

## ORDINANCE NO. 1336

### AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, PIERCE COUNTY, WASHINGTON, ESTABLISHING A NEW FRANCHISE AGREEMENT BETWEEN ASTOUND BROADBAND, LLC AND THE CITY OF GIG HARBOR AND PROVIDING FOR AN EFFECTIVE DATE.

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WHEREAS, the City is authorized to grant and renew telecommunications franchises for the installation, operation, and maintenance of telecommunication systems and otherwise regulate telecommunications services within the City boundaries by virtue of federal and state statutes, by the City's police powers, by its authority over its public rights-of-way, and by other City powers and authority; and

WHEREAS, Astound Broadband, LLC d/b/a Wave ("Franchisee"), desires to provide telecommunications services and to construct, operate and maintain a telecommunications system within the City; and

WHEREAS, the City Council has the authority to grant franchises for the use of its streets and other public properties pursuant to RCW 35A.47.040; and

WHEREAS, the City Council has determined that the terms of the Franchise are consistent with their desired objectives and serves the interest of the community and its citizens.

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 do hereby agree as follows:

#### Section 1. Franchise Granted.

1.1 Pursuant to RCW 35A.47.040, the city of Gig Harbor, a Washington municipal corporation (the "City"), grants to Franchisee, its successors, legal representatives and assigns, subject to the terms and conditions set forth below, a franchise ("Franchise") for a period of ten (10) years, beginning on the effective date of this ordinance, set forth in Section 41.

1.2 This Franchise grants Franchisee the right, privilege, and authority to construct, operate, maintain, replace, acquire, sell, lease, and use all necessary Facilities for a telecommunications network in, under, on, across, over, through, along or below the public Rights-of-Ways located in the City, including such additional areas as may be subsequently included in the corporate limits of the City during the term of this Franchise (the "Franchise Area"), as approved pursuant to City permits issued pursuant to Section 8.2. The phrase "Rights-of-Way" (singular "Right-of-Way") as used in this Franchise, means land or an easement acquired or dedicated for public roads and streets, but does not include state highways and other ways, land dedicated for roads, streets and highways not opened and not improved for motor vehicle use by the public, structures including poles and conduits, located within the right-of-way, federally granted trust lands or forest board trust lands, lands owned or managed by the state parks and recreation commission, or federally granted railroad rights-of-way acquired under 43 U.S.C. Section 912 and related provisions of federal law that are not open for motor vehicle use. To the extent that easements are designated for only certain functions or do not permit such Facilities, such easements will not be considered part of the Rights-of-Way. "Facilities" as used in this Franchise means one or more elements of Franchisee's telecommunications network, with all necessary cables, wires, conduits, ducts, pedestals, antennas, electronics, and other necessary appurtenances; provided that new utility poles for overhead wires or cabling are specifically excluded. Equipment enclosures with air conditioning or other noise generating equipment are also excluded from "Facilities," to the extent such equipment is located in zoned residential areas of the City.

## Section 2. Authority Limited to Occupation of Public Rights-of-Way.

2.1 The authority granted by this Franchise is a limited, non-exclusive authorization to occupy and use the City's Rights-of-Way. Such use must be in compliance with the Gig Harbor Municipal Code provisions, including and not limited to Chapter 12.18. Franchisee represents that it expects to provide the following services within the City: telecommunications services, private line, internet access services, dark fiber services and lit fiber services (the "Services"). Nothing contained within this Franchise shall be construed to grant or convey any right, title, or interest in the Rights-of-Way of the City to Franchisee other than for the purpose of providing the Services. A more detailed description of Franchisee's telecommunications system and Services is described in Exhibit A. If Franchisee desires to expand the Services provided within the City, it

shall provide written notification of the addition of such services prior to the addition of the service; provided, however, that Franchisee may not offer Cable Services pursuant to Section 2.3.

2.2 As described in Section 8, construction is not authorized without the appropriate permits, leases, easements, or approvals. This Franchise does not and shall not convey any right to Franchisee to install its Facilities on, under, over, across, or to otherwise use City owned or leased properties of any kind outside of the incorporated area of the City or to install Facilities on, under, over, across, or otherwise use any City owned or leased property other than the City's Rights-of-Way. This Franchise does not convey any right to Franchisee to install its Facilities on, under, over, or across any facility or structure owned by a third-party without such written approval of the third-party. Further this Franchise does not convey any right to continue in any streets, avenues, alleys, roads or public places which are eliminated from the City limits by reason of subsequent disincorporation or reduction of City limits. No substantive expansions, additions to, or modifications or relocation of any of the Facilities shall be permitted without first having received appropriate permits from the City pursuant to Section 8.2. As of the effective date of this Franchise, Franchisee has no owned Facilities located in the City's Rights-of-Way.

2.3 Under this Franchise, the Facilities shall not be used for Cable Services as that term is defined in 47 U.S.C. § 522(6).

2.4 Franchisee shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers consistent with this Franchise provided:

(a) Franchisee at all times retains exclusive control over its telecommunications system, Facilities and Services and remains responsible for constructing, installing, and maintaining its Facilities pursuant to the terms and conditions of this Franchise;

(b) Franchisee may not grant rights to any customer or lessee that are greater than any rights Franchisee has pursuant to this Franchise;

(c) Such customer or lessee shall not be construed to be a third-party beneficiary under this Franchise; and

(d) No such customer or lessee may use the telecommunications system or Services for any purpose not authorized by this Franchise.

Section 3. Non-Exclusive Franchise Grant. This Franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below, or across any Rights-of-Way. This Franchise shall in no way prevent or prohibit the City from using any Rights-of-Way or affect its jurisdiction over any Rights-of-Way or any part of Right-of-Way, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of Right-of-Way as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new Rights-of-Way, thoroughfares, and other public properties of every type and description.

Location of Telecommunications Facilities. Franchisee is maintaining a telecommunications network consisting of Facilities within the City. Franchisee may locate its Facilities anywhere within the Franchise Area consistent with the City's Design and Construction Standards, the Gig Harbor Municipal Code, and subject to the City's applicable permit requirements. Franchisee shall not be required to amend this Franchise to construct or acquire Facilities within the Franchise Area.

#### Section 5. Relocation of Facilities.

5.1 Pursuant to Gig Harbor Municipal Code section 12.18.220, Franchisee is on notice with respect to the existence of the City's transportation improvement plan. Franchisee has an obligation to comply with the provisions outlined in Gig Harbor Municipal Code section 12.18.220. Should the City follow the procedures outlined in Gig Harbor Municipal Code section 12.8.220, sections 5.4 and 5.5 of this Franchise and the notice provisions contained therein are inapplicable. The procedure outlined in Gig Harbor Municipal Code 12.18.220 shall take precedence over this Franchise.

5.2 Franchisee agrees and covenants to protect, support, temporarily disconnect, relocate, or remove from any Rights-of-Way any of its Facilities when reasonably required by the City by reason of traffic conditions or public safety, dedications of new Rights-of-Way and the establishment and improvement thereof, widening and/or improvement of existing Rights-of-Way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity or as otherwise necessary for the operations of the City or other governmental entity, provided that Franchisee shall in all such cases have the privilege to temporarily bypass in the authorized portion of the same Rights-of-Way upon approval by the City, which approval shall not unreasonably be withheld or delayed, any Facilities required to be

temporarily disconnected or removed. Except as otherwise provided by law, the costs and expenses associated with relocations ordered pursuant to this Section 5.2 shall be borne by Franchisee. Nothing contained within this Franchise shall limit Franchisee's ability to seek reimbursement for relocation costs when permitted by RCW 35.99.060 and Gig Harbor Municipal Code Chapter 12.18.250.

5.3 Upon request of the City and in order to facilitate the design of City street and Right-of-Way improvements, Franchisee agrees, at its sole cost and expense, to locate, and if reasonably determined necessary by the City, to excavate and expose its Facilities for inspection so that the Facilities' location may be taken into account in the improvement design. The decision as to whether any Facilities need to be relocated in order to accommodate the City's improvements shall be made by the City upon review of the location and construction of Franchisee's Facilities. The City shall provide Franchisee at least fourteen (14) days' written notice prior to any excavation or exposure of Facilities.

