ORDINANCE NO. 1353-12

AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO ASTOUND BROADBAND, LLC; AND DECLARING AN EMERGENCY

WHEREAS the City of Tualatin ("City"), and Astound Broadband, LLC ("Astound") have reached final agreements on the terms and conditions of a ten-year Franchise for Astound to use City streets to provide telecommunications services.

WHEREAS Astound has applied for a franchise and deposited the review fee as provided by Tualatin Municipal Code ("TMC") 10-1-250 through 270.

City OF TUALATIN ORDAINS AS FOLLOWS:

Section 1. Issuance of Non-Exclusive Franchise. City grants Astound Broadband, LLC, a Washington Limited Liability Company qualified to do business in the State of Oregon and to Astound's successors and assigns, as approved by City under this Franchise, a non-exclusive franchise to construct, operate and maintain a telecommunications system, with all necessary Facilities, in, under, and over the surface of City's Streets and designated rights-of-way. Astound intends to use its Telecommunications System to provide Telecommunications Services. To the extent that Astound's use of its Telecommunications System changes, City may reopen this Franchise.

This Franchise does not authorize Astound to operate a cable system or provide video programming, as defined by 47 U.S.C.A. 522(7). Astound represents that it has applied for and received all necessary regulatory authority to provide Telecommunications Services.

Nothing in this Franchise precludes Astound from entering into a contract for the use of any portion of its Telecommunications System with any Affiliate of Astound. Nothing in this Franchise precludes Astound from entering into a contract for the use of any portion of its Telecommunications System with any other Person or entity for any services, whether specified herein or not, provided that said Person or entity is another Licensee and has assumed responsibility for obtaining any required authority from City.

Section 2. Authority not exclusive. City reserves the right to grant rights to others to use its rights-of-way during the franchise term. City may do any work on, over or under any street, alley, utility easement or other right-of-way. Astound shall respect the rights and property of City and other authorized users of easements and rights-of-way. This agreement does not confer any right, title, or

interest in any public right-of-way on Astound beyond that expressly conferred in this agreement. Except as otherwise required by law, disputes between Astound and parties other than City over use of the easements and rights-of-way under this agreement shall be submitted to City for resolution. City's decision shall be made in a reasonable and non-arbitrary proceeding affording due process to Astound, and shall be final and binding.

Section 3. Duration of Franchise. The term of this Franchise, and all rights and obligations pertaining thereto, shall be for a period of ten (10) years commencing on the effective date of this Franchise, as defined in section 4, below.

Section 4. Effective Date. The effective date of this Franchise shall be upon passage of the Franchise by City Council unless Astound fails to file an unconditional written acceptance of this Franchise within 30 days of approval by City Council, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof.

Section 5. Tualatin Municipal Code ("TMC") 10-1 to Apply. To the extent authorized by law, this Franchise is subject to TMC 10-1 and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Astound, now in effect or hereafter made effective. TMC 10-1-250 through TMC 10-1-470, inclusive, is hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of City regarding permits, fees to be paid or the manner of construction.

Section 6. Definitions.

A. **Captions.** Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

B. **Definitions.** For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

1. "Affiliate" means, with respect to any Person, any other Person controlling, controlled by or under common control with such Person. For purposes of this definition, the term "control" (including the correlative meanings of the terms "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

2. "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

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

4. "City Council" means the Council of City of Tualatin.

5. "Conduit" means any structure, or section thereof, containing two or more ducts used for any wire, optical fiber or other cable.

6. "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such facilities in Astound's Telecommunications' System.

7. "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

8. "Facility" means any tangible component of the Telecommunications System.

9. "Franchise" means this Franchise agreement, as approved by City Council and accepted by Astound.

10. "Gross Revenues" means any and all gross revenues derived by Astound for the provision of any and all products, services or charges, originating or terminating in Tualatin, Oregon billed to a circuit, switch or address in Tualatin, Oregon, including revenues from dedicated private networks. Gross Revenues shall include any and all revenues from leases and IRUs for the Tualatin portion of Astound's system. Gross Revenues may be adjusted for the net write-off of uncollectible amounts of such revenues.

