

## ORDINANCE NO. 003/2022

AN ORDINANCE OF THE CITY OF MONROE, WASHINGTON, GRANTING TO ASTOUND BROADBAND, LLC D/B/A WAVE AND ITS AFFILIATES, SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR FIVE YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A TELECOMMUNICATIONS NETWORK, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF MONROE, WASHINGTON; SETTING FORTH THE TERMS AND CONDITIONS OF SAID FRANCHISE; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, Astound Broadband, LLC d/b/a Wave (“Franchisee”) is the successor in interest to Black Rock Cable, Inc., which was granted a franchise pursuant to Ordinance No. 001/2011; and

WHEREAS, the initial franchise adopted by Ordinance No. 001/2011 expired on January 23, 2021; and

WHEREAS, Franchisee has requested that the City Council grant it a nonexclusive franchise, 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.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MONROE, WASHINGTON, DO ORDAIN AS FOLLOWS:

**Section 1. Franchise.** The franchise by the Monroe City Council under Ordinance No. 001/2011 is hereby terminated and replaced in its entirety by this franchise, attached and incorporated herein as Attachment A. The term of the franchise shall be for five (5) years, commencing on the date the last party executes the franchise.

**Section 2. Terms & Conditions.** The terms and conditions governing the franchise specified in Section 1. shall be those set forth on Attachment A to this Ordinance and incorporated herein by this reference as if set forth in full.

**Section 3. Deadline for Acceptance.** The rights and privileges granted pursuant to this Ordinance shall not become effective until its terms and conditions are accepted by Astound Broadband, LLC. Such acceptance shall contain any required letter of credit, evidence of insurance, all applicable fees pursuant to Section 14. of the Franchise, and shall be filed with the City Clerk within sixty (60) days after the effective date of this

Ordinance. Such instrument shall conform substantially to Attachment B, and evidence the unconditional acceptance of the terms hereof and a promise to comply with and abide by the provisions, terms and conditions hereof.

**Section 4. Severability.** If any section, sentence, clause or phrase of this ordinance 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 Ordinance.


**Section 5. Correction.** The City Clerk are authorized to make necessary corrections to this ordinance, including the correction of clerical errors; references to other local, state or federal laws, codes, rules, or regulations; or ordinance numbering and section/subsection numbering.

**Section 6. Effective Date.** This Ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

PASSED by the City Council and APPROVED by the Mayor of the City of Monroe, at a regular meeting held this 22<sup>nd</sup> day of February, 2022.

First Reading: 02/08/2022  
Adoption: 02/22/2022  
Published: 02/25/2022  
Effective: 03/02/2022


CITY OF MONROE, WASHINGTON:

  
Geoffrey Thomas (Feb 23, 2022 11:45 PST)

Geoffrey Thomas, Mayor

ATTEST:

APPROVED AS TO FORM:

  
Jody Wycoff (Feb 24, 2022 08:29 PST)

Jody Wycoff, City Clerk

  
Zach Lell (Feb 23, 2022 11:42 PST)

J. Zachary Lell, City Attorney

# **ATTACHMENT A**

*[See attached.]*

**TELECOMMUNICATIONS FRANCHISE**  
**Between**  
**CITY OF MONROE, WASHINGTON**  
**and**  
**ASTOUND BROADBAND, LLC**

This Telecommunications Franchise is entered into by and between the City of Monroe, Washington a municipal corporation, hereinafter (“the City”) and Astound Broadband, LLC who is hereinafter known as (“Astound” or “Franchisee”). The City and Franchisee are sometimes referred to hereinafter collectively as the “parties.”

**Section 1. Franchise Granted.**

Section 1.1. Pursuant to RCW 35A.47.040, the City hereby grants to Astound a non-exclusive franchise (the “Franchise”) under the terms and conditions contained in this franchise ordinance (the “Franchise Ordinance”).

Section 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 of Monroe, as approved pursuant to City permits issued pursuant to this Franchise and in accordance with all applicable federal, state, and local codes.

(a) “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 placement by Franchisee of new utility poles is specifically excluded unless otherwise specifically approved by the City. 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. For the purposes of this Franchise the term Facilities excludes “microcell” facilities, “minor facilities,” “small cell facilities,” all as defined by RCW 80.36.375, and “macrocell” facilities, including towers and new base stations and other similar facilities (except for fiber optic cables) used for the provision of “personal wireless services” as defined by RCW 80.36.375.

(b) Public “Rights-of-Way” means land acquired or dedicated to the public or that is hereafter dedicated to the public and maintained under public authority, including, but not limited to, public streets or roads, highways, avenues, lanes, alleys, bridges, sidewalks, utility easements and similar public property located within the franchise area but does not include: State highways; land dedicated for road, streets, 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; federally granted railroad rights-of-way acquired under 43 USC § 912 and related provisions of federal law that are not open for vehicular use; or leasehold or City-owned property to which the City holds fee title or other title and which is utilized for park, utility or a governmental or proprietary use (for example, buildings, other City-owned physical facilities, parks, poles, conduits, fixtures, real property or property rights owned or leased by the City not reserved for transportation purposes).

