CITY OF STANWOOD
FINANCE COMMITTEE
AGENDA STAFF REPORT

ITEM NUMBER: 3

DATE: August 21, 2014

SUBJECT: Telecommunications Franchise Agreement

CONTACT PERSON: Greg Thramer, Finance Director

ATTACHMENTS:

A – Proposed Draft Telecommunications Franchise Agreement with Astound Broadband, LLC

ISSUE

Should the city move forward with the process negotiating a ten (10) year telecommunications franchise agreement with Astound Broadband, LLC?

RECOMMENDATION

The city should move forward with the process negotiating a ten (10) year telecommunications franchise agreement with Astound Broadband, LLC?

SUMMARY STATEMENT

At the July 10, 2014 meeting, city council approved a professional services agreement with River Oaks Communications in an amount not to exceed $3,530.00 to provide consulting services to assist the city in negotiating a telecommunications franchise agreement. That work is now underway, and staff expects to have a contract for council approval at an upcoming meeting.

In their letter dated November 9, 2012, Wave (Astound Broadband) has also requested a telecommunications franchise agreement instead of an open video service (OVS) franchise agreement. The current OVS franchise agreement with Blackrock has just expired, and it is Wave/Blackrock's intent not to renew it.

River Oaks Communications has just recently worked on behalf of Skagit County to negotiate a similar telecommunications franchise agreement with Wave; staff feels that

their familiarity and knowledge of telecommunications franchise agreements with ofhter local jurisdictions would help the City of Stanwood get the best possible deal.

FINANCIAL IMPACT

Under the proposed telecommunications franchise agreement, the city would receive 6% of gross revenues charged by Astound Broadband for the rental of dark fiber to customers within the city limits of Stanwood.

FINANCE COMMITTEE OPTIONS

1. Approve proposed telecommunications franchise agreement in its current draft form and direct staff to work with River Oaks Communications, the city attorney and Astound Broadband to prepare final documents to bring forward to the full council for its approval at a future meeting.

2. Do not approve proposed telecommunications franchise agreement in its current draft form and direct staff to work with River Oaks Communications, the city attorney and Astound Broadband to prepare final documents to bring forward to the full council for its approval at a future meeting.

3. Do not approve proposed telecommunications franchise agreement in its current draft form and direct staff to address specific finance committee questions or concerns.

RECOMMENDED MOTION

"I move to approve proposed telecommunications franchise agreement in its current draft form and direct staff to work with River Oaks Communications, the city attorney and Astound Broadband to prepare final documents to bring forward to the full council for its approval at a future meeting."

Attachment A

Draft 7-30-14

TELECOMMUNICATIONS FRANCHISE AGREEMENT

This Telecommunications Franchise Agreement ("Agreement" or "Franchise") is entered into in this _____ day of _____, 2014, by and between the City of Stanwood, a political subdivision of the State of Washington hereinafter (the "City") and Astound Broadband, LLC, a Washington limited liability company (herein "Grantee)". The City and Grantee may be individually referred to herein as "party", and may be collectively referred to herein as the "parties."

WHEREAS, Grantee has applied to the City for a non-exclusive franchise for the right of entry, use, and occupation of the public Rights-of-Way, as defined herein, expressly to construct operate, and maintain its facilities (Grantee Facilities, as defined herein) in those Rights-of-Way for purposes of offering and providing Network Services (including Telecommunications Service), as defined herein; and

WHEREAS, the 1934 Communications Act, as amended by the 1996 Telecommunications Act ("Telecommunications Act") relating to telecommunications providers, recognizes and provides local government authority to manage the public rights of way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis; and

WHEREAS, the City is authorized by applicable law~~ (including, but not limited to, RCW 36.55)~~ to grant one or more nonexclusive franchises for the construction, operation, and maintenance of telephone and similar facilities in the City~~.~~; and

WHEREAS, this franchise Agreement does not include, and is not a substitute for any other permit, agreement, or other authorization required by the City, including without limitation, permits required in connection with construction activities in public ways which must be administratively approved by the City after review of specific plans; and

WHEREAS, following proper notice, the~~ Skagit County Board of Commissioners of County~~ City Council held a public hearing on Grantee's request for a franchise, at which time representatives of Grantee and interested citizens were heard in a full public proceeding affording opportunity for comment by any and all persons desiring to be heard; and

WHEREAS, from information presented at such public hearing, and from facts and circumstances developed or discovered through independent study and investigation, the ~~Skagit County Board of Commissioners~~ City Council now deems it appropriate and in the best interest of the City that a franchise be granted to Grantee.

NOW, THEREFORE, in consideration of the mutual promises made herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and Grantee hereby agree as follows:

Section 1. Grant of Franchise - Right to Use Rights-of-Way in Franchise Area.

A. Pursuant to the laws of the State of Washington~~ including, but not limited to, RCW 36.55,~~ and subject to the terms and conditions stated herein, City hereby grants Grantee a franchise as set forth in this Agreement (herein the "Agreement" or "Franchise"), including without limitation general permission to enter, use and occupy the Rights-of-Way (as defined herein) within the Franchise Area (as defined herein).

B. Subject to the terms and conditions stated herein, Grantee is authorized to construct operate, and maintain Grantee Facilities, as defined herein, in the Rights-of-Way within the Franchise Area for the provision of Network Services within the Franchise Area. Grantee must install Grantee Facilities in a manner that minimizes interference with the use of the Rights-of-Way by others (including others that may be installing communications facilities). Grantee, through this Agreement, is granted the right to operate Grantee Facilities for purposes of providing Network Services using the City's Rights-of-Way within the Franchise Area in compliance with all applicable laws, rules, and regulations. The Grantee specifically agrees to comply with the provisions of City ordinances.

C. This Franchise does not authorize the use of the Franchise Area for any facilities or services other than for Grantee Facilities to be used to provide Network Services, and it extends no rights or privilege relative to any facilities or services of any type on private property within the City or outside of the Franchise Area.

D. This Franchise is non-exclusive and does not prohibit City from entering into other agreements, including other franchises, impacting the Franchise Area.

E. Except as explicitly set forth herein, this Franchise does not waive any rights that City has or may hereafter acquire with respect to the Franchise Area or any other City roads, Rights-of-Way, property, or any portions thereof. This Franchise shall be subject to the power of eminent domain, and in any proceeding under eminent domain, Grantee acknowledges its use of the Franchise Area shall have no value.

F. City reserves the right to change, regrade, relocate, abandon, or vacate any Right-of-Way within the Franchise Area.

G. Grantee agrees that its use of Franchise Area shall at all times be subordinated to and subject to City and the public's need for municipal infrastructure, travel, and access to the Franchise Area, except as may be otherwise required by law.

H. No rights shall pass to Grantee by implication. Without limiting the foregoing, by way of example and not limitation, this Agreement will not include or be a substitute for:

(1) Any other authorization required for the privilege of transacting and carrying on a business within the City that may be required by laws of the City;

(2) Any agreement or authorization required by the City for Rights-of-Way users in connection with operations on or in Rights-of-Way or public property including, by way of example and not limitation, street or road cut permits; or

(3) Any agreements for occupying any other property of the City or private entities to which access is not specifically granted by this Agreement including, without limitation, agreements for placing devices on poles, in conduits or in or on other structures.

I. This Agreement is intended to convey limited rights and interests only as to those Rights-of-Ways in which the City has an actual interest. It is not a warranty of title or interest in any Rights-of-Way; it does not provide the Grantee with any interest in any particular location within the Rights-of-Way; and it does not confer rights other than as expressly provided in the grant hereof.