11. "Hazardous Substances" has the meaning given by ORS 465.200 (2009).

12. "Indefeasible Right of User Interest" or "IRU" means a form of acquired capital in a telecommunications system, in which the holder of the interest possesses a right to use the telecommunications system, but not the right to control, maintain, construct or revise the telecommunications system.

13. "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by City to use the Streets including, if appropriate, City itself. For the purposes of Section I, Astound shall not be construed to be a "Licensee" as defined herein.

14. "Minimum Annual Franchise Fee" means $2,500.

15. "Optical Fiber" means a filament of transparent dielectric material, usually glass or plastic, and usually circular in cross section, that guides light, and is used to convey modulated information.

16. "Penalties" means any and all monetary penalties provided for in this Franchise.

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

18. "Streets" means the surface of, and the space above and below, any public street, road, alley or highway, within City, used or intended to be used by the general public for travel, to the extent City has the right to allow Astound to use them.

19. "Surplus ducts or conduits" means Conduit Facilities other than those occupied by Astound or any prior Licensee, one unoccupied duct held by Astound as an emergency use spare, and other unoccupied ducts that Astound reasonably expects to use within the next 18 months.

20. "Telecommunications Services" means:

    a. Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

b. Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video, or data transmission;

c. Services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carrier, or telephone company that provides local exchange services, for the purpose of voice, video, or data transmission; or

d. Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission.

21. "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles, Optical Fiber and other necessary Facilities owned or used by Astound for the purpose of providing Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City Licensee.

22. "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

Section 7. Compensation and Auditing.

A. Amount of Compensation.

As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of City, Astound shall pay as a Franchise fee to City, through the duration of this Franchise, the greater of either: (a) the Minimum Annual Franchise Fee; or, (b) an amount equal to five percent (5%) of Astound's Gross Revenues. However, revenues derived from the sale of facilities shall be excluded from the Gross Revenues calculation of Franchise fees under this Subsection 7.A.1.

B. Franchise Fee Payments.

1. Astound's Minimum Annual Franchise Fee shall be paid to City annually following the effective date of this Franchise. Each annual payment shall be made for the immediately preceding calendar year ending December 31. Each annual payment of Astound's Minimum Annual Franchise Fee shall be paid on or before the forty-fifth (45th) day following December 31st.

2. The Gross Revenue based Franchise fee, together with Franchise fees based upon revenues from sales under, shall be computed and paid on or before the forty-fifth (45th) day following each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) during the term of this Franchise.

3. Any failure to pay the Franchise fee when due shall be subject to a delinquency charge. The delinquency charge shall be five percent (5%) of the unpaid amount, but in no event less than $100.00 for recovery of City's administrative costs, inconveniences and burdens which would be difficult or incapable of accurate estimation. 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.

4. 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 300 basis points (3%). At no time shall the annual interest rate be reduced to less than 12%. Interest shall be compounded daily.

C. **Reports.** Each payment shall be accompanied by a written report to City, verified by an officer or other authorized representative of Astound, containing an accurate statement in summarized form, as well as, in detail of Astound's Gross Revenues, together with all fees based upon revenues from sales, IRUs and leases and the computation basis and method. Such reports shall be in a form satisfactory to City.

D. **Acceptance of Payment and Recomputation.** No acceptance of any payment by Astound shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of

payments be construed as a release of any claim City may have for further or additional sums payable. All amounts paid under Section 7.A shall be subject to confirmation and recomputation by City, provided that such audit and computation is completed within one (1) year of the date any audited and recomputed payment is due. If no such audit or financial review is conducted within the one (1) year period, then any claim that City might have had for additional compensation shall be forever waived and relinquished. Astound agrees to reimburse City for:

1. The reasonable costs of such confirmation if City's recomputation discloses that Astound has paid 95% or less of the Franchise fees owing for the period at issue upon receipt of an invoice from City showing such costs were actually incurred and directly related to the audit; or

2. One-half of the reasonable costs of such confirmation if City's recomputation discloses that Astound had paid more than 95% but less than 98% of the Franchise fees owing for the period at issue.