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

Section 2.1. The authority granted pursuant to this Franchise is a limited authorization to occupy and use the Rights-of-Way throughout the City (the “Franchise Area”). No right to install any facility, infrastructure, wires, lines, cables, or other equipment, on any City property other than a Right-of-Way, or upon private property without the owner’s consent, or upon any public or privately owned utility poles or conduits is granted herein. Franchisee hereby represents that it expects to provide the following services within the City: high speed data and fiber optic services, internet protocol-based services, internet access services, conduit and dark fiber leasing, telephone, data transport and other telecommunications and information services (the “Services”). Nothing contained herein shall be construed to grant or convey any right, title, or interest in the Rights-of-Way of the City to the Franchisee other than for the purpose of providing the Services, nor to subordinate the primary use of the Right-of-Way as a public thoroughfare. Franchisee may not offer Cable Services as defined in 47 U.S.C. § 522(6) or personal wireless services, without obtaining a new franchise or an amendment to this Franchise approved by the City Council.

Section 2.2. Notwithstanding the existence of this Franchise, the installation, construction, maintenance, use, operation, replacement and removal by Franchisee of any one or

more Franchise Facilities will be subject to all applicable provisions of Title 12 MMC, including, but not limited to, the City's Development Regulations and Design and Construction adopted by the City's Public Works Department of Public Works, the terms and conditions of City right-of-way use permits issued pursuant to Title 12 MMC, the terms and conditions of City building permits issued pursuant to chapter 15.04 MMC, and all other applicable laws, rules and regulations.

Section 2.3. 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 ownership 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, provided that leases or other commercial arrangements for the use of the Facilities installed pursuant to this Franchise may extend beyond the term of the 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, unless such rights are otherwise granted by the City.

### **Section 3. Non-Exclusive Franchise.**

Section 3.1. This Franchise is granted to the Franchisee upon the express condition and understanding that it shall be a non-exclusive Franchise which shall not in any manner prevent or hinder the City from granting to other parties, at other times and under such terms and conditions as the City, in its sole discretion, may deem appropriate, other franchises or similar use rights in, on, to, across, over, upon, along, under or through any Public Rights-of-Way. Additionally, this Franchise shall in no way prevent, inhibit or prohibit the City from using any of the roads, Public Rights-of-Way or other public properties covered or affected by this Franchise, nor shall this Franchise affect the City's jurisdiction, authority or power over any of them, in whole or in part.

The City expressly retains its power to make or perform any and all changes, relocations, repairs, maintenance, establishments, improvements, dedications, or vacations of or to any of the roads, Public Rights-of-Way or other public properties covered or affected by the Franchise as the City may, in its sole and absolute discretion, deem fit, including the dedication, establishment, maintenance and/or improvement of new Public Rights-of-Way, thoroughfares and other public properties of every type and description.

#### **Section 4. Term; Early Termination.**

Section 4.1. The initial term of the Franchise shall be for a period of five (5) years (the “Initial Term”), beginning on the Effective Date of the Franchise, and continuing until the date that is one day prior to the fifth anniversary of the Effective Date (the “Initial Term Expiration Date”), unless earlier terminated, revoked or modified pursuant to the provisions of this Franchise.

Section 4.2. The Franchise granted by this Franchise Ordinance shall automatically renew on the fifth anniversary of the Effective Date with the same terms and conditions as set forth in this Franchise, for one (1) additional five (5) year (the “Renewal Term,” and, together with the Initial Term, the “Term”).

#### **Section 5. Location of Facilities.**

Section 5.1. 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 standards and the Monroe Municipal Code and subject to the City’s applicable permit requirements. Franchisee shall not commence any construction or other similar work within a Public Right-of-Way until (i) a right-of-way use permit authorizing such work has been issued by the City pursuant to Title 12 MMC for a site-specific location or installation, including, but not limited to, relocations, and (ii) if required by chapter 15.04 MMC, a building permit authorizing such work has been issued by the City.

Section 5.2. To the extent that any Rights-of-Way within the Franchise Area are part of the state highway system (“State Highways”), are considered managed access by the City and are governed by the provisions of Chapter 47.24 RCW and applicable Washington State Department of Transportation (WSDOT) regulations, Franchisee shall comply fully with said requirements in addition to local ordinances and other applicable regulations. Franchisee specifically agrees that:

- (a) any pavement trenching and restoration performed by Franchisee within State Highways shall meet or exceed applicable WSDOT requirements;
- (b) any portion of a State Highway damaged or injured by Franchisee shall be restored, repaired and/or replaced by Franchisee to a condition that meets or exceeds applicable WSDOT requirements; and
- (c) without prejudice to any right or privilege of the City, WSDOT is authorized to enforce in an action brought in the name of the State of Washington any condition of this Franchise with respect to any portion of a State Highway.

