ORDINANCE NO. 645

AN ORDINANCE GRANTING TO ASTOUND BROADBAND, LLC, A WASHINGTON LIMITED LIABILITY COMPANY AND WHOLLY-OWNED SUBSIDIARY OF WAVE DIVISION HOLDINGS, LLC, A NON-EXCLUSIVE FRANCHISE AND RIGHT TO CONSTRUCT, OPERATE, AND MAINTAIN A DATA COMMUNICATIONS SERVICE FACILITY AND PROVIDE TELECOMMUNICATION SERVICES IN THE CITY OF AMITY, OREGON.

THE CITY OF AMITY ORDAINS AS FOLLOWS:

Section 1. Definitions - as used in this ordinance:

1. "City" means City of Amity, Oregon.

2. "Company" means Astound Broadband, LLC, the grantee of rights under this Franchise, including its successors or assigns.

3. "Council" means the City Council of the City of Amity, Oregon.

4. "Franchise" means this document embodying the agreement of City and Company.

5. "Gross revenues" means any and all revenues derived by Company for the provision of telecommunications services in Amity, Oregon, including revenues from dedicated private networks. Gross Revenues shall include any and all revenues from leases and IRUs for the Company facilities located within Amity. Gross Revenues may be adjusted for the net write-off of uncollectible amounts of such revenues.

6. "Person" means any person, firm, partnership, association, corporation, limited liability company, entity, or organization of any kind.

7. "Reseller" means a consumer of telecommunications services that pays franchise fee to City and uses another person's telecommunications facilities to sell telecommunications service in City.

8. "Telecommunications" means the transmission of information chosen by a person, between or among points specified by the person.

9. "Telecommunications service" means two-way switched access and transport of voice or data communications but does not include: (a) services provided by radio common carrier, (b) one-way transmission of television signals, (c) surveying, (d) private telecommunications networks, or (e) communications of the customer which take place on the customer side of on-premises equipment.

10. "Telecommunications service providers" means any entity that pays a franchise or permit fee to City for the use of Company's facilities.

11. "Uncollectible accounts of customers" means any Company account, on which Company derives revenue from the sale of goods or services to persons within the corporate limits of the City, towards which Company has made a reasonable, good-faith effort to collect and that Company has written off as uncollectible for purposes of Company's public accounting.

Section 2. Grant of Authority. City grants to Company the right and privilege to construct, install, maintain and operate in, on, and under the present and future City rights of way of the City of Amity, conduits, cables and other technical facilities necessary for the purpose of providing Telecommunication services and internet access services. This Franchise is not exclusive, and City reserves the right to grant a similar privilege to any other Person at any time during the period of this Franchise.

Section 3. Compliance with Laws, Rules and Regulations. At all times during the term of this Franchise, Company shall comply with all applicable laws, rules and regulations of the United States of America, the State of Oregon, and the City of Amity including all agencies and subdivisions thereof. All terms and conditions applicable to Telecommunications carriers, contained in the Amity Municipal Code or other applicable law, apply to Company even if not recited in this Franchise. Company shall be subject to the lawful exercise of the police power of City and to such reasonable regulations as City may from time to time hereafter by resolutions or ordinance provide. City will administer this Franchise and exercise its police power on a reasonable, uniform, non-discriminatory basis with respect to other telecommunications franchises.

Section 4. Company Liability, Insurance.

1. Company shall at all times conduct its operations under this Franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or City.

2. Company shall maintain a comprehensive liability insurance policy which shall contain minimum coverages consistent with other coverages required by Company's franchises with other Oregon cities of similar size to City. In addition, the provisions set forth below shall constitute additional requirements upon Company:

    a. City, and its elected and appointed officers, agents, and employees shall be added as additional insured with respect to all policies. All commercial general liability insurance policies will be endorsed to show this additional coverage.

    b. Upon any cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage, Company shall provide notice to City within thirty (30) days of receiving notice from the insurance company.

    c. Coverages provided by Company must be underwritten by an insurance company deemed reasonably acceptable by City. City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.

d. As evidence of the insurance coverage required by this Franchise, Company shall furnish to City a Certificate of Insurance and endorsement naming City as additional insured. This Franchise shall not be in effect until the required certificates have been received by City. A renewal certificate will be sent to City ten (10) days prior to coverage expiration.

3. In the event that City's tort liability limits are raised by the Oregon Legislature to exceed the limits described in this section, Company shall obtain and maintain insurance in the amount of City's tort liability limits.