J. Grantee acknowledges that the physical condition of the Rights-of-Way is provided by the City in an "as is" condition. Grantee agrees that the City has never made any representations, implied or express warranties or guarantees as to the suitability, security or safety of Grantee's location of Grantee Facilities in public property or Rights-of-Way or possible hazards or dangers arising from other uses of the Rights-of-Way or other public property by the City or the general public.

Section 2. Notices.

A. Written notices to the parties shall be sent by certified mail to the following addresses, unless a different address shall be designated in writing and delivered to the other party. Each party shall maintain and file with the other an address for the delivery of notices and communications by mail. All notices and communications shall be sent to such respective address(es), and such shall be effective upon the date of mailing. At the effective date of this Agreement:

County~~City~~:	~~Skagit County~~City of Stanwood Attn: ~~Public Works Director~~Greg Thramer, Finance Director 1800 Continental Place10220 270th Street NW Mount Vernon, WA 98273Stanwood, WA 98292
With a copy to:	~~Skagit County Prosecuting Attorneys' Office~~ Attn: ~~Civil Division~~ 605 South Third Street Mount Vernon, WA 98273
Grantee:	Astound Broadband, LLC

401 Kirkland Parkplace
Suite 500
Kirkland, WA 98033
Attention: Steve Weed CEO, and Jim Penney, EVP

B. Any changes to the Grantee's contact information shall be sent to the City's ~~Public Works Director~~ Finance Director, ~~with copies to the Skagit County Prosecuting Attorney's Office (Civil Division),~~ referencing the title of this Agreement.

C. The Grantee's voice numbers shall be staffed at least during normal business hours, Pacific time zone.

Section 3. Term of Franchise.

A. The term of this Agreement shall be from the date of mutual execution (as specified in Section 5), until ~~June 2, 2022~~ _____, 2024, unless sooner terminated pursuant to the terms herein.

Section 4. Definitions.

~~For the purpose of this~~ Franchise the following terms, phrases, words, and their derivations will have the meanings given herein.~~:~~ ~~Words not defined will have the meaning ascribed to those words in the Skagit County Code, or in the federal Communications Act of 1934 as amended, unless inconsistent herewith:~~

"Affiliate" means any Person who owns or controls, is owned by or controlled by, or is under common ownership or control with Grantee. For purposes of this definition, the term "control" (including the correlative meanings of the terms "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management policies of such Person, whether through the ownership of voting securities, by contract or otherwise. For purposes of this Franchise, Grantee shall be responsible and liable for the actions and/or omissions of any Affiliate(s) of Grantee, and Grantee shall ensure compliance with all terms of this Franchise by Grantee's Affiliates.

"Emergency" means a condition of imminent danger to the health, safety and welfare of persons or property located within City including, without limitation, damage to persons or property from natural or other phenomena such as storms, earthquakes, riots, acts of terrorism or wars.

"Franchise Area" means the City's "Right-of-Way" within the jurisdictional boundaries of the City as now or hereafter constituted as may be served by Grantee as specified in this Franchise, and as more particularly described as follows:

Any, every and all of the City roads, streets, avenues, alleys, rights of way, and public ways as now laid out, platted, dedicated, established, or improved within the boundaries of the City~~ lying outside of any incorporated town or city~~, and any, every and all City roads, streets, avenues, alleys, rights of way, and public ways that may be hereafter laid out, platted, dedicated, established, or improved within the boundaries of the City~~ lying outside of any incorporated town or city~~ (whether owned in fee simple or as an easement by the City).

"Grantee Facilities" means, collectively, any and all facilities, equipment, or property installed, controlled, and/or owned by Grantee or Grantee's Affiliates necessary or convenient for the provision of any Network Services offered by Grantee, including without limitation fiber optic communications facilities, telecommunications facilities, other cables (including, without limitation, coaxial and fiber optic), wire, radio, optical, electromagnetic or other similar types of equipment and related appurtenances including without limitation such conductors, ducts, conduits, vaults, manholes, amplifiers, pedestals, attachments and other property and equipment for purposes of Grantee providing Network Services.

"Information Service" has the same meaning as "Information service" as defined under 47 U.S.C. § 153(24)~~, as may be subsequently amended~~.

"Network Services" means the services provided by Grantee using Grantee Facilities pursuant to the terms of this Franchise, including without limitation Information Service, Telecommunications Service, Network Telephone Service, and Network Infrastructure Services, as defined herein, but not cable service as defined under 47 U.S.C. § 522.

"Network Telephone Service" has the same meaning as "Network telephone service" as defined under RCW 82.16.010: the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable service, the providing of broadcast services by radio or television stations, nor the provision of internet access as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

"Network Infrastructure Services" means dark fiber services provided by Grantee using Grantee Facilities in the Franchise Area.

"Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Washington, and includes any natural person.

"Right-of-Way," pluralized "Rights-of-Way" means any City street, road, sidewalk, alley or other public City right of way under the jurisdiction and control of the City which has been acquired, established, dedicated or devoted to such purposes.

"Public Works Project" means any capital improvement, maintenance, and/or repair within the Franchise Area that is undertaken by the City (and/or by the City's contractors) and is funded by the City (either directly with its own funds or with other monies obtained by the City). For the avoidance of doubt, the term "Public Works Project" shall include any such capital improvement, maintenance, and/or repair undertaken by the City which requires the relocation of Grantee Facilities within the Franchise Area, even if such capital improvement, maintenance, and/or repair entails, in part, related work performed for a Third Party municipality or government under a valid interlocal agreement between the City and such Third Party municipality or government. The term "Public Works Project" shall not include, without limitation, any improvements, maintenance and/or repairs made or undertaken by or for the direct benefit of private (i.e. non-municipal) Third Party entities.

"State" means the State of Washington.

"Telecommunications Service" has the same meaning as "Telecommunications service" as defined under 47 U.S.C. § 153(53)~~, as may be subsequently amended~~.

"Third Party" means any person, party, or entity other than the City and Grantee.

Section 5. Acceptance of Franchise.

A. This Franchise, and any rights granted hereunder, shall not become effective for any purpose unless and until Grantee files with the Clerk of the ~~Skagit County Board of Commissioners~~ City the duly executed Statement of Acceptance, attached hereto below (the "Franchise Acceptance"). The Franchise Acceptance shall be filed prior to or within thirty (30) days of execution of this Agreement by the ~~Skagit County Board of Commissioners~~ City. The date that the Franchise Acceptance is filed with the Clerk of the ~~Skagit County Board of Commissioners~~ City shall be the effective date of this Franchise.

B. Should Grantee fail to file the duly executed Franchise Acceptance with the Clerk of the ~~Skagit County Board of Commissioners~~ City prior to or within thirty (30) days of execution of this Agreement by the ~~Skagit County Board of Commissioners~~ City, this Franchise ~~will~~ may automatically terminate and shall be ~~null and void~~ voidable at the discretion of the City.

Section 6. Construction and Maintenance.

A. Subject to applicable laws and this Agreement, Grantee shall perform all construction and maintenance necessary for the operation of Grantee Facilities in the Franchise Area. All work regarding Grantee Facilities shall, regardless of who performs the work, be and

remain Grantee's responsibility. Grantee shall apply for, and obtain, all permits necessary for construction and maintenance of Grantee Facilities and for excavating and laying any of Grantee Facilities within the Rights-of-Way. Grantee shall pay all applicable non-discriminatory fees upon issuance of the requisite permits by the City to Grantee.

B. Prior to beginning any construction, Grantee shall provide the City with a construction schedule for work in the Rights-of-Way. As a condition of any permit so issued, the City may impose such non-discriminatory conditions and regulations as are necessary for the purpose of protecting any structures in such Rights-of-Way, restoration of such Rights-of-Way and structures, protection of the public and the continuity of pedestrian or vehicular traffic.