## **Section 6. Relocation of Facilities**

Section 6.1. The Franchisee agrees and covenants that, upon reasonable notice, it will promptly, at its sole cost and expense, protect, support, temporarily disconnect, relocate, or remove from any Public Right-of-Way any portion of the Franchisee Facilities when so required by the City due to any of the following reasons: (i) traffic conditions, (ii) public safety, (iii) dedications of new rights-of-way and the establishment and/or improvement thereof, (iv) widening and/or improvement of existing rights-of-way, (v) right-of-way vacations, (vi) freeway construction, (vii) change or establishment of road grade, or (viii) the construction of any public improvement or structure by any governmental agency acting in a governmental capacity; PROVIDED that the Franchisee shall generally have the privilege to temporarily bypass, in the authorized portion of the same Public Right-of-Way, upon approval by the Public Works Director, any Franchisee Facilities required to be temporarily disconnected or removed. The provisions of this Section 6. apply to all Franchisee Facilities wheresoever situated within any Public Right-of-Way, regardless of whether the Franchisee Facility at issue was originally placed in such location under the authority of an easement or other property interest prior to the property becoming a Public Right-of-Way. For the avoidance of doubt, such projects shall include any Right-of-Way improvement project, even if the project entails, in part, related work funded and/or performed by or for a third party, provided that such work is performed for the public benefit, and not primarily for the benefit of a private entity, and shall not include, without limitation, any other improvements or repairs undertaken by or for the sole benefit of third party private entities. Collectively all such projects described in this Section 6.1 shall be considered a “Public Project”. Except as otherwise provided by law, the costs and expenses associated with relocations or disconnections ordered pursuant to



this Section 6.1 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.

Section 6.2. Upon the request of the City and in order to facilitate the design of City improvements to Public Rights-of-Way, Franchisee agrees, at its sole cost and expense, to locate and, if reasonably determined necessary by the City, to excavate and expose, at its sole cost and expense, portions of the Franchisee Facilities for inspection so that the location of the facilities may be taken into account in the Public Project design; PROVIDED, that Franchisee shall not be required to excavate and expose the Franchisee Facilities for inspection unless Franchisee's record drawings and maps of the Franchisee Facilities submitted pursuant to Section 13. of this Franchise are reasonably determined by the Public Works Director to be inadequate for the City's planning purposes. The decision to require relocation of any Franchisee Facilities in order to accommodate Public Projects shall be made by the Public Works Director upon review of the location and construction of the Franchisee Facilities at issue. Where the City incurs additional costs in performing any maintenance, operation, or improvement of or to public facilities due to measures taken by the City to avoid damaging or to otherwise accommodate one or more Franchisee Facilities, Franchisee shall reimburse the City for the full amount of such additional costs promptly upon receiving the City's invoice for same.

Section 6.3. Any condition or requirement imposed by the City upon any person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals for permits for zoning, land use, construction or development) which reasonably necessitates the relocation of any Franchisee Facilities shall constitute a required relocation for purposes of this Section 6.

Section 6.4. If the City determines that the Public Project necessitates the relocation of Franchisee's existing facilities, the City shall provide Franchisee in writing with a date by which the relocation shall be completed (the "Relocation Date") consistent with RCW 35.99.060(2). In calculating the Relocation Date, the City shall consult with Franchisee and consider the extent of facilities to be relocated, the services requirements, and the construction sequence for the relocation, within the City's overall project construction sequence and constraints, to safely complete the relocation, and the City shall endeavor to provide Franchisee at least sixty (60) days'

notice prior to the Relocation Date. Franchisee shall complete the relocation by the Relocation Date, unless the City or a reviewing court establishes a later date for completion, as described in RCW 35.99.060(2). To provide guidance on this notice process, the City will make reasonable efforts to involve Franchisee in the predesign and design phases of any Public Project. After receipt of the written notice containing the Relocation Date, Franchisee shall relocate such facilities to accommodate the Public Project consistent with the timeline provided by the City and at no charge or expense to the City. Such timeline may be extended by a mutual agreement.

Section 6.5. If Franchisee fails to complete this work within the time prescribed above and to the City's satisfaction, the City may cause such work to be done and bill the cost of the work to Franchisee, including all costs and expenses incurred by the City due to Franchisee's delay. In such event, the City shall not be liable for any damage to any portion of Franchisee's Facilities. Within thirty (30) days of receipt of an itemized list of those costs, Franchisee shall pay the City. In any event, if Franchisee fails to timely relocate, remove, replace, modify or disconnect Franchisee's facilities and equipment, and that delay results in any delay damage accrued by or against the City, Franchisee will be liable for all documented costs of construction delays attributable to Franchisee's failure to timely act. Grantee reserves the right to challenge any determination by the City of costs for construction delays related to an alleged failure to act in accordance with this Section 6.5.

Section 6.6. Franchisee will indemnify, defend, hold harmless, and pay the costs of defending the City, in accordance with the provisions of Section 19. 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.

Section 6.7. In the event of an emergency posing a threat to public safety or welfare, or in the event of an emergency beyond the control of the City which will result in severe financial consequences to the City, which necessitates the relocation of Franchisee's Facilities, Franchisee shall relocate its Facilities within the time period specified by the City.

Section 6.8. The provisions of this Section 6. 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.

Section 6.9. 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.

Section 6.10. The provisions of this Section 6. shall survive the expiration, revocation, abandonment or termination of this Franchise during such time as Franchisee continues to have Facilities in the Rights-of-Way.

## **Section 7. Undergrounding of Facilities.**

Section 7.1. Except as specifically authorized by permit of the City, Franchisee shall not be permitted to erect poles. All Facilities shall be installed underground in all areas of the City where all other telecommunications and cable facilities are located underground unless otherwise exempted from this requirement in writing. Franchisee acknowledges and agrees that if the City does not require the undergrounding of its Facilities at the time of 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; provided that the City requires all other wireline utilities, except electrical utilities, with aerial facilities in the area to convert such facilities to underground installation at the same time. Unless otherwise permitted by the City, Franchisee shall underground its Facilities in all new developments and subdivisions, and any development or subdivision where all utilities, other than electrical utilities, are currently underground.