5.4 If the City determines that the project necessitates the relocation of Franchisee's existing Facilities, the City shall:

(a) At least forty five (45) days prior to commencing the project, provide Franchisee with written notice requiring such relocation; provided, however, that in the event of an emergency situation, defined for purposes of this Franchise as a condition posing an imminent threat to property, life, health, or safety of any person or entity, the City shall give Franchisee written notice as soon as practicable; and

(b) At least forty five (45) days prior to commencing the project, provide Franchisee with copies of pertinent portions of the plans and specifications for the improvement project and a proposed location for Franchisee's Facilities so that Franchisee may relocate its Facilities in other City Rights-of-Way in order to accommodate such improvement project; and

(c) After receipt of such notice and such plans and specifications, Franchisee shall complete relocation of its Facilities at least ten (10) days prior to commencement of the City's project at no charge or expense to the City, except as otherwise provided by law. Relocation shall be accomplished in such a manner as to accommodate the City's project.

5.5 Franchisee may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocation. Such alternatives must be submitted to the City at least thirty (30) days prior to commencement of the project. The City shall evaluate the alternatives and advise Franchisee in writing if one or more of the alternatives are suitable to accommodate the work that would otherwise necessitate relocation of the Facilities. If so requested by the City, Franchisee shall submit at its sole cost and expense additional information to assist the City in making such evaluation. The City shall give each alternative proposed by Franchisee full and fair consideration. In the event the City ultimately determines that there is no other reasonable or feasible alternative, Franchisee shall relocate its Facilities as otherwise provided in this Section 5.

5.6 The provisions of this Section 5 shall in no manner preclude or restrict Franchisee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated, or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

5.7 Franchisee will indemnify, hold harmless, and pay the costs of defending the City, in accordance with the provisions of Section 18, against any and all claims, suits, actions, damages, or liabilities for delays on City construction projects caused by or arising out of the failure of Franchisee to remove or relocate its Facilities in a timely manner; provided, that Franchisee shall not be responsible for damages due to delays caused by circumstances beyond the control of Franchisee or the negligence, willful misconduct, or unreasonable delay of the City or any unrelated third party.

5.8 Whenever any person shall have obtained permission from the City to use any Right-of-Way for the purpose of moving any building, Franchisee, upon thirty (30) days' written notice from the City, shall raise, remove, or relocate to another part of the Right-of-Way, at the expense of the person desiring to move the building, any of Franchisee's Facilities that may obstruct the removal of such building.

5.9 If Franchisee fails, neglects, or refuses to remove or relocate its Facilities as directed by the City following the procedures outlined in Section 5.2 through Section 5.5 the City

may perform such work or cause it to be done, and the City's costs shall be paid by Franchisee pursuant to Section 16.3 and Section 16.4.

5.10 The provisions of this Section 5 shall survive the expiration or termination of this Franchise during such time as Franchisee continues to have Facilities in the Rights-of-Way.

**Section 6. Undergrounding of Facilities.**

6.1 Except as specifically authorized by permit of the City, Franchisee shall not be permitted to erect poles. Additionally, Franchisee shall not be permitted to run or suspend wires, cables, or other facilities on existing poles, but shall lay wires, cables, or other facilities underground in the manner required by the City, except that in areas where other telecommunications service providers run or suspend wires, cables, or other facilities on existing poles, Franchisee shall be permitted to run or suspend wires, cables, or other facilities on existing poles. Franchisee acknowledges and agrees that if the City does not require the undergrounding of its Facilities at the time of a permit application, the City may, at any time in the future, require the conversion of Franchisee's aerial facilities to underground installation at Franchisee's expense at such time as the City requires all other utilities, except electrical utilities, with aerial facilities in the area to convert them to underground installation. Unless otherwise permitted by the City, Franchisee shall underground its Facilities according to the City's Public Works Standards which apply to all new developments and subdivisions as well as City capital projects. Unless otherwise permitted by the City, Franchisee shall underground its Facilities in all new developments and subdivisions where other utilities are to be constructed underground and any development or subdivision where utilities are currently underground. In all circumstances, Franchisee must comply with the provisions included in Gig Harbor Municipal Code Chapters 12.06 and 12.16.

6.2 Franchisee is obligated to comply with the requirements of Gig Harbor Municipal Code Section 12.18.090 describing when any street or sidewalk may be broken, cut, or otherwise compromised.

6.3 Whenever the City may require the undergrounding of the aerial utilities in any area of the City, Franchisee shall underground its aerial facilities in the manner specified by the City, concurrently with and in the area of all of the other affected utilities. The location of any relocated and underground utilities shall be approved by the City. Where other utilities are present

and involved in the undergrounding project, Franchisee shall only be required to pay its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Franchisee's own Facilities. "Common costs" shall include necessary costs not specifically attributable to the undergrounding of any particular facility, such as costs for common trenching and utility vaults. "Fair share" shall be determined for a project on the basis of the number of conduits of Franchisee's Facilities being undergrounded in comparison to the total number of conduits of all other utility facilities being undergrounded. This Section 6.3 shall only apply to the extent Franchisee has existing aerial utilities in the City or is specifically authorized to build aerial utilities by the City.

6.4 Within forty-eight (48) hours (excluding weekends and City-recognized holidays) following a request from the City, Franchisee shall locate underground Facilities by marking the location on the ground. The location of the underground Facilities shall be identified using orange spray paint, unless otherwise specified by the City, and within two (2) feet of the actual location.

6.5 Franchisee shall be entitled to reasonable access to open utility trenches unless those trenches include water/sewer/stormwater infrastructure, provided that such access does not interfere with the City's placement of utilities or increase the City's costs. Franchisee shall pay to the City the actual cost to the City resulting from providing Franchisee access to an open trench, including without limitation the pro rata share of the costs of access to an open trench and any costs associated with the delay of the completion of a public works project.

6.6 Franchisee shall not remove any underground cable or conduit that requires trenching or other opening of the Rights-of-Way along the extension of cable to be removed, except as provided in this Section 6.6. Franchisee may remove any underground cable from the Right-of-Way that has been installed in such a manner that it can be removed without trenching or other opening of the Right-of-Way along the extension of cable to be removed, or if otherwise permitted by the City. Franchisee may remove any underground cable from the Rights-of-Way where reasonably necessary to replace, upgrade, or enhance its Facilities, or pursuant to Section 5. When the City determines, in the City's sole discretion, that Franchisee's underground Facilities must be removed in order to eliminate or prevent a hazardous condition, Franchisee shall remove the cable or conduit at Franchisee's sole cost and expense. If Franchisee ceases to use all or a portion of the underground cable and conduit in the Right-of-Way for a period of twelve consecutive months

or more, and such cable or conduit is not removed, then it shall be deemed abandoned and title thereto shall vest in the City at no cost to the City. Franchisee must apply and receive a permit, pursuant to Section 8.2, prior to any such removal of underground cable or conduit from the Right-of-Way and must provide as-built plans and maps pursuant to Section 7.1.

6.7 The provisions of this Section 6 shall survive the expiration, revocation, or termination of this Franchise during such time as Franchisee continues to have Facilities in the Rights-of-Way. Nothing in this Section 6 shall be construed as requiring the City to pay any costs of undergrounding any of Franchisee's Facilities.

#### Section 7. Maps and Records.

7.1 After construction is complete, Franchisee shall provide the City with accurate copies of as-built plans and maps. These plans and maps shall be provided at no cost to the City, and shall include hard copies and digital files in GIS format that are acceptable to the City and delivered electronically. Franchisee shall provide such maps within ten (10) days following a request from the City. Franchisee shall warrant the accuracy of all plans, maps and as-builts provided to the City. Franchisee shall provide the City with updated as-builts and maps at the conclusion of any material maintenance or modification of existing Facilities.

7.2 Within thirty (30) days of a written request from the City, Franchisee shall furnish the City with information sufficient to demonstrate: 1) that Franchisee has complied with all applicable requirements of this Franchise; and 2) that all taxes, including but not limited to sales, utility and/or telecommunications taxes due the City in connection with Franchisee's Services and Facilities have been properly collected and paid by Franchisee.

