



City Council Agenda Bill

20017

Bill Number

Subject: An ordinance granting a non-exclusive telecommunications franchise to Astound Broadband, LLC.

Summary Statement: The city granted Black Rock Cable a non-exclusive open video system (OVS) franchise in 1999. Black Rock Cable was recently merged into WDH Black Rock, LLC, a limited liability company owned by Astound Broadband, LLC. Astound Broadband then applied for a telecommunications franchise to replace the OVS franchise under which Black Rock has been operating since 1999. The application was reviewed by city staff in the Legal, Public Works, and Information Services and Technology Departments for compliance with code requirements

Previous Council Action: Ordinance 1999-05-032 (approval of OVS franchise), Ordinance 2005-11-090 (modification of OVS franchise)

Fiscal Impact: Applicant paid a \$5,000 application fee to reimburse the city for administrative expenses incurred in processing the application; Astound also will pay the City a utility tax of 6% on revenue (under the prior agreement with Black Rock Cable, the City received a 3% franchise fee)

Funding Source: n/a

Attachments: Proposed Ordinance.

| Meeting Activity | Meeting Date | Staff Recommendation | Presented By | Time |
|--|--------------|----------------------|--------------------------------|--------|
| Committee Briefing Council Vote Requested | 17-Jun-2013 | Vote to Approve | James Erb, Asst. City Attorney | 10 min |
| Third & Final Ordinance | 1-Jul-2013 | Pass Ordinance | | |

Council Committee:

Committee of the Whole
Seth Fleetwood, Chair

Committee Actions:

Seth Fleetwood excused. Michael Lillquist chaired.

GK/JW moved to recommend approval.
The motion carried 6-0.

Agenda Bill Contact:

James Erb, Asst. City Attorney

| Reviewed By | Initials | Date |
|-------------|----------|---------|
| Legal | JL | 6/12/13 |
| Mayor | JL | 6.12.13 |

Council Action:

6/17/13 KNUTSON / BORNEMANN moved approval for first and second reading. MOTION CARRIED 6-0.

ORDINANCE NO. _____

AN ORDINANCE GRANTING ASTOUND BROADBAND, LLC A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN TELECOMMUNICATIONS FACILITIES FOR THE TRANSMISSION OF TELECOMMUNICATIONS IN, THROUGH, OVER AND UNDER THE RIGHTS-OF-WAY WITHIN THE CITY OF BELLINGHAM

WHEREAS, the City of Bellingham (the "City") granted a franchise to Black Rock Cable, Inc., a Nevada corporation ("Black Rock Cable") under City Ordinance 1999-05-032 (later modified pursuant to ordinance 2005-11-090) authorizing Black Rock Cable to construct and operate an open video system and offer cable television services within the City; and

WHEREAS, Black Rock Cable has not offered cable television programming services under the terms of the open video services franchise; and

WHEREAS, Black Rock Cable was merged into WDH Black Rock, LLC, a Washington limited liability company, that is wholly-owned by Astound Broadband, LLC ("Grantee"); and

WHEREAS; Grantee intends to utilize the infrastructure installed by Black Rock Cable for the purpose of providing network telephone service and telecommunications infrastructure services; and

WHEREAS, Grantee has applied to the City of Bellingham ("City") for a non-exclusive franchise for the right of entry, use, and occupation of the public Rights-of-Way within City, expressly to install, construct, erect, operate, maintain, repair, relocate and remove its facilities in, on, upon, along and/or across those Rights-of-Way for purposes of offering and providing Network Telephone Service and Telecommunications Infrastructure Services ("Grantee Services"); and

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

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

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BELLINGHAM, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Grant of Franchise Right to Use Franchise Area.

A. Subject to the terms and conditions stated herein, City hereby grants Grantee a franchise as set forth in this Ordinance (this "Franchise"), including without limitation general permission to enter, use and occupy the right(s)-of-way and/or other public property within the City as now or hereafter constituted (the "Franchise Area").