Section 5. Indemnification

1. Company hereby agrees to defend, indemnify, and hold City and its officers, employees, agents, and representatives harmless from and against any and all damages, losses, and expenses, including reasonable attorney fees and costs of suit or defense, arising out of failures to act, or misconduct of company or its affiliates, officers, employees, agents, contractors, or subcontractors, in the construction, operation, maintenance, repair or removal of its Telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed, or prohibited by this Franchise or the Amity Municipal Code.

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

Section 6. Performance Bond.

1. Upon the effective date of this Franchise, Company shall furnish proof of the posting of a performance bond running to City, with good and sufficient surety approved by City, in the penal sum of $10,000, conditioned that Company shall well and truly observe, fulfill, and perform each term and condition of this Franchise. Company shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of this Franchise, including, if necessary, the time required for removal of all of Company's Telecommunications system installed in City's right of way. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice first being given to City. The bond shall be reviewed and approved as to form by the City Attorney.

2. During the term of this Franchise, Company shall file with City a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall City exercise its rights against the performance bond under Section 6.1 if a bona fide, good faith dispute exists between City and Company.

3. City may, based upon inflation or other identifiable needs, require the amount of the performance bond and any construction bond that may be required under Section 6.4 below to be increased to an amount recommended by City's insurance carrier after notice to Company.

4. City will require Company to acquire one or more separate performance securities to protect the City's interests when Company constructs facilities. The amount of such security depends on the project's impacts, thus the amount will be determined in connection with the permitting process.

Section 7. Conditions on Right of Way Occupancy.

1. Routing and Plan Approval. Routing maps and construction plans must be approved by City's department of Public Works before any work is started.

2. Use. Company shall construct, install, maintain and operate its fiber optic cable facilities in designated City rights of way to the industry standard and City's satisfaction; and in a manner so as to cause minimum interference with the proper use of streets, alleys, and other public ways and places, and to cause minimum interference with the rights of reasonable convenience of property owners who adjoin any of the streets, alleys or other public ways or places. Company's facilities shall be installed consistent with Amity Municipal Code or other applicable law.

3. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Company, including any unimproved surface, Company shall, at its own cost and expense and in a manner approved by City, replace and restore all surfaces disturbed to their prior condition to the extent reasonably practicable. If Company fails to make restoration as required, City shall cause the repairs to be made at the expense of Company. All work within City rights of way shall be in accordance with the City of Amity's Standards and Specifications in effect at the time.

4. Relocation.

   a. Except as provided below, if the removal or relocation of facilities is caused directly by an identifiable development of property and the removal or relocation of facilities occurs within the area to be developed, or is made for the convenience of a customer, Company may charge the expense of removal or relocation to the developer or customer. If the removal or relocation of facilities is required by the City in the interest of the public, the City may require Company to remove or relocate its facilities at Company's expense, in accordance with ORS 221.420.

   b. Company agrees to supply, at no cost to City, any information reasonably requested by the City to coordinate municipal functions with Company's activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum, as-built drawings of Company 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 geographic information service (GIS) format, and shall be provided in the format requested if reasonably possible.

5. Placement of Fixtures. Company shall not place its facilities where they will interfere with any existing or planned City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer or water facility. All facilities placed in City rights of way shall be placed as City directs.

6. Temporary Rearrangement of Facilities. Company shall upon receipt of seven (7) days written notice from anyone desiring to move a building or other object according to City ordinances regulating the moving of buildings, arrange to temporarily raise, lower, or otherwise move its facilities to permit the moving of buildings or other objects if the Person wishing to move the building or other object makes a reasonable arrangement to reimburse Company for its expenses in rearranging its facilities. Nothing contained in this section shall preclude City from requiring Company to move its facilities at Company's own expense when public convenience requires the move, as described in Subsection 4 of this section.

Section 8. Transfer of Franchise. Company shall not sell, assign, dispose of, or transfer in any manner whatsoever any interest in this Franchise or in the facilities authorized by this Franchise, without prior written approval of Council, which approval City will not unreasonably withhold. Notwithstanding the previous sentence, Company may, without Council's approval, sell, assign, dispose of, or transfer this Franchise or the facilities authorized by this Franchise to (a) any entity that controls, is controlled by, or is under common control with Franchisee; or (b) in connection with the sale of all or substantially all of Franchisee's assets. Council's approval shall not be required for the assignment of, or granting of a security interest in, the Franchise or the Telecommunications System to secure indebtedness.

Section 9. City Rights in Franchise.

1. City Supervisors and Inspection. City shall have the right to supervise all construction or installation of Company's facilities subject to the provisions of this Franchise and make such inspections as it shall find reasonably necessary to ensure compliance with governing laws, rules and regulations.