C. In the event that Emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may initiate such Emergency repairs and shall apply for appropriate permits within one (1) business day after discovery of the Emergency.

D. Whenever Grantee disturbs the surface of any Rights-of-Way for any purpose, Grantee shall promptly restore the Rights-of-Way to a condition reasonably comparable to the condition of the Rights-of-Way immediately prior to such disturbance, normal wear and tear excepted. When any opening is made by Grantee in a hard surface pavement in any Rights-of-Way, Grantee shall promptly refill the opening and restore the surface as required by the applicable permit.

E. If the Grantee fails to promptly restore the Rights-of-Way, the City may, after providing reasonable notice to Grantee, refill or repave any opening made by Grantee in the Rights-of-Way, and the reasonable expense thereof shall be paid by Grantee. The City may, after providing written notice of not less than ten (10) business days (or sooner if required by the public health, safety or welfare) to Grantee, repair any work done by Grantee that, in the determination of the City, does not conform to applicable City road standards and specifications. The reasonable cost thereof, including the costs of inspection and supervision, shall be paid by Grantee. All excavations made by Grantee in Rights-of-Way shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Agreement shall be done in compliance with all applicable rules, regulations and ordinances of the City.

F. Grantee Facilities shall be constructed and maintained in such a manner as not to interfere with sewers, storm water facilities, water pipes or any other property of the City, or with any other pipes, wires, conduits, pedestals, structures or other facilities that may have been laid in Rights-of-Way by, or under, the City's authority.

G. Grantee shall provide and use any equipment necessary to control and carry Grantee's signals so as to prevent damage to the City's property or property belonging to any other Person. Grantee, at its own expense, shall repair, renew, change and improve Grantee Facilities to keep Grantee Facilities in good repair and a safe condition.

H. The Grantee Facilities shall be located, erected and maintained so as not to endanger or interfere with the lives of Persons, or to unnecessarily hinder or obstruct the free use of Rights-of-Way or other public property.

I. Grantee shall give reasonable notice to private property owners and residents of construction work in adjacent Rights-of-Way. Nothing in this Agreement shall prevent the City from constructing any Public Works Project or improvement. In the event of significant construction work by Grantee, then Grantee shall provide at least seven (7) days prior written notice to property owners before commencing work. Grantee may provide such notice by letter, door hangers, or other reasonable means. Significant construction work does not include routine installations or repairs of Grantee Facilities. In the event work by Grantee is necessitated by an Emergency, Grantee shall provide notice to the City and affected property owners as soon as reasonably possible.

J. All work authorized and required hereunder shall be done by Grantee in a safe, thorough and workmanlike manner. The Grantee must comply with all federal, State and local safety requirements, rules, regulations, laws and practices, and use all necessary devices as required by applicable law during construction, operation and repair of Grantee Facilities. All installations of Grantee Facilities equipment shall be durable and installed in accordance with good engineering practices and of sufficient height to comply with all federal, State and local regulations, ordinances and laws.

K. On notice from the City that any work is being conducted by Grantee contrary to the provisions of this Agreement, or in an unsafe or dangerous manner, or in violation of the terms of any applicable permit, law, regulation, ordinance or standard, the work may immediately be stopped by the City. The stop work order shall:

(~~A~~1) Be in writing;

(~~B~~2) Be sent to Grantee by mail at the address given herein;

(~~C~~3) Indicate with reasonable particularity the nature of the alleged violation or unsafe condition; and

(~~D~~4) Establish conditions under which work may be resumed. The City shall reasonably cooperate with Grantee in resuming such work.

L. Grantee's contractors and subcontractors shall be licensed and bonded in accordance with local ordinances, regulations and requirements. Work by Grantee's contractors and subcontractors shall be subject to the same restrictions, limitations and conditions as if the work were performed by Grantee. Grantee shall be responsible for all work performed by its contractors and subcontractors and others performing work on Grantee's behalf, and shall ensure that all such work is performed in compliance with this Agreement and

other applicable law, and shall be jointly and severally liable for all damages caused by them. It is Grantee's responsibility to ensure that contractors, subcontractors or other Persons performing work on Grantee's behalf are familiar with the requirements of this Agreement and other applicable laws governing the work performed by them.

M. Grantee and the City shall each exercise all reasonable efforts to coordinate any construction work that either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and utilities within the Franchise Area informed of its intent to undertake such construction work. Grantee and the City shall further exercise reasonable efforts to minimize any delay or hindrance to any construction work undertaken by themselves or others within the Franchise Area.

Section 7. Grantee Information.

A. Grantee agrees to supply, at no cost to City, any information reasonably requested by the City to coordinate municipal functions with Grantee's activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum (but is not limited to), as-built drawings of Grantee Facilities, installation inventory, and maps and plans showing the location of existing or planned facilities within City. Said information may be requested either in hard copy and/or electronic format, if reasonably possible in a format compatible with City's database system, as now or hereinafter existing, including City's geographic information Service (GIS) data base. Grantee shall use its commercially reasonable efforts to keep the City informed of its long-range plans for coordination with City's long-range plans.

B. Upon the City's written request, Grantee shall provide to the City copies of any plans prepared by Grantee for initial installation, improvements, relocations and conversions to its Grantee Facilities within the Franchise Area; provided, however, any such plans so submitted shall be for informational purposes only and shall not obligate Grantee to undertake any specific improvements within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

~~C. Upon the~~ City's written request, Grantee shall provide to the City copies of available drawings in use by Grantee showing the location of Grantee Facilities at specific locations within the Franchise Area. ~~As to any such drawings so provided, Grantee does not warrant the accuracy thereof and, to the extent the locations of facilities are shown, such facilities are shown in their approximate location.~~ Grantee warrants the map and information supplied as accurate, and agrees to update the map and information timely with any changes made in Grantee Facilities in the Right-of-Way. Grantee agrees to save, indemnify and hold harmless City from any claim, damages, or cause of action arising from work in the Right-of-Way commenced or stopped because of inaccuracies in the map or information, including, but not limited to, costs of re-design, costs of relocation, costs of delay or otherwise. This indemnity shall include all City costs and reasonable attorneys' fees incurred by City in

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defending a claim, or cause of action brought against the City for damages, and for the City's costs and reasonable attorneys' fees incurred by City in enforcing this indemnity.

D. Subject to the provisions of this Agreement and applicable law, the City shall have access to, and the right to inspect, any books and records of Grantee and its Affiliates that are reasonably related to the enforcement of the provisions of this Agreement. Such review shall be at the Grantee's local office in the Kirkland area during normal business hours and on a non-disruptive basis following written notice of not less than ten (10) business days. Such notice shall specifically reference the Section or subsection of the Agreement that is under review so that the Grantee may organize the necessary books and records for easy access by the City. Grantee shall not deny the City access to any of Grantee's records on the basis that Grantee's records are under the control of any Affiliate. The City may, in writing, request copies of any such records or books, and Grantee shall provide such copies within thirty (30) days of the receipt of such request. One copy of all reports and records required under this or any other subsection shall be furnished to the City at the sole expense of Grantee. If the requested books and records are too voluminous, or for security reasons cannot be copied or removed, then Grantee may request, in writing within ten (10) days of receipt of such request, that the City inspect them at Grantee's local office~~ in the Bellingham area~~. If any books or records of Grantee are not kept in a local office and not made available in copies to the City upon written request as set forth above, and if the City reasonably determines that an examination of such records is necessary for the enforcement of this Agreement, then all reasonable City travel expenses incurred in making such examination shall be paid by Grantee.