3. City's costs which may be reimbursed under this Section 7.D. shall not exceed $5,000.00 per audit or financial review.

4. If City determines that Astound made any underpayment, and that the underpayment exceeded 5% of the amount due, Astound shall pay interest on the underpayment in accordance with Section 7.D above.

E. If Astound disputes City's determination of underpayment, Astound shall place the disputed amount in an escrow account until final resolution.

F. City and its agents and representatives shall have authority to arrange for and conduct reviews of the relevant financial obligations payable hereunder. City may reasonably determine the scope of review in each instance. All amounts paid by Astound shall be subject to review by City; provided that such review be completed within one (1) year from the date payment was due. City requests for reviews shall be in writing. If Astound has not provided copies of all information reasonably within the scope of the review to City within 60 days from the date of the written request, Astound shall provide access within the Tualatin metropolitan region, during normal business hours, upon 48 hours prior written notice. If City requests in writing that Astound provide, or cause to be provided, copies of any information reasonably within the scope of the review, and Astound fails within 60 days of receipt of the request to provide, or cause to be provided, such information, then the one (1) year period shall be extended by one day for each day or part thereof

beyond 60 days that Astound fails to provide, or fails to cause to be provided, such requested information.

Section 8. Intentionally Omitted.

Section 9. General Financial and Insurance Provisions.

A. Insurance.

1. Astound shall maintain public liability and property damage insurance that protects Astound and City from the claims referred to in Section 10, below, to the extent that liability coverage for the indemnity is available in the marketplace. The insurance shall provide coverage at all times of not less than $1,000,000 combined single limit for bodily injury liability and property damage liability per occurrence with an annual aggregate limit of not less than $3,000,000. The limits of the insurance shall be subject to any changes as to maximum statutory limits of liability imposed on municipalities of the State of Oregon during the term of the Franchise. The insurance shall be without prejudice to coverage otherwise existing, and shall name as additional insureds City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. Astound shall not cancel or materially alter coverage without first providing City thirty (30) days' prior written notice. If the insurance is canceled or materially altered within the term of this Franchise, Astound shall obtain a replacement policy with the same terms. Astound agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of this Franchise.

2. Astound shall maintain on file with City a certificate of insurance certifying the coverage required above. The certificate of insurance shall be reviewed and approved as to form by City Attorney.

3. In the alternative to providing a certificate of insurance to City, certifying liability insurance coverage as required in this Section, Astound may provide City with a statement regarding its self-insurance. Astound's self-insurance shall provide at least the same amount and scope of coverage for Astound and City, its officers,

agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to City Attorney's review and approval. Upon Astound's election to provide self-insurance coverage under this Section 9.A.3, any failure by Astound to maintain adequate self-insurance shall be cause for termination of this Franchise.

B. Faithful Performance Bond.

1. Upon the effective date of this Franchise, Astound shall furnish proof of the posting of a faithful performance bond or irrevocable letter of credit running to City, with good and sufficient surety approved by City, in the penal sum of Ten Thousand dollars ($10,000), conditioned that Astound shall well and truly observe, fulfill, and perform each term and condition of this Franchise. Astound shall pay all premiums or other costs associated with maintaining the bond or irrevocable letter of credit, and shall keep the same in full force and effect at all times throughout the like of this Franchise, including, if necessary, the time required for removal of all of Astound's Facilities installed in City's Streets. The bond or irrevocable letter of credit 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 or irrevocable letter of credit shall be reviewed and approved as to form by City Attorney.