Section 7.2. Whenever the City may require the undergrounding of the aerial utilities (other than electrical utilities and personal wireless services facilities) 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 the other affected utilities. The location of any such 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 and size of Franchisee's Facilities being undergrounded in comparison to the total number and size of all other utility facilities being undergrounded.

Section 7.3. To the extent Franchisee is providing Services to personal wireless services facilities, Franchisee shall adhere to the design standards for such personal wireless services facilities, and shall underground its Facilities and/or place its Facilities within the pole as may be required by such design standards. For the purposes of clarity, this Section 7.3 does not require undergrounding or interior placement of Facilities within the pole to the extent that the personal wireless services facilities are located on utility poles that have pre-existing aerial wireline facilities and provided such construction of Franchisee's Facilities continue to comply with Section 7.1 or Section 7.2.

Section 7.4. 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 7.4. Franchisee may remove any underground cable and other related facilities 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. Franchisee must apply and receive a permit, pursuant to Section 9. , prior to any such removal of underground cable, conduit and other related facilities from the Right-of-Way and must provide as-built plans and maps pursuant to Section 13.1.

Section 7.5. Both the City and Franchisee shall be entitled to reasonable access to open utility trenches, provided that such access does not interfere with the other party's placement of utilities or increase such party's actual 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 to access the open trench and any costs associated with the delay of the completion of a public works project. The City shall pay to the Franchisee the incremental costs of providing such access to the open trench.

Section 7.6. The provisions of this Section 7. shall survive the expiration, revocation, abandonment or termination of this Franchise. Nothing in this Section 7. shall be construed as requiring the City to pay any costs of undergrounding any of the Franchisee's Facilities.

### **Section 8. Emergency Work/Dangerous Conditions.**

Section 8.1. 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, or if Franchisee's construction area is otherwise in such a condition as to immediately endanger the property, life, health or safety of any individual, Franchisee shall immediately take the proper emergency measures to repair its Facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this Franchise. 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 the next succeeding day during which the Monroe City Hall is open for business. The City retains the right and privilege to cut or move any Facilities located within the Rights-of-Way of the City, in response to any public health or safety emergency.

Section 8.2. 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 sole negligence, intentional misconduct or criminal actions 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

8. except to the extent caused by the sole negligence, intentional misconduct or criminal actions of the City, its employees, contractors, or agents.

Section 8.3. Whenever the construction, installation or excavation of Facilities conducted by Franchisee as authorized by this Franchise has caused or materially contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct Franchisee, at Franchisee's own expense, to take reasonable action to protect the public, adjacent public places, City property or street utilities, 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 emergency conditions exist which require immediate action, before the City can timely contact Franchisee to request Franchisee effect the immediate repair, the City may enter upon the property and take such reasonable actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or reasonable actions regarded as necessary safety precautions, and Franchisee shall be liable to the City for the costs thereof.

**Section 9. Work in the Rights-of-Way.**

Section 9.1. 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 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 ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

Section 9.2. Whenever Franchisee shall commence work in any 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, in addition, shall give the City at least ten (10) working days prior notice (except in the case of an emergency) of its intent to commence work in the Rights-of-Way. The City shall only issue permits that are in compliance with Monroe Municipal Code and the City's generally applicable design standards. During the

progress of the work, the Franchisee shall not unnecessarily obstruct the passage or proper use of the Rights-of-Way, and all work by the Franchisee in the area shall be performed in accordance with applicable City standards and specifications. In no case shall any work commence within any Rights-of-Way without a permit, except as otherwise provided in this Franchise.

Section 9.3. If the Franchisee shall at any time plan to make excavations in any area covered by this Franchise and as described in this Section 9.3, the Franchisee 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 Franchisee causing the excavation to be made;
- (b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and
- (c) Franchisee may deny such request for safety reasons.

Section 9.4. Except for emergency situations, Franchisee shall give at least seven (7) days' prior notice of intended construction to residents in the affected area prior to any underground construction or disturbance. 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.

Section 9.5. Upon receipt of a permit (except in emergency situations), 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 9.5 shall only apply to the extent necessary to protect above ground Facilities. Franchisee's tree trimming activities shall 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 shall be at the expense of Franchisee. Franchisee may contract for such services, however, any firm or individual so retained must first receive City approval prior to commencing such trimming. 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 except to the extent it is necessary that Franchisee trims trees or vegetation upon, overhanging, or encroaching on public ways, streets, alleys, sidewalks, and other public places of the City so as to prevent such vegetation from coming in contact with Franchisee's Facilities. 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 designee.

Section 9.6. 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.

Section 9.7. Franchisee shall inform the City 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 RCW 35.99.070.



Section 9.8. 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. Further, upon request from a third party or the City, Franchisee shall locate its Facilities consistent with the requirements of Chapter 19.122 RCW. The City shall not be liable for any damages to Franchisee's Facilities or 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 9.9. The provisions of this Section 9. shall survive the expiration, revocation, abandonment, or termination of this Franchise.