E. It shall be Grantee's responsibility to mark all proprietary documents as "Confidential" as may be allowed under~~ RCW 42.56~~ law. If possible, the City shall reasonably attempt to provide Grantee with up to thirty (30) days written notice when a third party requests access to documents to which Grantee reasonably asserts are "confidential" or exempt from disclosure~~ per RCW 42.56~~. Upon receiving such written notice, Grantee may then seek a protective order, and if Grantee does not do so within thirty (30) days, then the City may release the documents.

~~F. Grantee expressly acknowledges and agrees that all and/or parts of any and all documents, materials, drawings, data, mapping and other information received by the~~ City from Grantee may be subject to public disclosure, pursuant to State law~~ (including, RCW 42.56)~~. While the City may take reasonable steps to attempt to prevent the disclosure of documents, materials, drawings, information, and/or materials that the City believes to be confidential, the City cannot and does not represent and/or guarantee that any specific documents, materials, drawings and/or information will not be released, even if the release of such documents, materials, drawings and/or information may be (or may arguably be) exempt or otherwise preventable by law, and Grantee hereby releases and holds the City harmless from any damages incurred by Grantee resulting from the release or disclosure of any documents, materials, drawings and/or information.

Section 8. Location and Relocation of Grantee Facilities.

A. Whenever the City causes the construction of any Public Works Project within the Franchise Area and such construction necessitates the relocation of Grantee's facilities from their existing location within the Franchise Area, such relocation shall be accomplished by Grantee at no cost, expense, or liability to the City, and within timeframes specified by the City. The City will treat all similarly situated providers in a comparable manner. Such alternate location for relocation of Grantee's facilities shall be determined and approved by the City, such approval not to be unreasonably withheld, delayed or conditioned, and, if necessary, shall be obtained and provided by Grantee, at no cost to the City. To the maximum extent provided by law, Grantee is responsible and liable for the timely performance of any reasonable request by the City for the relocation of any and all facilities located within the Franchise Area (to facilitate any Public Works Project) unless a delay in this performance is caused by the acts or omissions of the City, and Grantee further agrees (to the maximum extent permitted by law) to be liable and responsible for costs, expenses, and/or damages suffered by the City directly arising from and/or directly related to any delay caused by Grantee in such a relocation of the Facilities within the Franchise Area pursuant to the terms of this subsection.

B. In the event an Emergency posing a threat to public safety or welfare requires the relocation of Grantee's facilities within the Franchise Area, the City shall give Grantee notice of the Emergency as soon as reasonably practicable. Upon receipt of such notice from the City, Grantee shall endeavor to respond as soon as reasonably practicable to relocate the affected facilities.

C. Whenever any third party requires and requests the relocation of Grantee's facilities to accommodate work of such third party within the Franchise Area, Grantee shall have the right as a condition of any such relocation to require payment in advance by the third party to Grantee, at a time and upon terms acceptable to Grantee, for any and all costs and expenses incurred by Grantee in the relocation of Grantee's facilities.

D. Any condition or requirement imposed by the City upon any third party (including, but not limited to, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits obtained pursuant to any zoning, land use, construction or other development regulation) which requires the relocation of Grantee's facilities within the Franchise Area shall be a condition or requirement causing relocation of Grantee's facilities to occur subject to the provisions of subsection (C) above; provided, however, in the event the City reasonably determines and notifies Grantee that the primary purpose of imposing such condition or requirement upon such third party is to cause or facilitate the construction of a Public Works Project to be undertaken within a segment of the Franchise Area on the City's behalf, then Grantee shall otherwise relocate its facilities within such segment of the Franchise Area in accordance with this Agreement, and such relocation shall be accomplished by Grantee at no cost or expense to the City.

E. As to any relocation of Grantee's facilities whereby the cost and expense thereof is to be borne by Grantee in accordance with this Agreement, Grantee may, after receipt of

written notice requesting such relocation, submit in writing to the City alternatives to relocation of its facilities. Upon the City's receipt from Grantee of such written alternatives, the City shall timely evaluate such alternatives and shall advise Grantee in writing (at the City's reasonable option and discretion) if one or more of such alternatives are suitable to accommodate the work which would otherwise necessitate relocation of Grantee's facilities. In the event the City reasonably determines that such alternatives are not appropriate, Grantee shall relocate its facilities as otherwise provided in this Agreement.

F. Nothing in this subsection shall require Grantee to bear any cost or expense in connection with the relocation of any facilities under benefit of private easement or other rights not arising under this Agreement, nor shall anything in this subsection require the City to bear any such cost or expense. Nothing in this subsection shall be construed to be a waiver of any right of either Grantee or the City to contest any claim or assertion by the other of responsibility to pay such cost or expense.

G. All survey monuments which are disturbed or displaced by Grantee in its performance of any work under this Agreement shall be referenced and restored by Grantee, as per ~~WAC 332-120, as from time to time amended, and all~~ pertinent federal, State, and local laws. Grantee agrees that should any of its actions under this 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, said property to a safe condition. Such repair work shall be performed and completed to the reasonable satisfaction of the City.

H. Upon the City's reasonable written request, in connection with the design of any Public Works Project, Grantee shall verify the location of its underground facilities within the Franchise Area by excavating (e.g., potholing) at no expense to the City, and within timeframes specified by the City. In the event Grantee performs such excavation, Grantee's restoration of the disturbed area shall be substantially to the same condition as existed immediately prior to the excavation.

I. Nothing in this subsection is intended (or shall be construed) to relieve either party of their respective obligations arising under applicable law with respect to determining the location of Grantee Facilities. Grantee shall identify, mark, and otherwise locate any and all underground Grantee Facilities located within the Franchise Area in accordance with and subject to RCW 19.122 (commonly known as the "call before you dig" law), and/or any other such subsequent and/or successor legislation. Grantee agrees (to the maximum extent permitted by law) to be liable and responsible for any and all costs, expenses, and/or damages suffered by the City directly arising from any delay associated with Grantee's failure to locate underground Grantee Facilities within the Franchise Area within the timeframes specified by RCW 19.122 (and/or any other subsequent and/or successor legislation), and/or otherwise pursuant to the terms of this subsection.

Section 9. Abandonment or Removal of Grantee Facilities.

In the event Grantee permanently ceases use of any of Grantee Facilities within the Franchise Area, Grantee shall within one hundred eighty (180) days (or within such additional time as is agreed to in writing between the parties after such permanent cessation of use), remove such Grantee Facilities at the sole cost and expense of Grantee; provided that with the express written consent of the City, Grantee may leave such Grantee Facilities in place subject to the conditions set forth in this Section. Any such facilities to be left in place shall be made inert by disconnecting such Grantee Facilities, all in compliance with applicable laws, regulations and industry standards. The City's consent shall not relieve Grantee of the obligation and/or costs to subsequently remove or alter such Grantee Facilities in the event the City reasonably determines that such removal or alteration is necessary or advisable for the health and safety of the public, in which case Grantee shall perform such work at no cost to the City. The obligations contained in this Section shall survive the expiration, revocation, or termination of this Agreement.

Section 10. Undergrounding and Excavations.

A. The parties agree that this Franchise does not limit City's authority under federal law, State law, or local ordinance, to require the undergrounding of utilities.

B. Whenever City requires the undergrounding of aerial utilities in the Franchise Area, Grantee shall underground Grantee Facilities in the manner specified by the City ~~Engineer~~ at no expense or liability to City. Where other utilities are present and involved in the undergrounding project, Grantee shall be required to pay only its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Grantee Facilities. Common costs shall include necessary costs for common trenching and utility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded. The Grantee shall participate with other providers in joint trench projects to relocate its overhead facilities underground and remove its overhead facilities in areas where utilities are being converted to underground facilities.