7.3 All books, records, maps, and other documents maintained by Franchisee with respect to its Facilities within the Rights-of-Way shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this Section 7.3 shall be construed to require Franchisee to violate state or federal law regarding customer privacy, nor shall this Section 7.3 be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature. Unless otherwise prohibited by State or federal law, nothing in this Section 7.3 shall be construed as permission to withhold relevant customer data from the City that the City requests in conjunction with a tax audit.

or review; provided, however, Franchisee may redact identifying information such as names, street addresses (excluding City and zip code), Social Security Numbers, or Employer Identification Numbers related to any confidentiality agreements Franchisee has with third parties.

7.4 Franchisee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature. The City agrees to keep confidential any proprietary or confidential books or records to the extent permitted by law. Franchisee shall be responsible for clearly and conspicuously identifying the work as confidential or proprietary, and shall provide a brief written explanation as to why such information is confidential and how it may be treated as such under State or federal law. In the event that the City receives a public records request under Chapter 42.56 RCW or similar law for the disclosure of information Franchisee has designated as confidential, trade secret, or proprietary, the City shall promptly provide written notice of such disclosure so that Franchisee can take appropriate steps to protect its interests. Nothing in this Section 7.4 prohibits the City from complying with Chapter 42.56 RCW or any other applicable law or court order requiring the release of public records, and the City shall not be liable to Franchisee for compliance with any law or court order requiring the release of public records. The City shall comply with any injunction or court order obtained by Franchisee that prohibits the disclosure of any such confidential records; however, in the event a higher court overturns such injunction or court order and such higher court action is or has become final and non-appealable, Franchisee shall reimburse the City for any fines or penalties imposed for failure to disclose such records as required hereunder within sixty (60) days of a request from the City.

#### Section 8. Work in the Rights-of-Way.

8.1 During any period of relocation, construction or maintenance, all work performed by Franchisee or its contractors shall be accomplished in a safe and workmanlike manner, so as to minimize interference with the free passage of traffic and the free use of adjoining property, whether public or private. Franchisee shall at all times post and maintain proper barricades, flags, flaggers, lights, flares, and other measures as required for the safety of all members of the general public and comply with all applicable safety regulations during such period of construction as required by the Gig Harbor Municipal Code or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems. Franchisee shall, at its own expense, maintain its Facilities in a safe condition, in good repair, and in a manner suitable to the City. Additionally, Franchisee shall keep its Facilities free of debris and anything of

a dangerous, noxious, or offensive nature or which would create a hazard or undue vibration, heat, noise, or any interference with City services. The provisions of this Section 8 shall survive the expiration of this Franchise during such time as Franchisee continues to have Facilities in the Rights-of-Way.

8.2 Whenever Franchisee shall commence work in any public Rights-of-Way for the purpose of excavation, installation, construction, repair, maintenance, or relocation of its cable or equipment, it shall apply to the City for a permit to do so and shall comply with the requirements of the Gig Harbor Municipal Code Chapters 12.02, 12.08 and 12.18 along with the requirements listed in the City's Shoreline Master Program which was adopted through Ordinance 1278 and available from the City's website. In addition, Franchisee shall give the City at least one working day prior written notice of its intent to commence work in the Rights-of-Way. During the progress of the work, Franchisee shall not unnecessarily obstruct the passage or proper use of the Rights-of-Way, and all work by Franchisee in the area shall be performed in accordance with applicable City standards and specifications and warranted for a period of two (2) years. In no case shall any work commence within any Rights-of-Way without a permit, except as otherwise provided in this Franchise or in the Gig Harbor Municipal Code.

8.3 If either the City or Franchisee shall at any time plan to make excavations in any area covered by this Franchise and as described in this Section 8.3, the party planning such excavation shall afford the other, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT:

- (a) Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;
- (b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties and in accordance with the applicable codes, rules and regulations; and
- (c) To the extent reasonably possible, the Franchisee shall, at the direction of the city, cooperate with the City and provide other franchisees with the opportunity to utilize joint or shared excavations in order to minimize disruption and damage to the right-of-way as well as to minimize traffic related impacts.

(d) Either party may deny such request for safety reasons.

8.4 Except for emergency situations, Franchisee shall give at least seven (7) days' prior notice of intended construction to residents in the affected area. Such notice shall contain the dates, contact number, nature and location of the work to be performed. At least twenty-four (24) hours prior to entering private property or streets or public easements adjacent to or on such private property, Franchisee shall physically post a notice on the property indicating the nature and location of the work to be performed. Door hangers are permissible methods of notifications to residents. Franchisee shall make a good faith effort to comply with the property owner/resident's preferences, if any, on location or placement of underground installations (excluding aerial cable lines utilizing existing poles and existing cable paths), consistent with sound engineering practices. Following performance of the work, Franchisee shall restore the private property as nearly as possible to its condition prior to construction, except for any change in condition not caused by Franchisee. Any disturbance of landscaping, fencing or other improvements on private property caused by Franchisee's work shall, at the sole expense of Franchisee, be promptly repaired and restored to the reasonable satisfaction of the property owner/resident. Notwithstanding the above, nothing herein shall give Franchisee the right to enter onto private property without the permission of such private property owner, or as otherwise authorized by applicable law.

8.5 Franchisee may trim trees upon and overhanging on public ways, streets, alleys, sidewalks, and other public places of the City so as to prevent the branches of such trees from coming in contact with Franchisee's Facilities. The right to trim trees in this Section 8.5 shall only apply to the extent necessary to protect above ground Facilities. Franchisee shall ensure that its tree trimming activities protect the appearance, integrity, and health of the trees to the extent reasonably possible. Franchisee shall be responsible for all debris removal from such activities. All trimming, except in emergency situations, is to be done after the explicit prior written notification of the City and at the expense of Franchisee. Nothing herein grants Franchisee any authority to act on behalf of the City, to enter upon any private property, or to trim any tree or natural growth not owned by the City. Franchisee shall be solely responsible and liable for any damage to any third parties' trees or natural growth caused by Franchisee's actions. Franchisee shall indemnify, defend and hold harmless the City from third-party claims of any nature arising out of any act or negligence of Franchisee with regard to tree and/or natural growth trimming, damage, and/or removal. Franchisee shall reasonably compensate the City or the property owner for any damage caused by

trimming, damage, or removal by Franchisee. Except in an emergency situation, all tree trimming must be performed under the direction of an arborist certified by the International Society of Arboriculture, unless otherwise approved by the Public Works Director or his/her designee.

8.6 Franchisee shall meet with the City and other franchise holders and users of the Rights-of-Way upon written notice as determined by the City, to schedule and coordinate construction in the Rights-of-Way. All construction locations, activities, and schedules shall be coordinated as ordered by the City to minimize public inconvenience, disruption, or damages.

8.7 Franchisee acknowledges that it, and not the City, shall be responsible for compliance with all marking and lighting requirements of the Federal Aviation Administration ("FAA") and the Federal Communications Commission ("FCC") with respect to Franchisee's Facilities, if applicable. Franchisee shall indemnify and hold the City harmless from any fines or other liabilities caused by Franchisee's failure to comply with such requirements. Should Franchisee or the City be cited by either the FCC or the FAA because the Facilities or Franchisee's equipment is not in compliance and should Franchisee fail to cure the conditions of noncompliance within the timeframe allowed by the citing agency, the City may, upon at least forty-eight (48) hours' prior written notice to Franchisee, either terminate this Franchise immediately if the equipment is not brought into compliance by the expiration of such notice period or may proceed to cure the conditions of noncompliance at Franchisee's expense, and collect all reasonable costs from Franchisee in accordance with the provisions of Section 16.3 and Section 16.4.

8.8 The granting of this Franchise shall not preclude the City, its accredited agents or its contractors, from blasting, grading or doing other necessary road work contiguous to the Franchisee's improvements. The City shall provide Franchisee with twenty-four (24) hours written notice of any blasting, grading, excavating or doing other necessary road work contiguous to Franchisee's improvement.