## **Section 10. Restoration.**

Section 10.1. Franchisee shall, after installation, construction, relocation, maintenance, or repair of its Facilities, or after abandonment approved pursuant to Section 22. , promptly remove any obstructions from the Rights-of-Way and restore the surface of the Rights-of-Way to at least the same 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. The Public Works Director or 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 (such as Chapter 332-120 WAC), and local standards and specifications.

Section 10.2. 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 construction permit issued by the City. All work by Franchisee pursuant to this Franchise shall be performed in accordance with applicable City standards.

Section 10.3. If conditions (e.g. weather) make the complete restoration required under Section 10. 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.

Section 10.4. In the event Franchisee does not repair a Right-of-Way or an improvement in or to a Right-of-Way within the time reasonably directed 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 invoice to Franchisee in accordance with the provisions of Section 14.3 and Section 14.4. In addition, and pursuant to Section 14.3 and Section 14.4, the City may bill Franchisee for expenses associated with the inspection of such restoration work. The failure by Franchisee to complete such repairs shall be considered a breach of this Franchise and is subject to remedies by the City including the imposition of damages consistent with Section 24. .

Section 10.5. The provisions of this Section 10. shall survive the expiration, revocation, abandonment, or termination of this Franchise.

### **Section 11. Safety Requirements.**

Section 11.1. 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, 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.

Section 11.2. If an unsafe condition or a violation of Section 11.1 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 14.3 and Section 14.4.

Section 11.3. 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.

Section 11.4. 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:

- (a) 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, consistent with the applicable laws, regulations, ordinances or generally applicable standards under which work may be resumed.

## **Section 12. Work of Contractors and Subcontractors.**

Section 12.1. 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. Maps and Records.**

Section 13.1. The Franchisee agrees and covenants that it shall, within 10 days of substantial completion of any construction project involving a Public Right-of-Way, provide to the City, at no cost to the City, accurate copies of as-built plans and maps stamped and signed by a professional land surveyor or engineer in a form and content acceptable to the Public Works Director or designee.

Section 13.2. Within thirty (30) days of a written request from the Public Works Director, the Franchisee shall furnish the City with information sufficient to demonstrate: (1) that the 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 the Franchisee's services and Facilities provided by the Franchisee have been properly collected and paid by the Franchisee.

Section 13.3. Books, records, maps, and other documents maintained by Franchisee with respect to its Facilities within the Rights-of-Way and which are reasonably necessary to demonstrate compliance with the terms of this Franchise, shall, after reasonable prior notice from the City, be made available for inspection by the City at reasonable times and intervals but no more than one time each calendar year or upon the City's reasonable belief that there has been a violation of this Franchise by Franchisee; provided, however, that nothing in this Section 13.3 shall be construed to require Franchisee to violate state or federal law regarding customer privacy, nor shall this Section 13.3 be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature. Unless otherwise permitted or required by State or federal law, nothing in this Section 13.3 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.

Section 13.4. Franchisee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature; provided, however, Franchisee shall disclose such information to comply with a utility tax audit, or in the event the City is permitted to charge franchise fees as further described in Section 15.1, or as otherwise required in this Franchise. Franchisee shall be responsible for clearly and conspicuously identifying the work as confidential, trade secret, 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 may take appropriate steps to protect its interests. Nothing in this Section 13.4 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 13.5. On an annual basis, upon thirty (30) days prior written notice, the City shall have the right to conduct an independent audit of Franchisee's records reasonably related to the administration or enforcement of this Franchise and the collection of utility taxes, in accordance with GAAP. If the audit shows that tax payments have been underpaid by three percent (3%) or more, Franchisee shall pay the total cost of the audit.

#### **Section 14. Costs and Fees.**

Section 14.1. Franchisee shall pay a one-time fee for the actual administrative expenses incurred by the City that are directly related to the receiving and approving this Franchise pursuant to RCW 35.21.860, including the costs associated with the City's legal costs incurred in drafting

and processing this Franchise, not to exceed \$5,000. No construction permits shall be issued for the installation of Facilities authorized until such time as the City has received payment of this fee; further, this Franchise shall be considered void if the fee is not paid within ninety (90) days of receipt of the invoice. 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 14.3.

Section 14.2. In addition to Section 14.1, Franchisee shall promptly reimburse the City in accordance with the provisions of Section 14.3 and Section 14.4 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.

Section 14.3. Consistent with state law, 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 Right-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 Right-of-Way as the result of the presence of Franchisee's Facilities in the Right-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.

Section 14.4. 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. Billing will be made on a monthly basis.

### **Section 15. City's Reservation of Rights**

Section 15.1. Franchisee hereby represents that its operations as authorized under this Franchise are those of a telephone business as defined in RCW 82.16.010, or service provider as defined in RCW 35.21.860. As a result, the City will not impose a Franchise fee under the terms of this Franchise, other than as described herein. The City hereby reserves its right to impose a Franchise fee on Franchisee if Franchisee's operations 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 removed. In either instance, the City also reserves its right to require that Franchisee obtain a separate Franchise for its change in use. Nothing contained herein shall preclude Franchisee from challenging any such new fee or separate agreement under applicable federal, State, or local laws.