C. If, at any time or from time to time, either Grantee or the City shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the other, upon receipt of a written request to do so, an opportunity to use such excavation, provided that: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made; and (2) such joint use shall be arranged and accomplished on terms and conditions reasonably satisfactory to both parties.

D. To the extent it is technically and economically feasible, Grantee shall joint trench or share bores or cuts and work with other providers (such as, but not limited to, cable, gas and electric companies), licensees, permittees and franchisees so as to reduce the number of Right-of-Way cuts within the City.

Section 11. Indemnification and Hold Harmless.

A. Grantee shall indemnify, defend and hold the City, its appointed and elected officials, agents, officers, employees, and volunteers harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever including all costs and attorneys' fees, on account of injury, harm, death or damage to persons or property which is caused by, in whole, or in part, and then only to the extent of the negligent acts or omissions of, Grantee or its agents, servants, employees, contractors, or subcontractors, in the exercise of the rights granted to Grantee by this Agreement. Provided, however, such indemnification shall not extend to that portion of any claims, demands, liability, loss, cost, damage or expense of any nature whatsoever including all costs and attorneys' fees caused by the sole or contributory negligence of the City, its appointed and elected officials, agents, officers, employees, and volunteers. In the case of contributory negligence of both parties, the Grantee's indemnification obligation shall remain for its percentage portion of the contributory negligence, and the City shall be responsible for its percentage portion of the contributory negligence.

B. Grantee shall indemnify, defend and hold the City, its appointed and elected officials, agents, officers, employees, and volunteers harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever including all costs and attorneys' fees, on account of violation of any environmental laws directly resulting from the use, operation, or maintenance of Grantee Facilities, or from any release of hazardous substances on or from Grantee Facilities. This indemnity includes, but is not limited to: (a) liability for a governmental agency's costs of removal or remedial action for hazardous substances; (b) damages to natural resources caused by hazardous substances, including the reasonable costs of assessing such damages; (c) liability for any other person's costs of responding to hazardous substances; and (d) liability for any costs of investigation, abatement, correction, cleanup, fines, penalties, or other damages arising under any environmental laws.

C. It is further specifically and expressly understood that, solely to the extent required to enforce the indemnification provided herein, Grantee waives its immunity under RCW Title 51; provided, however, the foregoing waiver shall not in any way preclude Grantee from raising such immunity as a defense against any claim brought against Grantee by any of its employees. This waiver has been mutually negotiated by the parties.

D. In the event any matter (for which the City intends to assert its rights under this subsection) is presented to or filed with the City, the City shall promptly notify Grantee thereof, and Grantee shall have the right, at its election and at its sole costs and expense, to settle and compromise such matter as it pertains to Grantee's responsibility to indemnify, defend and hold harmless the City, its appointed and elected officials, agents, officers, employees, and volunteers. In the event any suit or action is started against the City based upon any such matter, the City shall likewise promptly notify Grantee thereof, and Grantee shall have the right, at its election and at its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election, as it

pertains to Grantee's responsibility to indemnify, defend and hold harmless the City, its appointed and elected officials, agents, officers, employees, and volunteers.

E. Acceptance by the City of any work performed by Grantee under this Agreement shall not be grounds for avoidance of this Section.

~~F. Grantee shall at its own cost, expense, and liability, comply with all applicable laws, statutes, rules, and regulations concerning a release of Hazardous Substances by Grantee directly arising from or directly relating to~~ Grantee Facilities. ~~"Hazardous Substances" shall mean any material or substance which causes environmental pollution or contamination (and associated liability and clean-up costs related thereto) as defined under applicable state and federal laws, rules, and regulations, specifically including, but not necessarily limited to, pollutants or substances now or hereafter defined as "hazardous waste", "hazardous substances", "hazardous materials", "pollutants", "contaminates", or "toxic substances" in the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 (PL 99-499); the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq.; the Resource Conservation and Recovery Act, 15 U.S.C. Section 2601, et seq.; the Resource Conversation and Recovery Act of 1976, as amended, 42 U.S.C. Section 1601, et seq.; the Clean Water Act, 33 U.S.C. Section 1251, et seq.; the Washington State Environmental Policy Act, RCW 90.48.010, et seq.; the Water Pollution Control Act, RCW 90.48.010, et seq.; the Hazardous Waste Management Statute, RCW 90.105, et seq.; the Toxic Substance Control Act, RCW 70.105C, et seq.; and the Model Toxics Control Act, RCW 70.105C, et seq.; and in the rules or regulations adopted and guidelines promulgated pursuant to said laws.~~ Grantee shall be solely and separately liable and responsible for the containment, remediation and/or clean-up of any release of Hazardous Substances caused by Grantee directly arising from or directly relating to Grantee Facilities. Grantee shall indemnify, defend and hold the City harmless from any fines, suits, procedures, claims, costs, damages, expenses, and actions of any kind arising out of or in any way connected with any release(s) of Hazardous Substances caused by Grantee directly arising from or directly relating to Grantee Facilities. This indemnity includes, but is not limited to: (a) liability for a governmental agency's costs of removal or remedial action for Hazardous Substances; (b) damages to natural resources caused by Hazardous Substances, including the reasonable costs of assessing such damages; (c) liability for the City's costs of responding to Hazardous Substances; and (d) liability for any costs of investigation, abatement, mitigation, correction, remediation, cleanup, fines, penalties, or other damages arising under any environmental laws.

G. The City specifically does not, by any provision of this Agreement, waive any right, immunity, limitation or protection otherwise available to the City, its elected officials, officers, boards, commissions, agents or employees under federal, State, or local law.

Section 12. Insurance.

A. Grantee shall procure and maintain for the duration of this Agreement, insurance, or provide self-insurance, against all claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to Grantee, its agents, representatives or employees. Grantee shall provide evidence of self-insurance and/or an insurance certificate, that names the City, its officers, elected officials, agents, employees, representatives, engineers, consultants and volunteers as additional insureds, to the City prior to the commencement of any work or installation of any Grantee Facilities pursuant to this Agreement. Such self-insurance and/or insurance certificate shall evidence the following minimum coverages. All required insurance shall be obtained from companies rated "A-" or better in "A.M. Best's Insurance Guide," or an equivalent rating by similar rating agencies, and shall be from insurers authorized to transact business in the State. In no event shall the limits of any insurance policies be construed as limiting the liability of Grantee.

(1) Comprehensive general/excess liability insurance including coverage for premises - operations, explosions and collapse hazard, underground hazard and products completed hazard, with limits not less than:

(a) $3,000,000 (three million dollars) per occurrence and in the aggregate for bodily injury or death to each person;

(b) $3,000,000 (three million dollars) for property damage resulting from any one accident; and

(c) $3,000,000 (three million dollars) for general liability

(2) Automobile liability for owned, non-owned and hired vehicles with a limit of $1,000,000 (one million dollars) for each person and $1,000,000 (one million dollars) for each accident;

(3) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than $2,000,000 (two million dollars);

If coverage is purchased on a "claims made" basis, then Grantee shall warrant continuation of coverage, either through policy renewals or the purchase of an extended discovery period, if such extended coverage is available, for not less than three years from the date of termination of this Agreement, and/or conversion from a "claims made" form to an "occurrence" coverage form. The required liability limits may be met under a primary or an excess policy, or any combination thereof.

B. Any deductibles or self-insured retentions must be declared to the City, if requested by the City. Payment of deductibles and self-insured retentions shall be the sole responsibility of Grantee. The insurance certificate required by this subsection shall contain a

clause stating that coverage shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

C. Grantee's insurance shall be primary insurance with respect to the City, its officers, officials, employees, agents, consultants, and volunteers. Any insurance maintained by the City, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of Grantee's insurance and shall not contribute with it.