B. Grantee is authorized to install, remove, construct, erect, operate, maintain, relocate and repair the types of facilities necessary or convenient for Grantee Services and all appurtenances thereto (collectively, "Grantee Facilities") in, along, under and across the Franchise Area.

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

D. This Franchise is non-exclusive and does not prohibit City from entering into other agreements, including other franchises, impacting the Franchise Area, unless City determines that entering into such agreements interferes with Grantee's rights set forth herein.

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

F. City reserves the right to change, regrade, relocate, abandon, or vacate any Right-of-Way within the Franchise Area. If, at any time during the term of this Franchise, City vacates any portion of the Franchise Area containing Grantee Facilities, City shall reserve an easement for public utilities within that vacated portion, pursuant to RCW 35.79.030, within which Grantee may continue to operate any existing Grantee Facilities under the terms of this Franchise for the remaining period set forth under Section 3.

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

Section 2. Notices.

A. Written notices to the parties shall be sent by certified mail to the following addresses, unless a different address shall be designated in writing and delivered to the other party.

City: City of Bellingham
ATTN: Public Works Director
210 Lottie Street
Bellingham, WA 98225

with a copy to: City of Bellingham
ATTN: City Clerk
210 Lottie Street
Bellingham, WA 98225

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

B. Any changes to the Grantee's information shall be sent to City's Public Works Director, with copies to the City Clerk, referencing the title of this agreement.

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

Section 3. Term of Franchise.

A. This Franchise shall run for a period of ten (10) years, from the date of execution specified in Section 5.

B. If the Parties fail to formally renew this Franchise prior to the expiration of its term or any extension thereof, this Franchise shall automatically continue in full force and effect until renewed or either party gives written notice at least one hundred and eighty (180) days in advance of intent not to renew this Franchise.

Section 4. Definitions. For the purpose of this Franchise:

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

policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

"Gross Revenues" means any and all gross revenues that Grantee derives directly or indirectly from the provision of the services authorized by this franchise agreement. Gross revenues shall not include any taxes on services which taxes are imposed directly on a subscriber or user by a city, county, state, or other governmental unit. Gross revenue shall not include amounts which cannot be collected and are identified as bad debt. However, amounts previously classified as bad debt that are later collected shall be included in gross revenues for the period in which they were collected.

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

"Maintenance" or "Maintain" means examining, testing, inspecting, repairing, maintaining and replacing the existing Grantee Facilities or any part thereof as required and necessary for safe operation.

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

"Relocation" means permanent movement of Grantee Facilities required by City, and not temporary or incidental movement of such facilities, or other revisions Grantee would accomplish and charge to third parties without regard to municipal request.

"Right-of-Way" (pluralized as "Rights-of-Way") means the surface and the space above and below streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, easements, rights-of-way and similar public properties and areas.

"State" means the State of Washington.

"Network Telephone Service" has the same meaning as "Network telephone service" as defined under RCW 82.16.010 (2012).

"Telecommunications Infrastructure Services" means any other services provided by Grantee using Grantee Facilities in the Rights-of-Way excluding Network Telephone Service. Telecommunications Infrastructure Services includes the provision of dark fiber. Dark fiber is optical fiber infrastructure installed and maintained by Astound, but which is not provisioned by Astound by the installation of optronics equipment to transmit light pulses for the transmission of information.

Section 5. Acceptance of Franchise.

A. This Franchise, and any rights granted hereunder, shall not become effective for any purpose unless and until Grantee files with the City Clerk the Statement of Acceptance, attached hereto as Exhibit A (the "Statement of Acceptance"). The date that the Statement of Acceptance is filed with the City Clerk shall be the effective date of this Franchise.

B. Should Grantee fail to file the Statement of Acceptance with the City Clerk within 30 days after the effective date of this ordinance, then the Franchise will automatically terminate and shall be null and void.

C. The parties agree that this franchise agreement governs the Grantee's provision of Network Telephone Services and Telecommunications Infrastructure Services. This franchise agreement does not permit Grantee to provide cable service or operate an open video system within the City. If Grantee intends to provide cable service or operate an open video system within the City, the Grantee agrees to submit a new franchise application outlining the terms and conditions related to the provision of those services as required by BMC 6.70.260.