2. The irrevocable letter of credit or performance bond must be issued by a financial institution with a rating by Moody's Investor's Corporation Service, Standard and Poor's or comparable service that is reasonably acceptable to City. If the rating of the issuer of the letter of credit is significantly downgraded to a lower rating during the term of the Franchise, City may require Astound to provide a replacement through an institution with an acceptable rating. If Astound is providing a letter of credit, it must be issued by and presentable to a Tualatin branch of the financial institution. The performance bond or letter of credit must provide City with unrestricted rights to draw upon the guaranty for the purposes identified in the Franchise for the performance bond. The issuing financial institution's liability to pay and to be reimbursed by Astound customer must be absolute upon the occurrence of the triggering circumstances. Should City have cause to draw upon the performance bond or letter of credit, it will promptly notify Astound, and Astound shall promptly restore the performance bond or letter of credit to the full required amount.

3. During the term of this Franchise, Astound shall file with City a duplicate copy of the bond or irrevocable letter of credit along with written evidence of payment of the required premiums. However, in no event shall City exercise its rights against the performance bond or irrevocable letter of credit under Section 9 B if a bona fide, good faith dispute exists between City and Astound.

C. **Construction Bond.** During all times when Astound is performing any construction work in or under the Streets requiring a street opening permit, Astound shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to City, with good and sufficient surety approved by City, in the sum of $100,000. The bond or letter of credit shall be conditioned that Astound shall well and truly observe, fulfill and perform each term and condition. Astound shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of Astound's construction work in or under the Streets by City Engineer which shall not be unreasonably withheld or delayed. Upon such approval, City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Astound shall file with City a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the reasonable approval of City Attorney as to its adequacy under the requirements of this Section.

Section 10. Covenant to Indemnify and Hold City Harmless.

A. Indemnification.

1. Astound hereby agrees and covenants to indemnify, defend and hold City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Astound, its agents or employees, or by reason of any neglect or omission of Astound to keep its Telecommunications System in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by City, its officers, agents or employees. City shall provide Astound with prompt notice of any such claim which Astound shall defend with counsel of its own choosing and no settlement or compromise of

any such claim will be done by City without the prior written approval of Astound. Astound and its agents, contractors and others shall consult and cooperate with City while conducting its defense of City.

2. Astound also hereby agrees to indemnify City for any damages, claims, additional costs or expenses assessed against and paid by City arising out of or resulting, directly or indirectly, from Astound's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with a relocation schedule furnished to Astound by City Engineer, unless Astound's failure arises directly from City's negligence or willful misconduct.

3. Indemnification – Hazardous Substances. Astound agrees to forever indemnify City, its officers, agents, and employees, 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 Astound's Facilities in the Streets.

Section 11. Construction and Relocation.

A. Construction.

1. Subject to applicable regulations of City, Astound may perform all necessary construction to construct, operate, and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System Facilities within Streets incident to Astound's provision of Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Astound. Astound shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City Streets. Astound shall pay all applicable fees due for City construction permits.

2. Maps.

   a. Prior to beginning construction, Astound shall provide City's Engineer with an initial construction schedule for work in the Streets and the estimated total cost of such work. As Astound's construction in the Streets is completed, Astound shall provide City with maps showing the location of its installed Facilities in the Streets, as built. Such as-built maps shall be in a form

reasonably acceptable to City Engineer. Within one year of the effective date of this Franchise, Astound shall begin providing as built maps in electronic form.

b. One year after the effective date of this Franchise, and annually thereafter, Astound shall provide a map to City's Office of Cable Communications and Franchise Management, or its successor, showing the location of Astound's optical fibers, conduit and ducts in, over or through the Streets on a scale of Three thousand five hundred feet (3,500') per inch or whatever standard scale City and Astound agree upon. Astound shall also provide such maps in an electronic format reasonably acceptable to City and Astound.