D. In addition to the coverage requirements set forth in this subsection, the certificate of insurance shall provide that:

> "The above described policies will not be canceled before the expiration date thereof, without the issuing company giving sixty (60) days written notice to the certificate holder."

In the event of said cancellation or intent not to renew, Grantee shall obtain and furnish to the City evidence of replacement insurance policies meeting the requirements of this subsection by the cancellation date.

Section 13. Security for Performance.

A. Prior to commencing any work in the Franchise Area, Grantee shall post a surety bond in a form and amount satisfactory to the City (as determined by the City, at the City's sole option, judgment, and discretion) to ensure satisfactory restoration of the Franchise Area following the completion of Grantee's work therein. In lieu of separate bonds for routine individual projects involving work in the Franchise Area, Grantee may satisfy the City's bond requirements (at the discretion of the City) by posting a single on-going performance bond in the amount of fifty thousand dollars ($50,000) to ensure satisfactory restoration of the Franchise Area following the completion of Grantee's work therein. The bond shall be in effect and on-going for the term of this Agreement and Grantee shall pay all premiums or costs associated with maintaining the bond(s), and shall keep the same in full force and effect at all times. The bond(s) shall be in a form reasonably acceptable to the City~~'s Risk Manager~~.

B. The bond(s) shall provide that the bond(s) shall not be cancelled or materially altered so as to be out of compliance with the requirements of this subsection without thirty (30) days written notice first being given to the City. If the bond(s) is/are cancelled or materially altered so as to be out of compliance with the requirements of this subsection, Grantee shall provide replacement bonds. Grantee agrees to maintain continuous uninterrupted bonds in the amounts required for the duration of this Agreement or thereafter as specified in this Agreement.

Section 14. Vacation of Rights of Way.

A. If any Rights-of-Way or portion thereof used by Grantee are vacated by the City during the term of this Agreement, unless the City specifically reserves to Grantee an easement (for the right to continue use of portion[s] of vacated Rights-of-Way), Grantee shall, without delay or expense to the City, remove Grantee Facilities from such Rights-of-Way and restore, repair or reconstruct the Rights-of-Way where such removal has occurred. In the event of failure, neglect or refusal of Grantee to restore, repair or reconstruct such Rights-of-Way after sixty (60) days written notice from the City, the City may do such work or cause it to be done, and the City's reasonable costs thereof shall be paid by Grantee within thirty (30) days of receipt of an invoice and documentation.

~~B. Prior to incorporation of any of the City roads and/or Rights-of-Way by any city or town, the City may (but shall not be required to) grant to Grantee an easement sufficient in size for the existing Facilities contained in the incorporated road and/or Right-of-Way.~~

Section 15. Construction and Use of Poles and Towers.

A. Grantee shall attach Grantee Facilities to existing poles to the extent reasonably possible when the installation of Grantee Facilities above-ground is permitted. In the event Grantee cannot obtain the necessary poles pursuant to a pole attachment agreement, and only in such event, then, subject to obtaining the City's prior written consent (such consent not to be unreasonably withheld), it shall be lawful for Grantee to make all necessary excavations in the streets for the purpose of placing, erecting, maintaining, repairing and removing poles needed for the maintenance or extension of Grantee Facilities. The City shall not be responsible or liable for the unavailability of any utility poles and/or structures owned by the City and/or third parties. The City shall have the right to require Grantee to change the location of any pole within Rights-of-Way when, in the reasonable opinion of the City, the public health, safety or welfare requires such change, and the expense thereof shall be paid by Grantee.

B. Antenna supporting structures ("Towers") shall be designed for proper loading as applicable industry standards may require (as may be amended from time to time). Towers shall be painted, lighted, erected and maintained in accordance with all applicable rules and regulations of the Federal Aviation Administration and all other applicable federal, State or local codes or regulations.

Section 16. Vegetation Management.

A. As between the parties, Grantee shall be responsible and/or liable for the maintenance of vegetation that may affect or impair Grantee Facilities within the Franchise Area. Trees which unreasonably interfere with facilities may be trimmed or removed. Grantee shall otherwise coordinate its routine vegetation management activities with the City and may trim vegetation in close proximity to its facilities within the Franchise Area in compliance with all federal and State laws and all applicable City ordinances, regulations, resolutions, policies

and rules. Trimming and removal of vegetation within the Franchise Area shall be performed by Grantee using industry standards and practices.

C. At the written request of the City, Grantee shall, in coordination with City staff, identify vegetation species appropriate for location in proximity to Grantee's facilities and shall cooperatively act with the City to promote the use of such identified species in proximity to the facilities.

D. Nothing in this Agreement shall impair the City's ability to perform vegetation management activities within the Franchise Area, as the City may determine to be useful or necessary to serve and protect the public interest and welfare; provided that nothing in this Agreement shall create or impose any duty or obligation on the part of the City to perform any vegetation management activities within the Franchise Area.

Section 17. Inspection of Facilities.

A. The City may inspect any of Grantee Facilities and equipment located in the Rights-of-Way or on other public property at any reasonable time during business hours upon at least twenty-four (24) hours notice, or, in case of an Emergency, upon demand without prior notice. If an unsafe condition is found to exist, the City, in addition to taking any other action permitted under applicable law, may order Grantee to make the necessary repairs and alterations specified therein and correct the unsafe condition within the time specified by the City. The City has the right to correct, inspect, administer and repair the unsafe condition if Grantee fails to do so within the time specified and to charge Grantee for the City's cost incurred therefor. In such event, the City shall not be liable for any damage to any portion of Grantee Facilities.

Section 18. Successors and Assignees.

A. Except to an Affiliate of Grantee, this Agreement and the Grantee Facilities shall not be assigned, transferred, sold, or disposed of, in whole or in part, by voluntary sale, sale and leaseback, merger, consolidation, exchange of stock, by provision of a management agreement, or otherwise, or by forced or involuntary sale, without the prior written consent of the City and then only under such conditions as the City may prescribe consistent with state and federal law. All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors, assigns of, and independent contractors of Grantee, and all rights and privileges, as well as all obligations and liabilities of Grantee shall inure to its successors, assignees and contractors equally as if they were specifically mentioned herein wherever Grantee is mentioned.

~~B. This Franchise shall not be leased, assigned or otherwise alienated, except to an Affiliate of Grantee, without the express consent of City by resolution of the Board of Commissioners, which approval shall not be unreasonably withheld.~~

C~~B~~. Grantee and any proposed assignee or transferee shall provide and certify the following to City not less than one hundred and twenty (120) days prior to the proposed date of transfer: (a) complete information setting forth the nature, term and conditions of the proposed assignment or transfer; (b) all information required by City of an applicant for a Franchise with respect to the proposed assignee or transferee; and, (c) a transfer application fee which shall be set by City, plus any other costs actually and reasonably incurred by City in processing, and investigating the proposed assignment or transfer. ~~A transferee, new controlling party and the Grantee requesting a transfer of this Agreement shall be responsible for a transfer application fee in an amount of one thousand five hundred dollars ($1,500).~~

D~~C~~. Prior to City's consideration of a request by Grantee to consent to a Franchise assignment or transfer, the proposed assignee or transferee shall file with City a written promise to unconditionally accept all terms of this Franchise, effective upon such transfer or assignment of this Franchise. City is under no obligation to undertake any investigation of the transferor's state of compliance and failure of City to insist on full compliance prior to transfer does not waive any right to insist on full compliance thereafter. The City may request any information it deems reasonable to evaluate the financial, technical and legal qualifications of the proposed transferee or new controlling party. Grantee, the proposed transferee and new controlling party shall provide the information requested by the City in a timely manner.