2. Termination or Abandonment of Franchise. Upon any termination of this Franchise, all facilities installed or used by Company shall be removed by Company at Company's expense and the property upon which the facilities were used restored by Company to the condition it was in before installation except that City may elect to acquire the facilities for their fair market value as provided by law. Value shall be determined by an appraiser who is mutually acceptable to City and Company. City agrees to provide Company with written notice of its intention to acquire Company's facilities pursuant to this section within 120 days after termination of this Franchise by City, or City's declaration of facilities abandonment by Company, with the closing of any acquisition to occur as soon thereafter as is practicable.

Section 10. Franchise Fee.

1. The annual franchise fee payable to the City shall be the greater of (i) five percent (5%) of Grantee's gross revenues earned from the provision of telecommunications services to customers in the City or (ii) $500 per year.

2. The franchise fee shall be paid quarterly, in arrears, for each quarter during the term of the license. The franchise fee shall be due and payable within forty-five (45) days of the end of each calendar quarter, together with a written report containing an accurate statement of Grantee's gross revenues and the computation of the payment amount.

3. Grantee may, in lieu of all or a portion of the franchise fee payment required under section 10.1, provide telecommunications or other services to the City or its approved affiliated entities. Any agreement for the provision of such services will be as mutually agreed by the parties in separate documentation and the offset value of any such services provided to the City or affiliated entities, and other details of the offset, will be mutually agreed in the separate documentation. The amount of any discounted services provided by Grantee under this section shall only be applicable to the franchise fee due from Grantee for the calendar year in which the discounted services are provided. If the offset value available to Grantee for any calendar year exceeds the amount of the franchise fee due from the Grantee for that calendar year, Grantee may not carry over excess offset amount into the next calendar year.

4. Any failure to pay fees owed under Section 10 when due shall be subject to a delinquency charge of five percent (5%) of the unpaid amount. Delinquency charges are due within thirty (30) days of the applicable payment due date. Failure to make full payment and associated delinquency charges within sixty (60) days of the applicable payment date shall constitute a violation of this Franchise. In addition, any overdue amounts, including delinquency charges, shall bear interest as described in Section 10.5 below.

5. Franchise fee payments not received by City on or before the due date shall be assessed interest based on the average prime interest rate set by City's bank on December 31st of the previous year, plus three hundred (300) basis points (3%).

6. Company may, at its option, deduct Uncollectible accounts of customers within the corporate limits of City from Company's gross revenues.

7. With each payment, Company shall at the end of each twelve month period, furnish City with a written statement under oath, executed by an officer of Company, verifying the amount of gross revenues of Company within City for the annual period covered by payment computed on the basis set out in Subsection 1 of this section.

8. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this Franchise.

Section 11. Company Records and Reports.

1. Company shall keep accurate books of financial accounts at an office within the state of Oregon throughout the term of this Franchise. Company shall produce all books and records directly concerning its gross revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon no less than ten (10) days prior written notice, during normal working hours. City may require periodic reports from Company relating to its operation within City. City shall have the right during the term of this Franchise or within 180 days thereafter to conduct audits of Company's records related to compliance with this Franchise. Such audits shall be undertaken by an accountant selected by Company from a list of three accountants submitted by City. Such audit shall be conclusive and binding on City and Company. The cost of any such audit shall be borne by City, unless the results of any such audit reveal an underpayment of more than 5% of the franchise fee for the period audited. In the case of such underpayment, the full cost of such audit shall be paid by Company. Company shall immediately pay the amount of the underpayment as determined by such audit to City together with 12% per annum interest from the date such payment should have been made to the date the payment is actually made.

2. Any information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law.

Section 12. Permit and Inspection Fees. Nothing in this ordinance shall be construed to limit the right of City to require Company to pay reasonable costs incurred by City in connection with the issuance of a permit, making an inspection, or performing any other service for or in connection with Company or its facilities, whether pursuant to this ordinance or any other ordinance or regulation now in effect hereafter adopted by City.

Section 13. Enforcement and Termination of Franchise for Violation.

1. Default. Time of payment and performance are of the essence in the Franchise. The following shall be events of default:

   a. Default in Payments. The failure of Company to pay City when due any amounts required by the Franchise and such failure continues for a period of ten (10) days after the due date.

   b. Default in Other Covenants. The failure of Company to perform any of the covenants and conditions required herein to be kept and performed by Company, and such failure continues for a period of thirty (30) days after notice from City of such failure.

2. Termination. Upon the occurrence of an event of default, this Franchise may be terminated at the option of City by notice in writing to Company given within thirty (30) days of the date of default. If this Franchise is not terminated by election of City, Company shall pay to City a penalty in the sum of $200 per day for each day the default continues along with any additional damages suffered by City as a result of Company's default. City may not assess penalties under the previous sentence in excess of $8,000 per year. Damages are not included in the cap.