3. ONLY AS A LAST RESORT, Astound may make excavations or open cutting of streets in City Streets for any Facility needed for the maintenance or extension or removal of Astound's Telecommunications System, subject to obtaining permits from City. Prior to doing such work, Astound must apply for, and obtain, appropriate permits from City, and give appropriate notices to any further franchisees, licensees or permittees of City, or other units of government, owning or maintaining facilities which may be affected by the proposed excavation.

4. In the event that emergency repairs are necessary for Astound's Facilities in the Streets, Astound shall immediately notify City of the need for such repairs. Astound may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Astound must comply with all City codes and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

5. Locates. Astound shall comply with the requirements of the Oregon Utility Notification Law (ORS 757.542 to 757.562 and 757.993 (2007)) and the rules and regulations promulgated thereunder.

6. Relocation. City shall have the right to require Astound to change the location of its Facilities within the Streets when the public convenience requires such change, and the expense thereof shall be paid by Astound (however, payment by Astound shall in no way limit Astound's right, if any, to seek reimbursement for such costs from any third party). Except as to materials or design requirements for bridge maintenance or seismic upgrading, if in ordering relocation, City imposes additional specifications regarding materials or design for Astound's Facilities, the additional marginal

increase shall not be considered relocation costs that are Astound's responsibility. City Engineer shall have unlimited discretion in determining the reasonable relocation schedule, based upon City Engineer's consideration of the total circumstances of the project schedule. If after receiving City Engineer's relocation schedule, Astound identifies in writing that the work associated with relocating Astound's Facilities will be of such size or scope that Astound believes that it is probable that Astound will not be able to complete the work within the schedule, Astound may request a meeting with City Engineer to discuss whether modification of the relocation schedule, alternate construction methods, or alternate locations are reasonably possible given other project constraints. City Engineer will consider Astound's safety, reliability, and cost concerns while considering potential effects on project schedules, project budget, and any other relevant matters. However, City Engineer will retain full authority and discretion to make any final decisions regarding any modifications to the relocation schedule, based upon City Engineer's consideration of the total circumstances of the project schedule. City shall provide Astound with the standard notice given under the circumstances to other persons franchised, permitted, licensed, or otherwise granted authority by City. Should Astound fail to remove or relocate any such Facilities by the date established by City Engineer's schedule, City may cause and/or effect such removal or relocation by qualified workers and the expense thereof shall be paid by Astound, including all direct, indirect, and/or consequential costs and expenses incurred by City due to Astound's delay (however, payment by Astound shall in no way limit Astound's right, if any, to seek reimbursement for such costs from any third party). If City requires Astound to relocate its Facilities located within the Streets, City will make a reasonable effort to provide Astound with an alternate location for its Facilities within the Streets, or if an alternate location is unavailable, will make City's project management personnel available to meet with affected property owners and explain City project needs in support of Astound's efforts to secure an alternate location on private property.

7. Astound's Telecommunications System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of City, or with any other pipes, wires, conduits or other facilities that may have been laid in the Streets by or under City's authority.

8. Within thirty (30) days following Astound's acquisition of any Telecommunications System Facilities in the Streets, or upon any addition or annexation to City of any area in which Astound retains

any such Facilities in the Streets, Astound shall submit to City a written statement describing all Facilities involved, whether authorized by franchise or any other form of prior right, and specifying the location of all such Facilities. At City's sole option, as expressed by ordinance adopted by City Council, Facilities acquired by Astound shall immediately be subject to the terms of this Franchise, within a reasonable period of time to bring such acquired Facilities into compliance with this Franchise.

Section 12. Restoration of Streets.

A. Whenever Astound disturbs the surface of any unimproved Street for any purpose, Astound shall promptly restore the street to at least its prior condition to the satisfaction of City Engineer, to the extent reasonably practicable. When any opening is made by Astound in a hard surface pavement in any Street, Astound shall promptly refill the opening and restore the surface to a condition satisfactory to City Engineer, in accordance with standards developed and adopted by City Engineer.