Section 6. Construction and Maintenance.

A. Grantee shall apply for, obtain, and comply with the terms of all permits required under Bellingham Municipal Code chapters 6.70 and 13.15 for any work done on Grantee Facilities. Grantee shall comply with all applicable City, State, and federal codes, rules, regulations, and orders in undertaking such work, which shall be done in a thorough and proficient manner consistent with the standards of the telecommunications industry.

B. Grantee agrees to use commercially reasonable efforts to coordinate its activities with City and all other utilities located within the Franchise Area.

C. City expressly reserves the right to prescribe how and where Grantee Facilities shall be installed within the Franchise Area and may from time to time, pursuant to the applicable sections of this Franchise, require the removal, Relocation and/or replacement thereof in the public interest and safety at the expense of Grantee.

D. Before commencing any work within the Franchise Area, Grantee shall comply with the One Number Locator provisions of RCW Chapter 19.122 to identify existing utility infrastructure.

E. Upon prior written approval of City and in accordance with City ordinances, Grantee shall have the authority (but not the obligation) to reasonably trim trees upon and overhanging streets, Public Ways and places in the Franchise Area so as

to prevent the branches of such trees from coming in physical contact with Grantee Facilities. Grantee shall be responsible for debris removal from such activities. If such debris is not removed within twenty-four (24) hours of completion of the trimming, City may, at its sole discretion, remove such debris and charge Grantee for the cost thereof. This section does not, in any instance, grant automatic authority to clear vegetation for purposes of providing a clear path for radio signals. Any such general vegetation clearing will require a land clearing permit.

Section 7. Repair and Emergency Work.

In the event of an Emergency, Grantee may commence such repair and Emergency response work as required under the circumstances, provided that Grantee shall notify the City Public Works Director in writing as promptly as possible, before such repair or Emergency work commences, or as soon thereafter as possible, if advance notice is not practical. City may act, at any time, without prior written notice in the case of Emergency, but shall notify Grantee in writing as promptly as possible under the circumstances.

Section 8. Damages to City and Third-Party Property.

Grantee agrees that should any of its actions under this Franchise materially impair or damage any City property, survey monument, or property owned by a third-party, Grantee will restore, at its own cost and expense, said property to the same condition as existed prior to such action. Such repair work shall be performed and completed to the reasonable satisfaction of the Public Works Director.

Section 9. Location Preference.

A. Any structure, equipment, appurtenance or tangible property of a utility, other than Grantee's, which was installed, constructed, completed or in place prior in time to Grantee's application for a permit to construct Grantee Facilities under this Franchise shall have preference as to positioning and location with respect to Grantee Facilities. However, to the extent that Grantee Facilities are completed and installed prior to another utility's submittal of a permit for new or additional structures, equipment, appurtenances or tangible property, then Grantee Facilities shall have priority. These rules governing preference shall continue in the event of the necessity of relocating or changing the grade of any City road or Right-of-Way. A relocating utility shall not necessitate the relocation of another utility that otherwise would not require Relocation. This Section shall not apply to any City facilities or utilities that may in the future require the Relocation of Grantee Facilities. Such Relocations shall be governed by Section 11.

B. Grantee shall maintain a minimum underground horizontal separation of five (5) feet from City water facilities and ten (10) feet from above-ground City water

facilities; provided, that for development of new areas, City, together with Grantee and other utility purveyors or authorized users of Rights-of-Way, will develop and follow the Public Works Director's determination of a consensus for guidelines and procedures for determining specific utility locations, subject additionally to this Franchise.

Section 10. Grantee Information.