~~E~~D. The approval of a sale, transfer or change in control in one instance shall not render unnecessary approval of any subsequent sale, transfer or change in control. Approval of a sale, transfer or change in control by the City does not constitute a waiver or release by the City of its rights under this Agreement or applicable law.

Section 19. Dispute Resolution.

A. The parties recognize that cooperation and communication are essential to resolving issues quickly and efficiently. If any dispute arises in regard to the material terms or conditions of this Agreement, then the parties shall meet and engage in good faith discussions with the objective of settling the dispute within ten (10) business days after either party requests such a meeting. For purposes of this Agreement, "material" means Grantee's payment of the Franchise Fees, the scope of Grantee's authority to provide authorized services and its responsibility to act in a timely manner. If the parties cannot resolve the dispute within such ten (10) business day period, the parties will, upon the written request of either party and written notice to the other party of the disputed material term of the Agreement, seek to resolve the dispute in accordance with the following dispute resolution process:

Level One – A representative from Grantee and the City~~'s Public Works Director~~ shall meet to discuss and attempt to resolve the dispute in a timely manner. If these representatives cannot resolve the dispute within ten (10) business days after referral of the dispute to Level One, either party may by written notice to the other party refer the dispute to Level Two.

Level Two – In the event either party properly refers the dispute to Level Two, a new Grantee representative and a new City representative shall meet to discuss and attempt to resolve the dispute in a timely manner. If these representatives cannot resolve the dispute within ten (10) business days after referral of the dispute to Level Two, either party may by written notice to the other party refer the dispute to Level Three.

Level Three – In the event either party properly refers the dispute to Level Three, the parties shall refer the dispute to mediation using a mediator mutually agreeable to the parties. If mediation does not resolve the dispute within ten (10) business days after referral of the dispute to Level Three, either party may by written notice to the other party refer the dispute to Level Four.

Level Four – In the event either party properly refers the dispute to Level Four or the dispute is not resolved at Level Three within ten (10) business days after referral of that dispute to Level Three, either party may seek resolution of the dispute through litigation or other judicial proceedings in any court having jurisdiction over the dispute.

B. Nothing in this Section 19 (or any other provision of this Agreement) shall be deemed to otherwise bar the right of the City or Grantee to seek or obtain judicial relief from a violation of any term or provision of this Agreement via the commencement of litigation or other judicial proceedings or request injunctive or other equitable relief necessary to prevent irreparable harm, but in such event the parties may (except as may be prohibited by judicial order) nevertheless continue to follow the procedures set forth in Section 19. Further, the dispute resolution timeframes specified within this Section 19 shall not alter or impair Grantee's duty to relocate Facilities within the Franchise Area pursuant to the terms of Section 8 of this Agreement, and shall not alter or impair Grantee's duty to locate underground Facilities within the Franchise Area pursuant to the terms of Section 8 or Section 10 of this Agreement. Neither the existence of other remedies identified in this Agreement (including the Dispute Resolution procedures provided within this Section 19) nor the exercise thereof shall be deemed to bar or otherwise limit the right of the City or Grantee to recover monetary damages for such violations by the other party, or to seek and obtain judicial enforcement of the other party's obligations by means of specific performance, injunctive relief or mandate, or any other remedy at law or in equity.

Section 20. Enforcement and Remedies.

A. Subject to the dispute resolution provisions of this Agreement, if Grantee shall fail to comply with a material provision of this Agreement, the City may serve upon Grantee a written order to so comply within thirty (30) days from the date such order is received by Grantee. If Grantee is not in compliance with this Agreement after expiration of said thirty (30) day period, the City may, by resolution of the Board of Commissioners, declare an immediate forfeiture of this Agreement.

B. The City and Grantee shall, as may be reasonably practicable, continue to perform their respective obligations under this Agreement while a dispute is pending.

C. Should City determine that Grantee is acting beyond the scope of permission granted herein for Grantee Facilities and Network Services, City reserves the right to cancel this Franchise and require Grantee to apply for, obtain, and comply with all applicable City permits, franchises, or other City permissions for such actions, and if Grantee's actions are not allowed under applicable federal and state or City laws, to compel Grantee to cease such actions.

Section 21. Compliance with Laws and Regulations.

A. This Franchise is subject to, and Grantee shall comply with all applicable federal and state and/or City laws, regulations and policies (including all applicable elements of City's comprehensive plan), in conformance with federal laws and regulations, affecting performance under this Franchise. Furthermore, notwithstanding any other terms hereof to the contrary, Grantee shall be subject to the police power of City to adopt and enforce general ordinances necessary to protect the safety and welfare of the general public in relation to the rights granted in the Franchise Area.

B. City reserves the right at any time to amend this Franchise to conform to any hereafter enacted, amended, or adopted federal or state statute or regulation relating to the public health, safety, and welfare, or relating to roadway regulation, or a City Ordinance enacted pursuant to such federal or state statute or regulation upon providing Grantee with thirty (30) days written notice of its action setting forth the full text of the amendment and identifying the statute, regulation, or ordinance requiring the amendment. Said amendment shall become automatically effective upon expiration of the notice period unless, before expiration of that period, Grantee makes a written call for negotiations over the terms of the amendment. If the parties do not reach agreement as to the terms of the amendment within thirty (30) days of the call for negotiations, City may enact the proposed amendment, by incorporating Grantee's concerns to the maximum extent City deems possible.

Section 22. Consideration.

A. As consideration for this Franchise, Grantee contractually agrees to pay the City franchise fees in the amount of six percent (6%) on gross revenues derived from Grantee's provision of leasing dark fiber to Third Party businesses or other Third Party customers and for Network Telephone Service, Telecommunications Service, and Network Infrastructure Services utilizing the Grantee Facilities in the City, net of bad debt or other uncollectable amounts~~, excluding those revenues derived from the City under the Dark Fiber Optic Lease Agreement (defined herein below at Section 31), and any renewals or extensions of the Dark Fiber Optic Lease Agreement, or substantially similar successor agreement(s) in which the City obtains dark fiber service from Grantee~~. The parties intend that this franchise fee obligation be construed to cover and include all of Grantee's gross revenues from services that are derived from Grantee Facilities in the City except for Information Services and cable service.

B. Grantee's franchise fee payments to the City shall be computed quarterly for the preceding calendar quarter ending 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 said dates. Payments shall be made to the Clerk of the ~~Board of County Commissioners at 1800 Continental Place, Mount Vernon, WA 98273~~ City, unless otherwise specified by the City in writing.

C. No acceptance of any payment shall be construed as an accord by the City that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable or for the performance of any other obligation of Grantee.

D. Each payment shall be accompanied by a written report to the City verified by an authorized representative of Grantee, containing an accurate statement in summarized form, as well as in reasonable detail, of Grantee's gross revenues and the computation of the payment amount. Grantee shall, no later than sixty (60) days after the end of each calendar year, furnish to the City a statement of gross revenues and all payments, deductions and computations for the year just ended. Such statement shall be reviewed and approved by an authorized representative of Grantee prior to submission to the City.