B. If Astound excavates the surface of any Street, Astound shall be responsible for restoration of the Street and its surface within the area affected by the excavation. City may, after providing notice to Astound, refill and/or repave any opening made by Astound in the Street, and the expense thereof shall be paid by Astound. City reserves the right, after providing notice to Astound, to remove and/or repair any work done by Astound which, in the determination of City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by Astound. All excavations made by Astound in the Streets shall be properly safeguarded for the prevention of accidents. All of Astound's work shall be done in strict compliance with all applicable rules, regulations and ordinances of City. Astound's responsibility for maintaining repairs to any surfaces disturbed by Astound's work shall end upon the occurrence of either a reconstruction of the Street in an approved manner by City (curb to curb) or upon subsequent work at the same location by any other Person franchised, permitted, licensed or otherwise granted authority by City, whichever occurs first.

C. Tree Trimming.

1. After obtaining a written permit from City, Astound may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Astound's Facilities. Except in emergencies,

Astound may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For the purposes of this Section, an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of Astound's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Astound may prune such tree at its own expense.

2. City may waive the notification and permit process in the case of single trees, if Astound adequately demonstrates the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Astound shall be subject to the approval of City. City shall have the discretion to cancel the permit if, at any time, Astound or its agents, fails to use proper arboricultural practices.

Section 13. Reservation of City Street Rights.

A. City acknowledges that as Astound is building its Telecommunication System and securing customers, it may have telecommunications equipment in the right-of-way that is not activated within one year but is not abandoned as contemplated by TMC 10-1.230 and 10-1.380. Therefore, City agrees that at such time as Astound intends to discontinue using or to remove any telecommunications network facility or facilities within City, including actions pursuant to a City termination order, Astound shall submit a specific plan for such discontinuance or removal to City Engineer for City Engineer's approval. City Engineer may allow Astound to abandon in place any facility, may require Astound to remove or modify the facilities within the public rights-of-way or other public place or property, may cause the facilities to be removed at Astound's expense, or may take any combination of these actions. Astound shall complete such removal or modifications in accordance with a schedule set by City Engineer. Until such time that Astound's property is completely removed and all restorations to the public rights-of-way or other public places or property have been completed, Astound shall be responsible for all necessary repairs, relocations, and maintenance of the facilities in the same manner and degree as if the facilities were in active use, and Astound shall retain all liability for such facilities.

B. Astound does not require City's consent to transfer, assign, lease, merge, or consolidate with a third party except that such third party shall not

succeed to Astound's rights hereunder unless that third party is a valid franchise holder in City and agrees in writing to abide by the provisions of this franchise agreement.

Section 14. Change of Law; Amendment.

A. This agreement may be amended from time to time to conform to any changes in the controlling federal or state law or other changes material to this agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This agreement may be amended or terminated by the mutual consent of the parties and their successors in interest.

B. City reserves the right to adopt such additional regulations as it finds necessary in the exercise of its police power, provided that such regulations or ordinances are reasonable and not in conflict with the rights granted in this Agreement. At all times during the term of this Agreement, Astound shall be subject to all lawful exercise of the police power by City, and to such reasonable regulations that City may subsequently provide by resolution or ordinance. With regard to this franchise, City reserves the right to exercise all authority now or hereafter granted to City by state statute or City charter, except where such authority may be modified or superseded by the Constitutions of the United States or the State of Oregon.

Section 15. Taxes. Nothing contained in this Agreement shall be construed to exempt Astound from any license, occupation, or excise tax or assessment that is or may be lawfully imposed on all entities in the same business as Astound.

Section 16. Severability Clause. If any clause, sentence, or any other portion of this Agreement becomes illegal, null or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law. If any material portion of the Agreement becomes illegal, null or void so that the intent of the Agreement is frustrated, the parties agree to negotiate replacement provisions to fulfill the intent of the Agreement consistent with applicable law.

Section 17. Remedies.