Section 15.2. Franchisee acknowledges that its operation with the City constitutes a telecommunications business subject to the utility tax imposed pursuant to the Monroe Municipal Code Chapter 5.08. Franchisee stipulates and agrees that certain of its business activities are subject to taxation as a telephone business and that Franchisee shall pay to the City the rate applicable to such taxable services under Monroe Municipal Code Chapter 5.08, 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 Monroe Municipal Code Chapter 5.08 as may be permitted by law. Nothing in this Franchise is intended to alter, amend, modify or expand the taxes and fees that may be lawfully assessed on Franchisee's Services.

### **Section 16. Police Powers and City Ordinances.**

Section 16.1. Nothing in this Franchise Ordinance 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 the Franchise granted by this Franchise Ordinance, including, but not limited to, any valid ordinance made in the exercise of the City's 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 control by appropriate regulations, including design standards and utility accommodation policies, the

location, elevation, manner of construction, and maintenance of any Franchisee Facilities located within any Public Right-of-Way or affecting any Public Right-of-Way, and the Franchisee shall promptly conform with all such regulations, unless compliance would cause the Franchisee to violate other requirements of law. In the event of a conflict between the regulatory provisions of this Franchise Ordinance and any other ordinance(s) enacted under the City's police power authority, such other ordinance(s) shall take precedence over the regulatory provisions set forth herein.

### **Section 17. Limitation of City's Liability.**

Section 17.1. Administration by the City of the Franchise granted by this Franchise Ordinance shall not be construed to create the basis for any liability to any third party on the part of the City, its elected and appointed officials, officers, employees, and agents for any injury or damage from the failure of the Franchisee to comply with the provisions of this Franchise Ordinance; by reason of any plan, schedule or specification review, inspection, notice and order, permission, or other approval or consent by the City; for any action or inaction thereof authorized or done in connection with the implementation or enforcement of the Franchise by the City; or for the accuracy of plans submitted to the City.

### **Section 18. Compliance with All Applicable Laws.**

Section 18.1. Each party agrees to comply with all present and future federal, state and local laws, ordinances, rules and regulations. Neither the City nor Franchisee waive any rights they may have under any such laws, rules or regulations. This Franchise is subject to ordinances of general applicability enacted pursuant to the City's police powers. Franchisee further agrees to remove all liens and encumbrances arising as a result of said use or work. Franchisee shall, at its own expense, maintain its Facilities in a safe condition, in good repair and in a manner reasonably 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. City reserves the right at any time to amend this Franchise to conform to any hereafter enacted, amended, or adopted federal or state statute or regulation relating to the public health, safety, and welfare, or relating to roadway regulation, or a City ordinance enacted pursuant to such federal or state statute or regulation 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 over the terms of the amendment. If the parties do not reach agreement as to the terms of the amendment within thirty (30) days of the call for negotiations, either party may pursue any available remedies at law or in equity.

### **Section 19. Indemnification**

Section 19.1. Franchisee releases, covenants not to bring suit, and agrees to indemnify, defend, and hold harmless the City, its officers, agents, employees, volunteers, elected and appointed officials, and contractors 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.

Section 19.2. 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 19. . 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.

Section 19.3. 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 19.3. 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.

Section 19.4. The parties acknowledge that this Franchise may be 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.

Section 19.5. Notwithstanding any other provisions of this Section 19. , 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 sole negligence, intentional misconduct or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. In no event shall the City be liable for any indirect, incidental, special, consequential, exemplary, or punitive damages, including by way of example and not limitation lost profits, lost revenue, loss of goodwill, or loss of business opportunity in connection with its performance or failure to perform under this Franchise. 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, lost profits and consequential damages, 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 intentional misconduct, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors.

Section 19.6. The provisions of this Section 19. shall survive the expiration, revocation, termination, or abandonment of this Franchise.

## **Section 20. Insurance.**

Section 20.1. 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 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.

Section 20.2. 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 20. . Franchisee's umbrella liability insurance policy shall provide "follow form" coverage over its primary liability insurance policies.

Section 20.3. The insurance policies, with the exception of Workers' Compensation obtained by Franchisee shall name the City, its officers, agents, employees, volunteers, elected and appointed officials, and contractors ("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 20. 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.

Section 20.4. Franchisee is obligated to notify the City of any cancellation or intent not to renew any insurance policy, required pursuant to this Section 20. , thirty (30) days prior to any such cancellation. Within fifteen (30) 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 20. . Failure to provide the insurance cancellation notice and to furnish to the City meeting the requirements of this Section 20. shall be considered a material breach of this Franchise and subject to the City's election of remedies described in Section 24. below. Notwithstanding the cure period described in Section 24.2, the City may pursue its remedies immediately upon a failure to furnish replacement insurance.

Section 20.5. Franchisee's maintenance of insurance as required by this Section 20. 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 20.6. As of the effective date of this Franchise, Franchisee is not self-insured. Should Franchisee wish to become self-insured at the levels outlined in this Franchise at a later date, Franchisee must provide the City with thirty (30) days advanced written notice of its intent to self-insure. In order to self-insure, Franchisee shall comply with the following: (i) Franchisee is responsible for all payments within the self-insured retention; and (ii) Franchisee assumes all defense and indemnity obligations as outlined in the indemnification section of this Franchise. These requirements may be modified by written amendment executed by both parties.