A. Grantee agrees to supply, at no cost to City, any information reasonably requested by the Director of Public Works (or his designee) to coordinate municipal functions with Grantee's activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum, as-built drawings of Grantee Facilities, installation inventory, and maps and plans showing the location of existing or planned facilities within City. Said information may be requested either in hard copy and/or electronic format, if reasonably possible in a format compatible with City's database system, as now or hereinafter existing, including City's geographic information Service (GIS) data base. Grantee shall use its commercially reasonable efforts to keep the Public Works Director informed of its long-range plans for coordination with City's long-range plans.

B. The parties understand that Washington law limits the ability of City to shield from public disclosure any information given to City. Accordingly, the parties agree to work together to avoid disclosures of information which would result in economic loss or damage to Grantee because of mandatory disclosure requirements to third persons. Grantee shall indemnify and hold harmless City for any loss or liability for costs for attorneys fees because of non-disclosures requested by Grantee under Washington's open public records law, provided reasonable notice and opportunity to defend was given to Grantee or Grantee is made aware of the pending of a request or claim.

Section 11. Relocation of Grantee Facilities.

A. Except as otherwise so required by law, Grantee agrees to Relocate, remove, or reroute its facilities as ordered by the City Engineer at no expense or liability to City, except as may be required by RCW Chapter 35.99. Any determination to require the Relocation of Grantee Facilities shall be made in a reasonable, uniform and non-discriminatory manner. Any City funds used to reimburse costs incurred by any Person in connection with any relocation shall be allocated in a reasonable, uniform and non-discriminatory manner. Pursuant to the provisions of Section 14, Grantee agrees to protect and save harmless City from any customer or third-party claims for service interruption or other losses in connection with any such change, Relocation, abandonment, or vacation of public property.

B. If a readjustment or Relocation of Grantee Facilities is necessitated by a request from a Person other than City, that party shall pay Grantee the actual costs thereof.

Section 12. Abandonment and or Removal of Grantee Facilities.

A. Within one hundred and eighty days (180) of Grantee's permanent cessation of use of Grantee Facilities, or any portion thereof, Grantee shall, at City's discretion, either abandon in place or remove the affected facilities.

B. The parties expressly agree that this Section shall survive the expiration, revocation or termination of this Franchise.

Section 13. Undergrounding.

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

B. Whenever City requires the undergrounding of aerial utilities in the Franchise Area, Grantee shall underground Grantee Facilities in the manner specified by the City Engineer at no expense or liability to City, except as may be required by RCW Chapter 35.99. Where other utilities are present and involved in the undergrounding project, Grantee shall be required to pay only its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Grantee Facilities. Common costs shall include necessary costs for common trenching and utility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded.

Section 14. Indemnification and Hold Harmless.

A. Grantee shall defend, indemnify, and hold City and its officers, officials, agents, employees, and volunteers harmless from any and all costs, injuries, damages, losses, suits, or liabilities of any nature including attorneys' fees arising out of or in connection with any third party claims arising from Grantee's performance under this Franchise, except to the extent such costs, claims, injuries, damages, losses, suits, or liabilities are caused by the negligence or willful misconduct of City.

B. City shall hold Grantee harmless from any liability arising out of or in connection with any damage or loss to Grantee Facilities caused by Maintenance and/or construction work performed by, or on behalf of, City within the Franchise Area or any other City road, Right-of-Way, or other public property (provided that prior to undertaking any such activities City shall provide notice to Grantee and a reasonable opportunity to perform such activities itself), except to the extent any such damage or loss is directly caused by the negligence of Grantee, or its agent performing such work.

C. Grantee acknowledges that neither City nor any other public agency with responsibility for firefighting, Emergency rescue, public safety or similar duties within City has the capability to provide trench, close trench or confined space rescue. Grantee, and its agents, assigns, successors, or contractors, shall make such arrangements as Grantee deems fit for the provision of such services. Grantee shall hold City harmless from any liability arising out of or in connection with any damage or loss to Grantee for City's failure or inability to provide such services, and, pursuant to the terms of Section 14(A), Grantee shall indemnify City against any and all third-party costs, claims, injuries, damages, losses, suits, or liabilities based on City's failure or inability to provide such services.