Section 9. One Call Locator Service. Prior to doing any work in the Rights-of-Way, the Franchisee shall follow established procedures, including contacting the Utility Notification Center in Washington and comply with all applicable State statutes regarding the One Call Locator Service pursuant to Chapter 19.122 RCW. The City shall not be liable for any damages to Franchisee's Facilities nor for interruptions in service to Franchisee's customers that are a direct result of

Franchisee's failure to locate its Facilities within the prescribed time limits and guidelines established by the One Call Locator Service regardless of whether the City issued a permit.

Section 10. Safety Requirements.

10.1 Franchisee shall, at all times, employ professional care and shall install and maintain and use industry-standard methods for preventing failures and accidents that are likely to cause damage, injuries, or nuisances to the public. All structures and all lines, equipment, and connections in, over, under, and upon the Rights-of-Ways, wherever situated or located, shall at all times be kept and maintained in a safe condition. Franchisee shall comply with all federal, State, and City safety requirements, rules, regulations, laws, and practices, which shall include Gig Harbor Municipal Code Chapter 12.18 and employ all necessary devices as required by applicable law during the construction, operation, maintenance, upgrade, repair, or removal of its Facilities. By way of illustration and not limitation, Franchisee shall also comply with the applicable provisions of the National Electric Code, National Electrical Safety Code, FCC regulations, and Occupational Safety and Health Administration (OSHA) Standards. Upon reasonable notice to Franchisee, the City reserves the general right to inspect the Facilities to evaluate if they are constructed and maintained in a safe condition.

10.2 If an unsafe condition or a violation of Section 10.1 is found to exist, and becomes known to the City, the City agrees to give Franchisee written notice of such condition and afford Franchisee a reasonable opportunity to repair the same. If Franchisee fails to start to make the necessary repairs and alterations within the time frame specified in such notice (and pursue such cure to completion), then the City may make such repairs or contract for them to be made. All costs, including administrative costs, incurred by the City in repairing any unsafe conditions shall be borne by Franchisee and reimbursed to the City pursuant to Section 16.3 and Section 16.4.

10.3 Additional safety standards include:

(a) Franchisee shall endeavor to maintain all equipment lines and facilities in an orderly manner, including, but not limited to, the removal of all bundles of unused cable on any aerial facilities.

(b) All installations of equipment, lines, and ancillary facilities shall be installed in accordance with industry-standard engineering practices and shall comply with all federal, State, and local regulations, ordinances, and laws.

(c) Any opening or obstruction in the Rights-of-Way or other public places made by Franchisee in the course of its operations shall be protected by Franchisee at all times by the placement of adequate barriers, fences, or boarding, the bounds of which, during periods of dusk and darkness, shall be clearly marked and visible.

10.4 Unsafe Conditions and Nuisances in the Rights-of-Way. Franchisee shall comply with any order issued by the Public Works Director or his/her designee regarding the correction or discontinuance of an unsafe, nonconforming or unauthorized condition within the Rights-of-Way and any stop work orders.

Section 11. Stop Work Order. On notice from the City that any work is being performed contrary to the provisions of this Franchise, or in an unsafe or dangerous manner as determined by the City, or in violation of the terms of any applicable permit, laws, regulations, ordinances, or standards, the work may immediately be stopped by the City. The stop work order shall:Be in writing;

- (b) Be given to the person doing the work or posted on the work site;
- (c) Be sent to Franchisee by overnight delivery;
- (d) Indicate the nature of the alleged violation or unsafe condition; and
- (e) Establish conditions under which work may be resumed.

Section 12. Work of Contractors and Subcontractors. Franchisee's contractors and subcontractors shall be licensed and bonded in accordance with State law and the City's ordinances, regulations, and requirements. Work by contractors and subcontractors are subject to the same restrictions, limitations, and conditions as if the work were performed by Franchisee. Franchisee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by Franchisee and shall ensure that all such work is performed in compliance with this Franchise and applicable law.

Section 13. City Conduit. Except in emergency situations, Franchisee shall inform the Public Works Director with at least thirty (30) days' advance written notice that it is constructing, relocating, or placing ducts or conduits in the Rights-of-Way and provide the City with an opportunity to request that Franchisee provide the City with additional duct or conduit, and related structures necessary to access the conduit pursuant to and subject to RCW 35.99.070. Such notification shall be in addition to the requirement to apply for and obtain permits pursuant to Section 8.2 and Gig Harbor Municipal Code Section 12.18.290.

Section 14. Restoration after Construction.

14.1 Franchisee shall, after installation, construction, relocation, maintenance, or repair of its Facilities, or after abandonment approved pursuant to Section 20, at Franchisee's own cost and expense, promptly remove any obstructions from the Rights-of-Way and restore the surface of the Rights-of-Way to a condition "as good as" or "better" than the condition the Rights-of-Way were in immediately prior to any such installation, construction, relocation, maintenance or repair, provided Franchisee shall not be responsible for any changes to the Rights-of-Way not caused by Franchisee or anyone doing work for Franchisee. All trees, landscaping and grounds removed, damaged or disturbed as a result of the installation, construction, relocation, maintenance or repair, shall be replaced or restored, at Franchisee's cost and expense, in "as good as" or "better" than the condition the Rights-of-Way were in immediately prior to any such work. The Public Works Director or his/her designee shall have final approval of the condition of such Rights-of-Way after restoration. All concrete encased survey monuments that have been disturbed or displaced by such work shall be restored pursuant to federal, state (Chapter 332-120 WAC), and local standards and specifications. Any excavation work performed by Franchisee shall comply with the requirements of Gig Harbor Municipal Code chapter 12.08.

14.2 Franchisee agrees to promptly complete all restoration work and to promptly repair any damage caused by work to the Franchise Area or other affected area at its sole cost and expense and according to the time and terms specified in the permits issued by the City, should any be required. All work by Franchisee pursuant to this Franchise shall be performed in accordance with applicable City standards and warranted for a period of two (2) years and for undiscovered defects as is standard and customary for this type of work.

14.3 If conditions (e.g. weather) make the complete restoration required under Section 14 impracticable, Franchisee shall temporarily restore the affected Right-of-Way or property. Such temporary restoration shall be at Franchisee's sole cost and expense. Franchisee shall promptly undertake and complete the required permanent restoration when conditions no longer make such permanent restoration impracticable.

14.4 In the event Franchisee does not repair a Right-of-Way or an improvement in or to a Right-of-Way within the time agreed to by the Public Works Director, or his/her designee, the City may repair the damage and shall be reimbursed its actual cost within sixty (60) days of submitting an itemized invoice to Franchisee in accordance with the provisions of Section 16.3 and Section 16.4. In addition, and pursuant to Section 16.3 and Section 16.4, the City may bill Franchisee for expenses associated with the inspection of such restoration work.

14.5 The provisions of this Section 14 shall survive the expiration or termination of this Franchise so long as Franchisee continues to have Facilities in the Rights-of-Way and has not completed all restoration to the City's standards.

#### Section 15. Emergencies.

15.1 In the event of any emergency in which any of Franchisee's Facilities located in or under any street endangers the property, life, health, or safety of any person, entity or the City, or if Franchisee's construction area is otherwise in such a condition as to immediately endanger the property, life, health, or safety of any person, entity or the City, Franchisee shall immediately take the proper emergency measures to repair its Facilities and to cure or remedy the dangerous conditions for the protection of property, life, health, or safety of any person, entity or the City, without first applying for and obtaining a permit as required by this Franchise. Franchisee shall notify the City, verbally or in writing, as soon as practicable following the onset of the emergency. However, this shall not relieve Franchisee from the requirement of obtaining any permits necessary for this purpose, and Franchisee shall apply for all such permits not later than forty-eight hours after beginning emergency work in the Rights-of Way. The City retains the right and privilege to cut or move any Facilities located within the Rights-of-Way of the City, as the City may determine to be necessary, appropriate, or useful in response to any public health or safety emergency. If the City becomes aware of an emergency before the Franchisee, then the City shall notify Franchisee by

telephone promptly upon learning of the emergency and shall exercise reasonable efforts to avoid an interruption of Franchisee's operations.

