, agreement of other document, the provisions of the Franchise shall control.

C. Failure of the City to declare any breach or default under this Franchise or any delay in taking action shall not waive such breach or default, but the City shall have the right to declare any such breach or default at any time. Failure of the City to declare one breach or default does not act as a waiver of the City's right to declare another breach or default.

D. Notwithstanding anything to the contrary herein, any determination by the City with respect to matters contained in this Franchise and matters related to the Franchise shall be made in accordance with applicable law.

Section 17. Notice. Any notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

City:

City of Maple Valley
Public Works Department
22017 SE Wax Road, Suite 200
Maple Valley, WA 98038
Attn: Steve Clark, Public Works
& Development Director and
David Johnson, City Manager

Grantee:

Astound Broadband, LLC
401 Kirkland Parkplace, Suite 500
Kirkland, WA 98033
Attn: Steve Weed, CEO and Jim
Penney, EVP

Notice shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the United States Mail in the case of regular mail, or the next day in the case of overnight delivery.

Section 18. Effective date. This Franchise shall be effective upon written acceptance by Grantee.

City of Maple Valley

Astound Broadband, LLC

By: _____

By: _____

Name: _____

Name: James A. Penney

Title: _____

Title: Executive Vice President