E. During the term of this Agreement, and for a period of one (1) year thereafter, the City may retain (on a non-contingent fee basis) an independent auditor to review and audit Grantee's relevant records to confirm the performance of payment obligations under this Agreement upon thirty (30) days prior written notice. Each party shall provide a list of two (2) auditors, one of whom thereafter must be mutually agreed to by the parties. Such audit shall: (a) be subject to Grantee's reasonable security and confidentiality requirements; (b) occur no more than once per year and not during the first or last three (3) weeks of a calendar quarter; and (c) transpire during Grantee's normal business hours. If the audit shows an underpayment to the City for any period of time, then Grantee shall, within thirty (30) days after completion of such audit, pay such underpaid amounts to the City. If the audit shows an overpayment to the City for any period of time, then the City shall, within thirty (30) days after completion of such audit, pay such overpaid amounts to Grantee. Any underpayment or overpayment will also include interest at the maximum allowed rate provided under State law, calculated from the date of the underpayment or overpayment. All expenses associated with such audit shall be paid by the City unless the audit reveals an underpayment of more than ten percent (10%) in payments required hereunder in which case Grantee shall reimburse the City for the reasonable costs of such audit, not to exceed Five Thousand Dollars ($5,000).

F. Any claim arising as a result of such an audit against Grantee must be made in writing within sixty (60) days of the City's completion of the audit. All information reviewed by the City or its auditor pursuant to any audit shall be deemed to be "Confidential Information" subject to the terms of Section 7 herein and shall be treated as such by the City in accordance with applicable law.

G. No more than once per year, Grantee agrees to meet with a representative of the City upon written request to review Grantee's methodology of record-keeping, financial reporting, the computing of franchise fee obligations and other procedures, the understanding of which the City deems necessary for reviewing reports and records that are relevant to the enforcement of this Agreement.

H. In the event any payment is not received within forty-five (45) days from the end of the calendar quarter, Grantee shall pay, in addition to the payment or sum due, interest on the amount due at the maximum allowed rate as provided under State law from the date the payment was due until the date the City receives the payment.

I. If this Agreement terminates for any reason, the Grantee shall file with the City, within sixty (60) calendar days of the date of the termination, a financial statement showing the gross revenues received by the Grantee since the end of the previous fiscal year. Within thirty (30) days of the filing of the certified statement with the City, Grantee shall pay any unpaid amounts as indicated. If the Grantee fails to satisfy its remaining financial obligations as required in this Agreement, the City may do so by utilizing the funds available in any security provided by the Grantee.

Section 23. Severability and Neutral Authorship.

If any portion of this Franchise is deemed invalid, the remaining portions shall remain in effect. Each of the terms and provisions of this Agreement have been reviewed and negotiated, and represents the combined work product of the parties hereto. No presumption or other rules of construction which would interpret the provisions of this Agreement in favor of or against the party preparing the same shall be applicable in connection with the construction or interpretation of any of the provisions of this Agreement. The parties represent that they have had a full and fair opportunity to seek legal advice with respect to the terms of this Agreement and have either done so, or have voluntarily chosen not to do so. The parties each represent that they are duly authorized to execute this Agreement. Whenever this Franchise sets forth a time for any act to be performed, such time shall be deemed to be of the essence, and any failure to perform within the allotted time may be considered a material violation of this Franchise.

Section 24. Titles.

The section titles used herein are for reference only and should not be used for the purpose of interpreting this Franchise.

Section 25. Attorneys' Fees.

If any action or suit arises in connection with this Agreement, excluding subsequent franchise renewal proceedings, the prevailing party shall be entitled to recover all of its reasonable attorneys' fees, consultants' fees, costs and expenses in connection therewith, in addition to such other relief as the court may deem proper.

Section 26. Authority to Amend.

Subject to applicable law, this Agreement may be amended at any time by duly executed subsequent written agreement between the parties.

Section 27. Governing Law and Venue.

This Agreement shall be governed, construed and enforced in accordance with the laws of the State of Washington, exclusive of its choice of law provisions, and applicable Federal laws, rules, and regulations (including the Telecommunications Act). Venue for any judicial dispute between the City and Grantee arising under or out of this Agreement shall be in ~~Skagit County Superior~~ _____ Court ~~in Mount Vernon, Washington~~.

Section 28. No Joint Venture or Third Party Beneficiaries.

Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner which would indicate any such relationship with the other. Nothing in this Franchise shall be construed to create or confer any right or remedy upon any person(s) other than the City and Grantee. No action may be commenced or prosecuted against any party by any Third Party claiming as a Third Party beneficiary of this Franchise. This Franchise shall not release or discharge any obligation or liability of any Third Party to either party.

Section 29. Non-Waiver.

The failure of either party at any time to require performance by the other party of any provision hereof shall in no way affect the right hereafter to enforce the same. The waiver by either party of any breach of any provision hereof shall not be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

Section 30. Actions of the City or Grantee.

In any action by the City or Grantee mandated or permitted under the provisions hereof, it shall act in a reasonable, expeditious and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

~~**Section 31. Continuity of Services to City.**~~

~~The parties recognize that the City and Grantee currently have a separate and unrelated agreement in place concerning services provided to the City by Grantee, namely an agreement entitled "Dark Fiber Optic Lease Agreement," Skagit County Contract # C20120063, as amended~~

~~by Amendment # A20130159, dated December 23, 2013 (the "Dark Fiber Optic Lease Agreement"). As part of the mutual consideration for this Franchise, the parties agree that said Dark Fiber Optic Lease Agreement shall continue (via renewal or extension, etc.) with substantially similar terms and pricing for a period not less than five (5) years from the effective date of this Franchise. The parties agree to mutually negotiate and work together in good faith to duly execute any renewals, or extensions of said Dark Fiber Optic Lease Agreement with substantially similar terms and pricing.~~

Section 3~~2~~1. Force Majeure

If either party is delayed from performing an obligation hereunder because of strikes, lockouts, labor troubles, the inability to procure materials, power failure, riots, insurrection, storms, hurricanes, floods, earthquakes or other natural disasters or acts of God, terrorism, war or other reason which is not the fault of or is beyond the reasonable control of the party delayed, then performance of the obligation will be excused for the period of the delay. The occurrence of a force majeure event shall not alter or impair any of the provisions concerning Grantee's insurance requirements as provided in this Agreement.

Section 3~~3~~2. Entire Agreement.

~~This Agreement represents the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and specifically replaces and supersedes the prior franchise agreement between the parties or the predecessors of the parties (the prior Open Video System ["OVS"] franchise agreement by and between the County and Black Rock Cable Inc., dated July 30, 2001, [Skagit County Contract No. 05397]), and the oral and written negotiations between the parties~~.

DATED this day of , 2014. PASSED by the City Council and approved by its Mayor this day of , 2014.

~~BOARD OF COUNTY COMMISSIONERS~~
SKAGIT ~~COUNTY, WASHINGTON~~
CITY OF STANWOOD

_____
~~Ron Wesen, Chair~~Mayor

_____
~~Kenneth A. Dahlstedt, Commissioner~~

Attest:

~~Sharon D. Dillon, Commissioner~~

Clerk of the BoardCity Clerk

~~Recommended:~~

Department Head

Approved as to form:

Civil Deputy Prosecuting AttorneyGrant Weed, City Attorney

~~Approved as to indemnification:~~

~~Risk Manager~~

~~Approved as to budget:~~

~~Budget & Finance Director~~

STATEMENT OF ACCEPTANCE

Astound Broadband, LLC, a Washington limited liability company ("Grantee"), for itself, its successors and assigns, hereby accepts and agrees to be bound by all lawful terms, conditions and provisions of the Agreement attached hereto and incorporated herein by this reference.

ASTOUND BROADBAND, LLC

By: _____ Date: _____, 2014
Name: James A. Penney
Title: Executive Vice President

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

On this ____ day of _____, 2014, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared, James A. Penney, the Executive Vice President of Astound Broadband, LLC, the Washington limited liability company that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said company, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the date hereinabove set forth.

_____
Signature

_____
NOTARY PUBLIC in and for the State of Washington,
residing at _____

My Commission Expires: _____