15.2 Whenever the construction, installation, or excavation of Facilities authorized by this Franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, an adjoining public place, street utilities, City property, Rights-of-Way, or private property (collectively "Endangered Property") or endangers the public, the Public Works Director or his/her designee, may direct Franchisee, at Franchisee's own expense, to take reasonable action to protect the Endangered Property or the public, and such action may include compliance within a prescribed time. In the event that Franchisee fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if an emergency situation exists that requires immediate action before the City can timely contact Franchisee to request Franchisee effect the immediate repair, the City may enter upon the Endangered Property and take such reasonable actions as are necessary to protect the Endangered Property or the public. Franchisee shall be liable to the City for the costs of any such repairs in accordance with the provisions of Sections 16.3 and 16.4.

15.3 The City shall not be liable for any damage to or loss of Facilities within the Rights-of-Way as a result of or in connection with any public works, public improvements, construction, grading, excavation, filling, or work of any kind in the Rights-of-Way by or on behalf of the City, except to the extent directly and proximately caused by the gross negligence or willful acts of the City, its employees, contractors, or agents. The City shall further not be liable to Franchisee for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the City's actions under this Section 15 except to the extent caused by the gross negligence or willful acts of the City, its employees, contractors, or agents.

#### Section 16. Recovery of Costs.

16.1 Franchisee shall pay a grant fee in an amount not to exceed Four Thousand Five Hundred Dollars (\$4,500) for the City's legal costs incurred in drafting and processing this Franchise and all work related thereto. No construction permits shall be issued for the installation of Facilities authorized until such time as the City has received payment of the grant fee. Franchisee shall further be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise or under the laws of the City. Where the City incurs costs and expenses

for review, inspection, or supervision of activities, including but not limited to reasonable fees associated with attorneys, consultants, City Staff and City Attorney time, undertaken through the authority granted in this Franchise or any ordinances relating to the subject for which a permit fee is not established, Franchisee shall pay such costs and expenses directly to the City in accordance with the provisions of Section 16.3.

16.2 In addition to Section 16.1, Franchisee shall promptly reimburse the City in accordance with the provisions of Sections 16.3 and 16.4 for any and all costs the City reasonably incurs in response to any emergency situation involving Franchisee's Facilities, to the extent said emergency is not the fault of the City. The City agrees to simultaneously seek reimbursement from any franchisee or permit holder who caused or contributed to the emergency situation.

16.3 Franchisee shall reimburse the City within sixty (60) days of submittal by the City of an itemized billing for reasonably incurred costs, itemized by project, for Franchisee's proportionate share of all actual, identified expenses incurred by the City in planning, constructing, installing, repairing, altering, or maintaining any City facility as the result of the presence of Franchisee's Facilities in the Rights-of-Way. Such costs and expenses shall include but not be limited to Franchisee's proportionate cost of City personnel assigned to oversee or engage in any work in the Rights-of-Way as the result of the presence of Franchisee's Facilities in the Rights-of-Way. Such costs and expenses shall also include Franchisee's proportionate share of any time spent reviewing construction plans in order to either accomplish the relocation of Franchisee's Facilities or the routing or rerouting of any utilities so as not to interfere with Franchisee's Facilities.

16.4 The time of City employees shall be charged at their respective rate of salary, including overtime if applicable, plus benefits and reasonable overhead. Any other costs will be billed proportionately on an actual cost basis. All billings will be itemized so as to specifically identify the costs and expenses for each project for which the City claims reimbursement. A charge for the actual costs incurred in preparing the billing may also be included in said billing. At the City's option, the billing may be on an annual basis, but the City shall provide the Franchisee with the City's itemization of costs, in writing, at the conclusion of each project for information purposes.

## Section 17. Franchise Fees and Utility Taxes.

17.1 Franchisee represents that its Services, as authorized under this Franchise, are a telephone business as defined in RCW 82.16.010, or that it is a service provider as used in RCW 35.21.860 and defined in RCW 35.99.010. As a result, the City will not impose franchise fees under the terms of this Franchise. The City reserves its right to impose a franchise fee on Franchisee if Franchisee's Services as authorized by this Franchise change such that the statutory prohibitions of RCW 35.21.860 no longer apply or if statutory prohibitions on the imposition of such fees are otherwise removed. The City also reserves its right to require that Franchisee obtain a separate franchise for a change in use, which franchise may include provisions intended to regulate Franchisee's operations as allowed under applicable law. Nothing contained within this Franchise shall preclude Franchisee from challenging any such new fee or separate agreement under applicable federal, State, or local laws.

17.2 Franchisee acknowledges that its operation with the City constitutes a telephone business subject to the tax imposed pursuant to the Gig Harbor City Code Section 3.16.060. Franchisee stipulates and agrees that certain of its business activities are subject to taxation as a telecommunication business and that Franchisee shall pay to the City the rate applicable to such taxable services under Gig Harbor City Code Chapter 3.16, and consistent with state and federal law. The parties agree however, that nothing in this Franchise shall limit the City's power of taxation as may exist now or as later imposed by the City. This provision does not limit the City's power to amend Gig Harbor City Code Chapter 3.16 as may be permitted by law.

## Section 18. Indemnification.

18.1 Franchisee releases, covenants not to bring suit, and agrees to indemnify, defend, and hold harmless the City, its officers, employees, agents, and representatives from any and all claims, costs, judgments, awards, or liability to any person, for injury or death of any person, or damage to property caused by or arising out of any acts or omissions of Franchisee, its agents, servants, officers, or employees in the performance of this Franchise and any rights granted within this Franchise.

18.2 Inspection or acceptance by the City of any work performed by Franchisee at the time of completion of construction shall not be grounds for avoidance by Franchisee of any

of its obligations under this Section 18. These indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be compromised, with Franchisee's prior written consent, prior to the culmination of any litigation or the institution of any litigation.

18.3 The City shall promptly notify Franchisee of any claim or suit and request in writing that Franchisee indemnify the City. Franchisee may choose counsel to defend the City subject to this Section 18.3. City's failure to so notify and request indemnification shall not relieve Franchisee of any liability that Franchisee might have, except to the extent that such failure prejudices Franchisee's ability to defend such claim or suit. In the event that Franchisee refuses the tender of defense in any suit or any claim, as required pursuant to the indemnification provisions within this Franchise, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Franchisee, Franchisee shall pay all of the City's reasonable costs for defense of the action, including all expert witness fees, costs, and attorney's fees, and including costs and fees incurred in recovering under this indemnification provision. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Franchisee to represent the City, then upon the prior written approval and consent of Franchisee, which shall not be unreasonably withheld, the City shall have the right to employ separate counsel in any action or proceeding and to participate in the investigation and defense thereof, and Franchisee shall pay the reasonable fees and expenses of such separate counsel, except that Franchisee shall not be required to pay the fees and expenses of separate counsel on behalf of the City for the City to bring or pursue any counterclaims or interpleader action, equitable relief, restraining order or injunction. The City's fees and expenses shall include all out-of-pocket expenses, such as consultants and expert witness fees, and shall also include the reasonable value of any services rendered by the counsel retained by the City but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by Franchisee. Each party agrees to cooperate and to cause its employees and agents to cooperate with the other party in the defense of any such claim and the relevant records of each party shall be available to the other party with respect to any such defense.

18.4 The parties acknowledge that this Franchise is subject to RCW 4.24.115. Accordingly, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Franchisee and the City, its

officers, officials, employees, and volunteers, Franchisee's liability shall be only to the extent of Franchisee's negligence. It is further specifically and expressly understood that the indemnification provided constitutes Franchisee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

18.5 Notwithstanding any other provisions of this Section 18, Franchisee assumes the risk of damage to its Facilities located in the Rights-of-Way and upon City-owned property from activities conducted by the City, its officers, agents, employees, volunteers, elected and appointed officials, and contractors, except to the extent any such damage or destruction is caused by or arises from any grossly negligent, willful, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. Franchisee releases and waives any and all such claims against the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. Franchisee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of Franchisee's Facilities as the result of any interruption of service due to damage or destruction of Franchisee's Facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors, except to the extent any such damage or destruction is caused by or arises from the sole negligence or any willful, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors.