A. In addition to other remedies specified in this Franchise, City may impose liquidated damages not to exceed $1000 per day or per incident, not to

exceed a total of $50,000 over the term of this Franchise, if Astound violates a material provision of this Agreement, subject to subparagraph 10(B).

B. If Astound fails to comply with a material provision of this Franchise or violates its terms, Astound will forfeit all rights and privileges granted by this Agreement. Prior to declaring a forfeiture City will:

1. Notify Astound in writing clearly and in detail of the failure or violation; and

2. Grant Astound, not more than ninety (90) days from the date of City's notice, to cure its compliance with the provisions of this Agreement; or if the provision cannot be satisfied within the ninety (90) day period, to commence and diligently pursue compliance.

If Astound fails to cure its compliance or otherwise diligently pursue compliance as required, City, at its sole discretion, has the right to determine that the franchise is forfeited. Forfeiture of the franchise shall not relieve Astound from complying with the Tualatin Municipal Code on telecommunications.

C. If Astound corrects the violation or commences and diligently pursues compliance within the ninety-day period, then no liquidated damages or other remedy shall be imposed.

D. Notwithstanding the above, failure, default or violation by Astound shall not constitute grounds for the forfeiture of this franchise if due materially, substantially and reasonably to an act of God, fire, flood, storm or element or casualty, theft, war, disaster, strike, lock-out, boycott, prevailing war or war preparation, or bona fide legal proceedings beyond the control of Astound.

E. All remedies and penalties under this Agreement, including termination of the franchise, are cumulative and not exclusive. The recovery or enforcement by one available remedy or imposition of a penalty is not a bar to recover or enforcement by other remedy or imposition of other penalty. City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon Astound under this Agreement. A specific waiver of a particular breach of a term, condition or obligation imposed on Astound under this Agreement shall not be a waiver of any other or subsequent breach of the same or other term, condition or obligation.'

Section 18. Attorney Fees. In the event of a suit, arbitration or other proceeding of any nature whatsoever, including without limitation, a proceeding under the U.S. Bankruptcy Code, is instituted to enforce any provision of this Franchise; each Party shall bear its own costs and fees, including attorney fees, at trial and on appeal.

Section 19. Notice. Unless otherwise specifically provided, all notices shall be mailed, postage prepaid, to the following address:

If to Astound: Astound Broadband LLC.
401 Kirkland Parkplace
Suite 500
Kirkland, WA 98033
Attention: Steve Weed, CEO and
Jim Penney, EVP

If to City: City of Tualatin
Attention: City Attorney
18880 SW Martinazzi
Tualatin, OR 97062

Section 20 Governing Law. The laws of the State of Oregon govern this Agreement and its interpretation, performance, and enforcement.

Section 21. Emergency. This ordinance is necessary for the immediate protection of the public peace, health, safety and welfare and shall take effect immediately upon adoption.

INTRODUCED AND ADOPTED THIS 26th DAY OF November, 2012.

CITY OF TUALATIN

BY _____
Lou Ogden
Mayor

Approved as to Form:

_____
Sean T. Brady
City Attorney

ATTEST:

BY _____
City Recorder

ACCEPTANCE OF FRANCHISE

TO THE CITY COUNCIL OF THE CITY OF TUALATIN, OREGON

WHEREAS, The City of Tualatin, Oregon, on November 26, 2012, passed Ordinance No. 1353-12, entitled:

> AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO ASTOUND BROADBAND LLC; AND DECLARING AN EMERGENCY

NOW, THEREFORE, the undersigned, ASTOUND BROADBAND, the Franchisee named in said ordinance, does hereby for itself and its successors and assigns accept the terms, conditions and provisions of Ordinance No. 1353-12 and agrees to be bound thereby and comply therewith.

IN WITNESS WHEREOF, Astound Broadband, LLC, by and through its duly authorized officers executes this instrument as below subscribed this 10th day of December, 2012.

Astound Broadband, LLC

By: _____

Title: Executive Vice President