## **Section 21. Bonds.**

Section 21.1. Construction Performance Bond. Upon an application for a permit involving excavation, installation, construction, restoration or relocation of the Facilities and if required by the City, Franchisee shall furnish a performance bond ("Performance Bond") written by a corporate surety reasonably acceptable to the city in an amount equal to 150% of the construction cost, which should not be less than \$2,000. The amount of the Performance Bond may be reduced during construction as determined by the City. 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 Maintenance Bond as described in Section 21.2.

Section 21.2. Maintenance Bond. Following excavation, installation, construction, restoration or relocation of the Facilities and if required by the City, Franchisee shall furnish a two (2) year maintenance bond (“Maintenance Bond”), or other surety acceptable to the City, at the time of final acceptance of construction work on Facilities within the Rights-of-Way. The Maintenance Bond amount will be equal to ten percent (10%) of the documented final cost of the construction work. The Maintenance Bond in this Section 21.2 must be in place prior to City’s release of the bond required by Section 21.1.

Section 21.3. Franchise Bond. 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 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 hereinabove described. Franchisee specifically agrees that its failure to comply with the terms of this Section 21. shall constitute a material breach of this Franchise. The amount of the 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. Abandonment of Franchisee’s Facilities.**

Section 22.1. 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 thirty (30) days of receiving written notice from the Public Works Director or 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. Franchisee shall restore the Right-of-Way to at least the same condition the Rights-of-Way were in immediately prior to any such removal provided Franchisee shall not be responsible for any changes to the Right-of-Way not caused by Franchisee or any person doing work for Franchisee. Franchisee shall be solely responsible for all costs associated with removing its Facilities.

Section 22.2. Notwithstanding Section 22.1 above, the City may permit Franchisee's improvements to be abandoned in place 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.

Section 22.3. Any Facilities which are not removed within one hundred twenty (120) days of either the date of termination or revocation or the date the City issued a permit authorizing removal, whichever is later, shall automatically become the property of the City. Any costs incurred by the City in safeguarding such Facilities or removing the Facilities shall be reimbursed by Franchisee. Nothing contained within this Section 22. 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.

Section 22.4. If Franchisee leases a structure in the Right-of-Way from a landlord and such landlord later replaces, removes or relocates the structure, for example by building a replacement structure, Franchisee shall remove or relocate its Facilities within the Right-of-Way within ninety (90) days of such notification from the landlord at no cost to the City.

Section 22.5. The provisions of this Section 22. shall survive the expiration, revocation, abandonment, or termination of this Franchise and for so long as Franchisee has Facilities in Rights-of-Way.

### **Section 23. Forfeiture and Revocation.**

Section 23.1. If Franchisee willfully violates or fails to comply with any of the provisions of this Franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given Franchisee by the City under the provisions of this Franchise, then Franchisee shall, at the election of the Monroe City Council, forfeit all rights conferred hereunder and this

Franchise may be revoked or annulled by the Council after a hearing held upon notice to Franchisee.

Section 23.2. 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. This hearing does not give the right to either the City or Franchisee to conduct discovery, subpoena witnesses, or take depositions. Within thirty (30) days after the hearing, the Monroe 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 Monroe 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 Monroe City Council does not grant any additional period, the Monroe 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. Remedies to Enforce Compliance.**

Section 24.1. The City may elect, without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling Franchisee to comply with the provisions of the Franchise and to recover damages and costs incurred by the City by reason of Franchisee's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force Franchisee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein. 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 otherwise provided by law equity, or otherwise, and nothing contained here shall be deemed or construed to effect any such waiver. 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.

Section 24.2. If either party (the “Defaulting Party”) shall violate, or fail to comply with any of the provisions of this Franchise, or should it fail to heed or comply with any notice given to such party under the provisions of this Franchise, 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 parties reasonably determine the breach cannot be cured within (30) thirty 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 24.1 above, or in the event Franchisee has failed to timely cure or commence cure of the breach, the City may, at its discretion, (1) revoke this Franchise with no further notification pursuant to this Section 24. , (2) refuse to grant additional permits, or (3) claim damages of Two Hundred Fifty Dollars (\$250.00) per day against the Franchisee or Franchise Bond set forth in Section 21.3.

**Section 25. Non-Waiver.**

Section 25.1. 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 herein 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 26. Acceptance.**

Section 26.1. Within sixty days of the approval of this Franchise Ordinance, the Franchisee shall execute and return to the City its execution and acceptance of this Franchise in the form attached hereto as Attachment B. In addition, Franchisee shall submit proof of insurance obtained and additional insured endorsement pursuant to Section 20. , any applicable construction Performance Bond pursuant to Section 21.1, the Franchise Bond required pursuant to Section 21.3, and the administrative fee pursuant to Section 14.1.

## **Section 27. Survival.**

Section 27.1. All of the provisions, conditions, and requirements of Section 6. , Section 7. Section 9. , Section 10. , Section 19. , Section 20. , Section 22. , Section 32.1, Section 35.3 and Section 35.4 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 the City's Franchise to Franchisee for the use of the Franchise Area, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise shall further be binding upon the heirs, 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 heirs, successors and assigns equally as if they were specifically mentioned where Franchisee is named herein.