18.6 The provisions of this Section 18 shall survive the expiration, revocation, or termination of this Franchise.

#### Section 19. Insurance.

19.1 Franchisee shall procure and maintain for so long as Franchisee has Facilities in the Rights-of-Way, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of rights, privileges and authority granted to Franchisee, its agents, representatives or employees. Franchisee shall require that every subcontractor maintain insurance coverage and policy limits consistent with this Section 19. Franchisee shall procure insurance from insurers with a current A.M. Best rating of not less than A-. Franchisee shall provide a copy of a certificate of insurance and additional insured endorsement

to the City for its inspection at the time of or prior to acceptance of this Franchise, and such insurance certificate shall evidence a policy of insurance that includes:

- (a) Automobile Liability insurance with limits no less than \$2,000,000 combined single limit per occurrence for bodily injury and property damage.
- (b) Commercial General Liability insurance, written on an occurrence basis with limits no less than \$3,000,000 combined single limit per occurrence and \$5,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; premises; operations; independent contractors; stop gap liability; personal injury; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.
- (c) Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington. No deductible is presently required for this insurance; and
- (d) Umbrella liability policy with limits not less than \$10,000,000 per occurrence and in the aggregate.

19.2 Any deductibles or self-insured retentions must be declared to and approved by the City. Such approval shall not be unreasonably withheld or delayed. The City acknowledges that Franchisee's current deductibles are subject to change based on business needs and the commercial insurance market. Payment of deductible or self-insured retention shall be the sole responsibility of Franchisee. Additionally, Franchisee shall pay all premiums for the insurance on a timely basis. Franchisee may utilize primary and umbrella liability insurance policies to satisfy the insurance policy limits required in this Section 19. Franchisee's umbrella liability insurance policy provides "follow form" coverage over its primary liability insurance policies.

19.3 The insurance policies, with the exception of Workers' Compensation obtained by Franchisee shall name the City, its officers, officials, employees, agents, and volunteers ("Additional Insureds"), as an additional insured with regard to activities performed by or on behalf of Franchisee. The coverage shall contain no special limitations on the scope of protection afforded to the Additional Insureds. In addition, the insurance policy 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. Franchisee shall provide to the City prior to or upon acceptance either (1) a true copy of the additional insured endorsement for each insurance policy required in this Section 19 and providing that such insurance shall apply as primary insurance on behalf of the Additional Insureds or (2) a true copy of the blanket additional insured clause from the policies. Receipt by the City of any certificate showing less coverage than required is not a waiver of Franchisee's obligations to fulfill the requirements. Franchisee's insurance shall be primary insurance with respect to the Additional Insureds, and the endorsement should specifically state that the insurance is the primary insurance. Any insurance maintained by the Additional Insureds shall be in excess of Franchisee's insurance and shall not contribute with it.

19.4 Franchisee is obligated to notify the City of any cancellation or intent not to renew any insurance policy, required pursuant to this Section 19, thirty (30) days prior to any such cancellation. Within five (5) days prior to said cancellation or intent not to renew, Franchisee shall obtain and furnish to the City replacement insurance policies meeting the requirements of this Section 19. Failure to provide the insurance cancellation notice and to furnish to the City replacement insurance policies meeting the requirements of this Section 19 shall be considered a material breach of this Franchise and subject to the City's election of remedies described in Section 22 below. Notwithstanding the cure period described in 22.1 and 22.2, the City may pursue its remedies immediately upon a failure to furnish replacement insurance.

19.5 Franchisee's maintenance of insurance as required by this Section 19 shall not be construed to limit the liability of Franchisee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or equity. Further, Franchisee's maintenance of insurance policies required by this Franchise shall not be construed to excuse unfaithful performance by Franchisee.

Section 20. Abandonment of Franchisee's Telecommunications Network. Upon the expiration, termination, or revocation of the rights granted under this Franchise, Franchisee shall remove all of its Facilities from the Rights-of-Way within ninety (90) days of receiving written notice from the Public Works Director or his/her designee. The Facilities, in whole or in part, may not be abandoned by Franchisee without written approval by the City. Any plan for abandonment or removal of Franchisee's Facilities must be first approved by the Public Works Director or his/her designee, and all necessary permits must be obtained prior to such work. Notwithstanding the above, the City may permit Franchisee's improvements to be abandoned and placed in such a

manner as the City may prescribe. Upon permanent abandonment, and Franchisee's agreement to transfer ownership of the Facilities to the City, Franchisee shall submit to the City a proposal and instruments for transferring ownership to the City. Any Facilities that are not permitted to be abandoned in place and that are not removed within thirty (30) days of receipt of City's notice shall automatically become the property of the City. Provided, however, that nothing contained within this Section 20 shall prevent the City from compelling Franchisee to remove any such Facilities through judicial action when the City has not permitted Franchisee to abandon said Facilities in place. The provisions of this Section 20 shall survive the expiration, revocation, or termination of this Franchise.

#### Section 21. Bonds.

21.1 Franchisee shall furnish a performance bond ("Performance Bond") written by a corporate surety acceptable to the City equal to at least 125% of the estimated value of the work and the estimated cost to restore existing improvements as determined by the Public Works Director. The Performance Bond shall guarantee the following: (1) timely completion of construction; (2) construction in compliance with all applicable plans, permits, technical codes, and standards; (3) proper location of the Facilities as specified by the City; (4) restoration of the Rights-of-Way and other City properties affected by the construction; (5) submission of as-built drawings after completion of construction; and (6) timely payment and satisfaction of all claims, demands, or liens for labor, materials, or services provided in connection with the work which could be asserted against the City or City property. Said bond must remain in full force until the completion of construction, including final inspection, corrections, and final approval of the work, recording of all easements, provision of as-built drawings, and the posting of a Warranty Bond as described in Section 21.2. Compliance with the performance deposit requirements described in the Gig Harbor Municipal Code Section 12.06.100 shall satisfy the provisions of this Section 21.1.

21.2 Franchisee shall furnish a two-year warranty bond ("Warranty Bond"), or other surety acceptable to the City, at the time of final acceptance of construction work on the Facilities within the Rights-of-Way. The Warranty Bond amount will be equal to fifteen percent (15%) of the actual construction costs. The Warranty Bond in this Section 21.2 must be in place prior to City's release of the Performance Bond required by Section 21.1. Compliance with the warranty deposit requirements described in the Gig Harbor Municipal Code Section 12.06.100 shall satisfy the provisions of this Section 21.2.

21.3 Franchisee shall provide City with a bond in the amount of Twenty-Five Thousand Dollars (\$25,000.00) ("Franchise Bond") running or renewable for the term of this Franchise, in a form and substance reasonably acceptable to City. In the event Franchisee shall fail to substantially comply with any one or more of the provisions of this Franchise, following written notice and a reasonable opportunity to cure, then there shall be recovered jointly and severally from Franchisee and the bond any actual damages suffered by City as a result thereof, including but not limited to staff time, material and equipment costs, compensation or indemnification of third parties, and the cost of removal or abandonment of Facilities. Franchisee specifically agrees that its failure to comply with the terms of this Section 21.3 shall constitute a material breach of this Franchise, subject to the notice and cure provisions of Section 22.2. Franchisee further agrees to replenish the Franchise Bond within fourteen (14) days after written notice from the City that there is a deficiency in the amount of the Franchise Bond. The amount of the Franchise Bond shall not be construed to limit Franchisee's liability or to limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

Section 22. Remedies to Enforce Compliance.

22.1 In addition to any other remedy provided in this Franchise, the City reserves the right to pursue any remedy available at law or in equity to compel or require Franchisee and/or its successors and assigns to comply with the terms of this Franchise and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a revocation for breach of the conditions. In addition to any other remedy provided in this Franchise, Franchisee reserves the right to pursue any remedy available at law or in equity to compel or require the City, its officers, employees, volunteers, contractors and other agents and representatives, to comply with the terms of this Franchise. Further, all rights and remedies provided herein shall be in addition to and cumulative with any and all other rights and remedies available to either the City or Franchisee. Such rights and remedies shall not be exclusive, and the exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy. Provided, further, that by entering into this Franchise, it is not the intention of the City or Franchisee to waive any other rights, remedies, or obligations as provided by law, equity or otherwise, and nothing contained in this Franchise shall be deemed or construed to affect any such waiver. The parties reserve the right to seek and obtain injunctive relief with respect to this Franchise to the extent authorized by applicable law and that the execution of this Franchise shall

not constitute a waiver or relinquishment of such right. The parties agree that in the event a party obtains injunctive relief, neither party shall be required to post a bond or other security and the parties agree not to seek the imposition of such a requirement.