D. Acceptance by City of any work performed by Grantee shall not be grounds for avoidance of this section.

Section 15. Insurance.

A. Grantee shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by Grantee, its agents, representatives, or employees in the amounts and types set forth below pursuant to BMC 13.15.160:

1. Automobile Liability insurance covering all owned, non-owned, hired, and leased vehicles with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

2. Commercial General Liability insurance with limits no less than \$1,000,000 each occurrence, \$3,000,000 general aggregate and a \$3,000,000 products-completed operations aggregate limit. Coverage shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, and personal injury and advertising injury and liability assumed under an insured contract. City shall be named as an additional insured under Grantee's Commercial General Liability insurance policy with respect to the work performed under this Franchise and the policy shall not be modified or cancelled for the duration of this franchise agreement. The insurer shall provide 30 days written notice to the city in the event the policy limits are reduced below the amounts required by this agreement.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

B. Grantee's insurance coverage shall be primary insurance as respects City. Any insurance, self-insurance, or insurance pool coverage maintained by City shall be in excess of Grantee's insurance and shall not contribute with it.

C. Grantee shall furnish City with certificates of the foregoing insurance coverage or a copy of amendatory endorsements, including but not necessarily limited to the additional insured endorsement.

D. Grantee shall have the right to self-insure any or all of the above-required insurance. Any such self insurance is subject to approval by City.

E. Grantee's maintenance of insurance as required by this Franchise shall not be construed to limit the liability of Grantee to the coverage provided by such insurance, or otherwise limit City's recourse to any remedy to which City is otherwise entitled at law or in equity.

Section 16. Performance Security.

Grantee shall provide City with a surety bond in the amount of Fifty Thousand Dollars (\$50,000) running or renewable for the term of this Franchise, in a form and substance reasonably acceptable to City. In the event Grantee 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 the principal and any surety of such surety bond any 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. Grantee specifically agrees that its failure to comply with the terms of Section 19 shall constitute damage to City in the monetary amount set forth therein. Such a financial guarantee shall not be construed to limit Grantee's liability to the guarantee amount, or otherwise limit City's recourse to any remedy to which City is otherwise entitled at law or in equity.

Section 17. Successors and Assignees.

A. All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors, assigns of, and independent contractors of Grantee, and all rights and privileges, as well as all obligations and liabilities of Grantee shall inure to its successors, assignees and contractors equally as if they were specifically mentioned herein wherever Grantee is mentioned.

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

C. Grantee and any proposed assignee or transferee shall provide and certify the following to City not less than sixty (60) days prior to the proposed date of transfer: (a) complete information setting forth the nature, term and conditions of the

proposed assignment or transfer; (b) all information required by City of an applicant for a Franchise with respect to the proposed assignee or transferee; and, (c) an application fee which shall be set by City, plus any other costs actually and reasonably incurred by City in processing, and investigating the proposed assignment or transfer.

D. Prior to City's consideration of a request by Grantee to consent to a Franchise assignment or transfer, the proposed assignee or transferee shall file with City a written promise to unconditionally accept all terms of this Franchise, effective upon such transfer or assignment of this Franchise. City is under no obligation to undertake any investigation of the transferor's state of compliance and failure of City to insist on full compliance prior to transfer does not waive any right to insist on full compliance thereafter.

Section 18. Dispute Resolution.

A. In the event of a dispute between City and Grantee arising by reason of this Franchise, the dispute shall first be referred to the operational officers or representatives designated by Grantor and Grantee to have oversight over the administration of this Franchise. The officers or representatives shall meet within thirty (30) calendar days of either party's request for a meeting, whichever request is first, and the parties shall make a good faith effort to achieve a resolution of the dispute.

B. If the parties fail to achieve a resolution of the dispute in this manner, either party may then pursue any available judicial remedies. This Franchise shall be governed by and construed in accordance with the laws of the State of Washington. In the event any suit, arbitration, or other proceeding is instituted to enforce any term of this Franchise, the parties specifically understand and agree that venue shall be exclusively in Whatcom County, Washington. The substantially prevailing party in any such action shall be entitled to its attorneys' fees and costs of suit, which shall be fixed by the judge hearing the case, and such fees shall be included in the judgment.