## **Section 28. Assignment.**

Section 28.1. 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 prompt written notice is provided to the City within sixty (60) days following the 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 notice shall not be required unless and until the secured party elects to realize upon the collateral. For purposes of this Section 28.1, 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.

Section 28.2. Any transactions which singularly or collectively result in a change of 50% or more of the (i) ownership or working control (for example, management of Franchisee or its Telecommunications facilities) of the Franchisee; or (ii) ownership or working control of the Franchisee's Telecommunications facilities within the City; or (iii) control of the capacity or bandwidth of the Franchisee's Telecommunication facilities within the City, shall be considered an assignment or transfer requiring notice to the City pursuant to this Franchise. Such transactions between affiliated entities are not exempt from notice requirements. A Franchisee shall notify the City of any proposed change in, or transfer of, or acquisition by any other party of control of a Franchisee within sixty (60) days following the closing of the transaction.

**Section 29. Entire Agreement.**

Section 29.1. This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution of this Franchise.

**Section 30. Extension.**

Section 30.1. If this Franchise expires without renewal or is otherwise lawfully terminated or revoked, the City may, subject to applicable law:

- (a) Allow Franchisee to maintain and operate its Facilities on a month-to-month basis, provided that Franchisee maintains insurance for such Facilities during such period and continues to comply with this Franchise; or
- (b) The City may order the removal of any and all Facilities at Franchisee's sole cost and expense consistent with Section 22.

**Section 31. Eminent Domain.**

Section 31.1. The existence of this Franchise shall not preclude the City from acquiring by condemnation in accordance with applicable law, all or a portion of the Franchisee's Facilities for the fair market value thereof. 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.**

Section 32.1. If at any time the City, by ordinance, 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. If Franchisee has Facilities in the vacated portion of the Right-of-Way, the City shall use reasonable efforts to reserve an appurtenant easement for Franchisee within the vacated portion of the Right-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 4. Notwithstanding the preceding sentence, the City shall incur no liability for failing to reserve such easement. The City shall notify the Franchisee in writing not less than sixty (60) days before vacating all or any portion of any such area, in which Franchisee is located. The City may, after sixty (60) days written notice to the Franchisee, terminate this Franchise with respect to such vacated area.

## **Section 33. Hazardous Substances.**

Section 33.1. 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 attorneys' 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 33.2. The obligations of the Franchisee under this Section 32.1 shall survive the expiration, revocation, abandonment, earlier termination of the Franchise granted by this Franchise Ordinance.

## **Section 34. Notice**

Section 34.1. Any Notice or information required or permitted to be given to the parties under this Franchise agreement may be sent to the following addresses unless otherwise specified:

CITY OF MONROE

City of Monroe  
City Administrator  
806 W. Main Street  
Monroe, WA 98272

FRANCHISEE

Richard Hayes  
Astound Broadband  
3700 Monte Villa Parkway  
Suite 110  
Bothell, WA 98021  
[rhays@wavebroadband.com](mailto:rhays@wavebroadband.com)  
360-631-4134

Section 34.2. The Franchisee's current emergency contact shall be Richard Hayes and is reachable via the following number 360-631-4134, and shall be available 24 hours a day, seven days a week. The Franchisee shall promptly notify the City of any change in the notice address or emergency contact (or title) and phone number.

**Section 35. Miscellaneous.**

Section 35.1. Prior to constructing any Facilities, Franchisee shall obtain a business or utility license from the City. Franchisee shall pay promptly and before they become delinquent, all taxes on personal property and improvements owned or placed by Franchisee and shall pay all license fees and public utility charges relating to the conduct of its business, shall pay for all permits, licenses and zoning approvals, shall pay any other applicable tax unless documentation of exemption is provided to the City and shall pay utility taxes and license fees imposed by the City.

Section 35.2. City and Franchisee respectively represent that its signatory is duly authorized and has full right, power and authority to execute this Franchise.

Section 35.3. If a suit or other action is instituted in connection with any controversy arising out of this Franchise, the prevailing party shall be entitled to recover all of its costs and expenses, including such sum as the court may judge as reasonable for attorneys' fees, costs, expenses and attorneys' fees upon appeal of any judgment or ruling.

Section 35.4. This Franchise shall be construed in accordance with the laws of the State of Washington. Venue for any dispute related to this Franchise shall be the United States District Court for the Western District of Washington, or Snohomish County Superior Court.

Section 35.5. Section captions and headings are intended solely to facilitate the reading thereof. Such captions and headings shall not affect the meaning or interpretation of the text herein.

Section 35.6. Where the context so requires, the singular shall include the plural and the plural include the singular.

Section 35.7. Franchisee shall be responsible for obtaining all other necessary 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 by any person or entity.

Section 35.8. This Franchise may be enforced at both law and equity.

Section 35.9. Franchisee acknowledges that it, and not the City, shall be responsible for the premises and equipment's compliance with all marking and lighting requirements of the FAA and the FCC. 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 the 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 either terminate this Franchise immediately on notice to the Franchisee or proceed to cure the conditions of noncompliance at the Franchisee's expense.

Section 35.10. This Franchise is subject to all current and future 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.

Section 35.11. There are no third party beneficiaries to this Franchise.













# Ordinance 003\_2022 Astound Telecommunications Franchise

Final Audit Report

2022-02-24

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✔ Agreement completed.

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