22.2 If either party violates or fails to comply with any of the provisions of this Franchise, or a permit issued as required by Section 8.2, or should it fail to heed or comply with any notice given to such party under the provisions of this Franchise (the "Defaulting Party"), the other Party (the "Non-defaulting Party") shall provide the Defaulting Party with written notice specifying with reasonable particularity the nature of any such breach and the Defaulting Party shall undertake all commercially reasonable efforts to cure such breach within thirty (30) days of receipt of notification. If the Non-defaulting Party reasonably determines the breach cannot be cured within thirty (30) days, the Non-defaulting Party may specify a longer cure period, and condition the extension of time on the Defaulting Party's submittal of a plan to cure the breach within the specified period, commencement of work within the original thirty (30) day cure period, and diligent prosecution of the work to completion. If the breach is not cured within the specified time, or the Defaulting Party does not comply with the specified conditions, the Non-defaulting Party may pursue any available remedy at law or in equity as provided in Section 22.1 above, or in the event Franchisee has failed to timely cure the breach, the City, at its sole discretion, may elect to (1) revoke this Franchise pursuant to Section 23, (2) claim damages of Two Hundred Fifty Dollars (\$250.00) per day against Franchisee (and collect from the Franchise Bond if necessary), or (3) extend the time to cure the breach if under the circumstances additional time is reasonably required. Liquidated damages described in this Section 22.2 shall not be offset against any sums due to the City as a tax or reimbursement pursuant to Section 16. Nothing in this Franchise shall be construed as limiting any remedies that the City may have, at law or in equity, from enforcement of this Franchise.

### Section 23. Revocation.

If Franchisee willfully violates or fails to comply with any material provisions of this Franchise, then at the election of the Gig Harbor City Council after at least thirty (30) days written notice to Franchisee specifying the alleged violation or failure, the City may revoke all rights conferred and this Franchise may be revoked by the Council after a hearing held upon such notice to Franchisee. Such hearing shall be open to the public and Franchisee and other interested parties may offer written and/or oral evidence explaining or mitigating such alleged noncompliance. Within

thirty (30) days after the hearing, the Gig Harbor City Council, on the basis of the record, will make the determination as to whether there is cause for revocation, whether the Franchise will be terminated, or whether lesser sanctions should otherwise be imposed. The Gig Harbor City Council may in its sole discretion fix an additional time period to cure violations. If the deficiency has not been cured at the expiration of any additional time period or if the Gig Harbor City Council does not grant any additional period, the Gig Harbor City Council may by resolution declare the Franchise to be revoked and forfeited or impose lesser sanctions. If Franchisee appeals revocation and termination, such revocation may be held in abeyance pending judicial review by a court of competent jurisdiction, provided Franchisee is otherwise in compliance with the Franchise.

Section 24. Non-Waiver. The failure of either party to insist upon strict performance of any of the covenants and agreements of this Franchise or to exercise any option conferred in any one or more instances shall not be construed to be a waiver or relinquishment of any such covenants, agreements, or option or any other covenants, agreements or option.

Section 25. Police Powers and City Regulations. Nothing within this Franchise shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Franchise and the franchises of similarly-situated entities, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to reasonably control by appropriate regulations, consistent with 47 U.S.C. § 253, the location, elevation, manner of construction, and maintenance of any Facilities by Franchisee and other similarly-situated franchisees, and Franchisee shall promptly conform with all such regulations, unless compliance would cause Franchisee to violate other requirements of law. The City reserves the right to promulgate any additional regulations of general applicability as it may find necessary in the exercise of its lawful police powers consistent with 47 U.S.C. § 253. In the event of a conflict between the provisions of this Franchise and any other ordinance(s) enacted under the City's police power authority, such other ordinance(s) shall take precedence over this Franchise.

Section 26. Cost of Publication. The cost of publication of this Franchise shall be borne by Franchisee.

Section 27. Acceptance. This Franchise may be accepted by Franchisee by its filing with the City Clerk of an unconditional written acceptance, within thirty (30) days from the City's

execution of this Franchise, in the form attached as Exhibit B. Failure of Franchisee to so accept this Franchise shall be deemed a rejection by Franchisee and the rights and privileges granted shall cease. In addition, Franchisee shall file the certificate of insurance and the additional insured endorsements obtained pursuant to Section 19, any Performance Bonds, if applicable, pursuant to Section 21.1, and the Franchise Bond required pursuant to Section 21.3, and the costs described in Section 16.1.

Section 28. Survival. All of the provisions, conditions, and requirements of Section 5, Section 6, Section 7, Section 8, Section 14, Section 15, Section 17, Section 18, Section 19, Section 20, Section 21, and Section 29 of this Franchise shall be in addition to any and all other obligations and liabilities Franchisee may have to the City at common law, by statute, or by contract, and shall survive this Franchise, and any renewals or extensions, to the extent provided for in those sections. All of the provisions, conditions, regulations, and requirements contained in this Franchise shall further be binding upon the successors, executors, administrators, legal representatives, and assigns of Franchisee and all privileges, as well as all obligations and liabilities of Franchisee shall inure to its successors and assigns equally as if they were specifically mentioned where Franchisee is named.

Section 29. Changes of Ownership or Control.

29.1 This Franchise may not be directly or indirectly assigned, transferred, or disposed of by sale, lease, merger, consolidation or other act of Franchisee, by operation of law or otherwise, unless approved in writing by the City, which approval shall not be unreasonably withheld, conditioned or delayed. The above notwithstanding, Franchisee may freely assign this Franchise in whole or in part to a parent, subsidiary, or affiliated entity, unless there is a change of control as described in Section 29.2 below, or for collateral security purposes. Franchisee shall provide prompt, written notice to the City of any such assignment. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. For purposes of this Section 29, no assignment or transfer of this Franchise shall be deemed to occur based on the public trading of Franchisee's stock; provided, however, any tender offer, merger, or similar transaction resulting in a change of control shall be subject to the provisions of this Franchise.

29.2 Any transactions that singularly or collectively result in a change of more than fifty percent (50%) of the: ultimate ownership or working control of Franchisee, ownership or working control of the Facilities, ownership or working control of affiliated entities having ownership or working control of Franchisee or of the Facilities, or of control of the capacity or bandwidth of Franchisee's Facilities, shall be considered an assignment or transfer requiring City approval. Transactions between affiliated entities are not exempt from City approval if there is a change in control as described in the preceding sentence. Franchisee shall promptly notify the City prior to any proposed change in, or transfer of, or acquisition by any other party of control of Franchisee. Every change, transfer, or acquisition of control of Franchisee shall cause a review of the proposed transfer. The City shall approve or deny such request for an assignment or transfer requiring City's consent within one-hundred twenty (120) days of a completed application from Franchisee, unless a longer period of time is mutually agreed to by the parties or when a delay in the action taken by the City is due to the schedule of the City Council and action cannot reasonably be obtained within the one hundred twenty (120) day period. In the event that the City adopts a resolution denying its consent and such change, transfer, or acquisition of control has been affected, the City may revoke this Franchise, following the revocation procedure described in Section 23 above. The assignee or transferee must have the legal, technical, financial, and other requisite qualifications to own, hold, and operate Franchisee's Services. Franchisee shall reimburse the City for all direct and indirect costs and expenses reasonably incurred by the City in considering a request to transfer or assign this Franchise, in accordance with the provisions of Section 16.3 and Section 16.4, and shall pay the applicable application fee.

29.3 Franchisee may, without prior consent from the City: (i) lease the Facilities, or any portion, to another person; (ii) grant an indefeasible right of user interest in the Facilities, or any portion, to another person; or (iii) offer to provide capacity or bandwidth in its Facilities to another person, provided further, that Franchisee shall at all times retain exclusive control over its Facilities and remain fully responsible for compliance with the terms of this Franchise, and Franchisee shall furnish, upon request from the City, a copy of any such lease or agreement, provided that Franchisee may redact the name, street address (except for City and zip code), Social Security Numbers, Employer Identification Numbers or similar identifying information, and other information considered confidential under applicable laws provided in such lease or agreement, and the lessee complies, to the extent applicable, with the requirements of this Franchise and applicable City codes. Franchisee's obligation to remain fully responsible for compliance with the terms under

this Section 29.3 shall survive the expiration of this Franchise but only if and to the extent and for so long as Franchisee is still the owner or has exclusive control over the Facilities used by a third party.