Section 19. Enforcement and Remedies.

A. If Grantee 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 Grantee under the provisions of this Franchise, City may shall provide Grantee with written notice specifying with reasonable particularity the nature of any such breach and Grantee shall undertake all commercially reasonable efforts to cure such breach within thirty (30) days of receipt of notification. If City reasonably determines the breach cannot be cured within (30) thirty days, City may specify a longer cure period, and condition the extension of time on Grantee'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 Grantee does not comply with the specified conditions, City may, at its

discretion, either (1) revoke this Franchise with no further notification, or (2) claim damages of Two Hundred Fifty Dollars (\$250.00) against the financial guarantee set forth in Section 16.

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

Section 20. Compliance with Laws and Regulations.

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

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

Section 21. License, Tax, Charges and Consideration.

A. This Franchise shall not exempt Grantee from any future license, tax, or charge which City may hereinafter adopt pursuant to authority granted to it under state or federal law for revenue or as reimbursement for use and occupancy of the Franchise Area.

B. As consideration for this Franchise, and consistent with RCW 35.21.860 and BMC 6.06.050, Grantee commits to pay a City utility tax not to exceed six percent (6%) on Gross Revenues derived from Grantee's provision of services including, but not

limited to, Network Telephone Services and Telecommunications Infrastructure Services in the City, or an amount equivalent to the amount due under such a tax, regardless of any change in law, or whether any authority may determine that said tax does not apply to said revenues.

C. The City may reasonably request financial information and records from Grantee for the purpose of verifying the accuracy of its payments under Section 21(B). Grantee agrees to provide the information requested within thirty (30) days of the request. Overpayments or underpayments shall be remedied using the procedure in BMC 6.06.120.

D. Grantee has paid an application fee as required by BMC 6.70.300(A) in the amount of \$5,000.00 to reimburse the City for its administrative expenses incurred in processing the application for a franchise. The application fee shall be applied to the costs associated with SEPA review (if required), publication costs, staff time, and legal fees. The parties agree that this amount is a reasonable estimate of the City's actual costs incurred in the processing of this application.

Section 22. Consequential Damages Limitation.

Notwithstanding any other provision of this Franchise, in no event shall either party be liable for any special, incidental, indirect, punitive, reliance, consequential or similar damages.

Section 23. Termination of Existing OVS Franchise

This franchise will supersede and replace the OVS franchise previously granted to Astound's predecessor-in-interest, Black Rock Cable pursuant to Ordinance 1999-05-032 (as modified by Ordinance 2005-11-090). The existing OVS franchise will terminate on the effective date of this franchise and the rights and responsibilities of the parties shall thereafter be governed by the terms and conditions of this ordinance.

Section 24. Severability.

If any portion of this Franchise is deemed invalid, the remainder portions shall remain in effect.

Section 25. Titles.

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

CITY OF BELLINGHAM

PASSED by the Council this ____ day of _____, 2013.

Seth Fleetwood
Council President

APPROVED by me this ____ day of _____, 2013.

Kelli Linville
Mayor

ATTEST:

John Carter,
Finance Director

APPROVED AS TO FORM:

Peter Ruffatto,
City Attorney

EXHIBIT "A"

STATEMENT OF ACCEPTANCE

Astound Broadband LLC, for itself, its successors and assigns, hereby accepts and agrees to be bound by all lawful terms, conditions and provisions of the Franchise attached hereto and incorporated herein by this reference.

ASTOUND BROADBAND, LLC

By: _____ Date: _____

Name: James A. Penney

Title: Executive Vice President

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

On this ____ day of _____, 2013, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared, James A. Penney, the Executive Vice President of Astound Broadband, LLC, the limited liability company that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said company, for the uses and purposes therein mentioned, and on oath stated that he/she is authorized to execute said instrument.

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

Signature

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

My Commission Expires: _____