Section 14. Remedies not Exclusive; Waiver. All remedies under this ordinance, including termination of this Franchise, are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Remedies contained in this ordinance, including termination of the Franchise, are not exclusive and City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to City at law or in equity. Failure to enforce any provision of this ordinance shall not be construed as a waiver of a breach of any other term, condition or obligation of this ordinance.

Section 15. Franchise Term. This Franchise is granted for a term of ten (10) years beginning on the date on which this Franchise ordinance is approved. City agrees to renegotiate in good faith a renewal of this Franchise for a similar term if this Franchise is not in default at its expiration.

Section 16. Acceptance of Franchise. Within thirty (30) days from the effective date of this ordinance, Company shall file with the City Recorder a written unconditional acceptance of this Franchise and all of its terms and conditions, and if Company fails to do so, this ordinance shall be void and of no effect.

Section 17. Severability. If any section, subsection, sentence, clause or portion of this ordinance is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect constitutionality of the remaining portion thereof. If for any reason, the franchise fee is invalidated or amended by the act of any court or governmental agency, then the highest reasonable franchise fee allowed by such court or other governmental agency shall be the franchise fee charged by this ordinance.

Section 18. Notices. Any notice required or permitted under this Franchise shall be deemed given when received or when deposited with postage prepaid in the United States Mail as registered or certified mail addressed as follows:

TO CITY:
City Manager
City of Amity
PO Box 159
109 Maddox Ave
Amity, OR 97101

TO COMPANY:
James Penney
Astound Broadband, LLC
401 Kirkland Parkplace, Suite 500
Kirkland, WA 98033

or to such other address as may be specified from time to time by either parties in writing.

Section 18. Interpretation/Jurisdiction. This Franchise shall be deemed to have been entered into in Yamhill County, Oregon. Jurisdiction of any dispute shall be in the Circuit Court of the State of Oregon, and venue shall be in Yamhill County, Oregon. Interpretation of the Franchise

shall be governed by laws of the State of Oregon; to this end, on behalf of the City the City Manager has the initial authority to interpret this Franchise, with the City Council retaining final authority, in its discretion, to interpret this Franchise.

This ordinance will take effect 30 days from date of adoption.

FIRST READING: February 4, 2015
SECOND READING: March 4, 2015

SUMBITTED AND APPROVED THIS 4th DAY OF March, 2015

Ayes: Blunt, Haggith, King, Miller, Van Soulen, Zipser

Nays: None

Signed:

Michael Cape

Mayor: Michael Cape

ATTEST:

City Recorder: Jennifer Elkins

ASTOUND BROADBAND, LLC	CITY OF AMITY, OREGON
By:	By: Michael Cape
Name: James A. Penney	Name: Michael Cape
Title: Executive Vice President	Title: Mayor, City of Amity
Date: March 9, 2015	Date: March 4, 2015

In the matter of granting to Astound Broadband, LLC, a non-exclusive franchise and right to construct, operate and maintain a data communications service facility and provide telecommunication services in the city of Amity, Oregon	))))))	City of Amity, Ordinance No. 645 ACCEPTANCE

WHEREAS, on March 4, 2015, the City Council of the city of Amity, Yamhill County, Oregon, (the "City") adopted Ordinance No. 645, granting a non-exclusive franchise to Astound Broadband, LLC ("Astound") for the transmission of telecommunications in, through, over and under the rights-of-way of the City (the "Ordinance").

WHEREAS, a hard copy of the Ordinance, signed by the City, was received by Astound from the City, countersigned, and returned to the City in fully executed form.

NOW, THEREFORE, Astound hereby unconditionally accepts the Ordinance and all terms and conditions thereof, and files this, its written acceptance, with the City.

IN TESTIMONY WHEREOF, Astound has caused this written Acceptance to be executed in its name by James A. Penney, its Executive Vice President, thereunto duly authorized on this 20 day of March 2015.

James A. Penney
Executive Vice President

State of Washington)
)ss.
County of King)

On this 20th day of March, 2015, personally appeared before me James A. Penney who stated that ~~(s)~~he is the Executive Vice President of Astound Broadband, LLC, a limited liability company, and that the instrument was signed on behalf of the company, and acknowledged said instrument to be its voluntary act and deed. Before me:

DAVID JOHANNES VON MORITZ
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
SEPTEMBER, 06 2017

DAVID JOHANNES VON MORITZ
Notary Public for Washington, Seattle
My Commission Expires: 09.06.2017