Section 30. Entire Agreement. This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter within this Franchise and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution of this Franchise.

Section 31. Eminent Domain. The existence of this Franchise shall not preclude the City from acquiring by condemnation in accordance with applicable law, all or a portion of Franchisee's Facilities for the fair market value. In determining the value of such Facilities, no value shall be attributed to the right to occupy the area conferred by this Franchise.

Section 32. Vacation. If at any time the City, by ordinance and in accordance with applicable laws, vacates all or any portion of the area affected by this Franchise, the City shall not be liable for any damages or loss to the Franchisee by reason of such vacation. The City shall use reasonable efforts to reserve an appurtenant easement for public utilities within the vacated portion of the Rights-of-Way within which Franchisee may continue to operate existing Facilities under the terms of this Franchise for the remaining period of the term set forth in Section 1.1. Notwithstanding the preceding sentence, the City shall incur no liability for failing to reserve such easement. The City shall notify Franchisee in writing not less than sixty (60) days before vacating all or any portion of any such area. The City may, after sixty (60) days' written notice to Franchisee, terminate this Franchise with respect to such vacated area.

Section 33. Notice. Any notice or information required or permitted to be given to the parties under this Franchise shall be sent to the following addresses unless otherwise specified by personal delivery, overnight mail by a nationally recognized courier, or by U.S. certified mail, return receipt requested and shall be effective upon receipt or refusal of delivery:

CITY OF GIG HARBOR  
Attn: City Clerk  
3510 Grandview Street  
Gig Harbor WA 98335  
Telephone: 253-851-8136

Astound Broadband, LLC  
401 Kirkland Parkplace, Suite 500  
Kirkland, WA 98033  
Attn: Steve Weed, CEO and  
Byron Springer, EVP  
Telephone: 425-896-1891

Section 34. Severability. If any section, sentence, clause, or phrase of this Franchise should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause, or phrase of this Franchise unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations, in which event either party may request renegotiation of those remaining terms of this Franchise materially affected by such court's ruling.

Section 35. Compliance with all Applicable Laws. Each party agrees to comply with all applicable present and future federal, state, and local laws, ordinances, rules, and regulations. This Franchise is subject to ordinances of general applicability enacted pursuant to the City's police powers. The City reserves the right at any time to amend this Franchise to conform to any 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, when such statute, regulation, or ordinance necessitates this Franchise be amended in order to remain in compliance with applicable laws, but only upon providing Franchisee 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, Franchisee makes a written request for negotiations regarding 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, either party may pursue any available remedies at law or in equity.

Section 36. Attorney Fees. If a suit or other action is instituted in connection with any controversy arising out of this Franchise, each party shall pay all its legal costs and attorney fees incurred in defending or bringing such claim or lawsuit, including all appeals, in addition to any other recovery or award provided by law; provided, however, nothing in this section shall be construed to limit the City's right to indemnification under Section 18 of this Franchise.

Section 37. Hazardous Substances. Franchisee shall not introduce or use any hazardous substances (chemical or waste), in violation of any applicable law or regulation, nor shall Franchisee allow any of its agents, contractors, or any person under its control to do the same. Franchisee will be solely responsible for and will defend, indemnify, and hold the City, its officers, officials, employees, agents, and volunteers harmless from and against any and all claims, costs, and

liabilities including reasonable attorney fees and costs, arising out of or in connection with the cleanup or restoration of the property to the extent caused by Franchisee's use, storage, or disposal of hazardous substances, whether or not intentional, and the use, storage, or disposal of such substances by Franchisee's agents, contractors, or other persons acting under Franchisee's control, whether or not intentional.

**Section 38. Licenses, Fees and Taxes.** Prior to constructing any Facilities or providing Services within the City, Franchisee shall obtain a business or utility license from the City. Franchisee shall pay all applicable taxes on personal property and Facilities owned or placed by Franchisee in the Rights-of-Way and shall pay all applicable license fees, permit fees, and any applicable tax unless documentation of exemption is provided to the City and shall pay utility taxes and license fees properly imposed by the City under this Franchise.

**Section 39. Miscellaneous.**

39.1 The City and Franchisee respectively represent that their respective signatories are duly authorized and have full right, power, and authority to execute this Franchise on such party's behalf.

39.2 This Franchise shall be construed in accordance with the laws of the State of Washington. The United States District Court for the Western District of Washington, and Pierce County Superior Court have proper venue for any dispute related to this Franchise.

39.3 Section captions and headings are intended solely to facilitate the reading of this Franchise. Such captions and headings shall not affect the meaning or interpretation of the text within this Franchise.

39.4 Where the context so requires, the singular shall include the plural and the plural includes the singular.

39.5 Franchisee shall be responsible for obtaining all other required approvals, authorizations, and agreements from any party or entity and it is acknowledged and agreed that the City is making no representation, warranty, or covenant whether any of the foregoing approvals, authorizations, or agreements are required or have been obtained by Franchisee.

39.6 This Franchise is subject to all applicable federal, State and local laws, regulations and orders of governmental agencies as amended, including but not limited to the Communications Act of 1934, as amended, the Telecommunications Act of 1996, as amended and the Rules and Regulations of the FCC. Neither the City nor Franchisee waive any rights they may have under any such laws, rules or regulations.

39.7 There are no third party beneficiaries to this Franchise.

39.8 This Franchise may be enforced at both law and in equity.

Section 40. Corrections by City Clerk or Code Reviser. Upon approval of the City Attorney, the City Clerk and the code reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors; ordinance, section or subsection numbering; or references to other local, state or federal laws, codes, rules, or regulations.

Section 41. Effective Date. This ordinance shall take effect and be in force five (5) days from and after its passage and publication as provided by law.

PASSED BY THE CITY COUNCIL OF THE CITY OF GIG HARBOR THIS 23<sup>rd</sup> DAY OF MAY, 2016;  
AND SIGNED IN AUTHENTICATION OF ITS PASSAGE THIS 23<sup>rd</sup> DAY OF MAY, 2016.

CITY OF GIG HARBOR

  
\_\_\_\_\_  
Mayor Jill Gernsey

ATTEST/AUTHENTICATED:

  
\_\_\_\_\_  
Molly M. Towslee, City Clerk

APPROVED AS TO FORM:

Office of the City Attorney

  
\_\_\_\_\_  
Angela G. Summerfield

FILED WITH THE CITY CLERK: 05/04/16  
PASSED BY THE CITY COUNCIL: 05/23/16  
PUBLISHED: 05/26/16  
EFFECTIVE DATE: 05/31/16  
ORDINANCE NO: 1336

## EXHIBIT A

Services: Telecommunications services, private line, internet access services, dark fiber services and lit fiber services.





**EXHIBIT B**  
**STATEMENT OF ACCEPTANCE**

Astound Broadband, LLC d/b/a Wave ("Astound") for itself, its successors and assigns, accepts and agrees to be bound by all lawful terms, conditions and provisions of the Franchise attached and incorporated by this reference. Astound declares that it has carefully read the terms and conditions of this Franchise and unconditionally accepts all of the terms and conditions of the Franchise and agrees to abide by such terms and conditions. Astound has relied upon its own investigation of all relevant facts and it has not been induced to accept this Franchise and it accepts all reasonable risks related to the interpretation of this Franchise.

Astound Broadband, LLC

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date: \_\_\_\_\_

**ACKNOWLEDGEMENT**

STATE OF WASHINGTON )  
 )SS.  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: \_\_\_\_\_.

|             |  |
|-------------|--|
| Notary Seal | <hr/> <p>(Signature of Notary)</p> <hr/> <p>(Legibly Print or Stamp Name of Notary)<br/>Notary Public in and for the State of<br/>Washington<br/>My appointment expires: _____</p> |
|-------------|--|