

CITY OF TIGARD, OREGON
TIGARD CITY COUNCIL
ORDINANCE NO. 15-01

AN ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE WITH ASTOUND BROADBAND, LLC PURSUANT TO 15.06.060 AND DECLARING AN EFFECTIVE DATE.

WHEREAS, the Tigard Municipal Code (“TMC”) Section 15.06.060 allows the City Council to grant a non-exclusive utility franchise to any person providing utility services which meets the requirements of the TMC; and

WHEREAS, Astound Broadband, LLC and the City of Tigard have negotiated a ten-year franchise agreement; and

WHEREAS, the City of Tigard requires an upgrade to its fiber serving city properties and Astound Broadband, LLC is providing cost savings to the city by installing the fiber at a reduce cost pursuant to an Agreement for Installation of Dark Fiber between the City and Astound Broadband LLC; and

WHEREAS, the City of Tigard finds that Astound Broadband, LLC meets all lawful requirements to obtain a franchise.

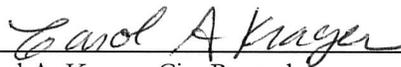
NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: The Mayor is authorized and directed to sign the ten-year franchise for Astound Broadband, LLC (“Astound”) substantially in the form attached as Exhibit A to this ordinance upon successful negotiation and approval by the City Manager of an Agreement for Installation of Dark Fiber.

SECTION 2: The City Council determines that the fee imposed by this franchise is not a tax subject to the limitations of Article XI, Section 11 (b) and 11 (19) of the Oregon Constitution and is not a fee imposed on property or property owners by fact of ownership.

SECTION 3: This ordinance shall take effect thirty days from its passage by the Council and signature by the Mayor, provided that Astound returns an executed original of the franchise to the City on or before the effective date of this ordinance. If Astound fails to provide an executed original on or before the effective date, this ordinance shall be null and void.

PASSED: By unanimous vote of all council members present after being read by number and title only, this 27th day of January, 2015.



Carol A. Krager, City Recorder

APPROVED: By Tigard City Council this 27th day of January, 2015.



John L. Cook, Mayor

Approved as to form:



Special Counsel
ORDINANCE No. 15-01

Date January 27, 2015

Ordinance Exhibit A

**CITY OF TIGARD, OREGON
FRANCHISE AGREEMENT**

THIS FRANCHISE AGREEMENT (“Agreement”) is made and entered into by and between the City of Tigard, an Oregon municipal corporation, (“City”) and Astound Broadband, LLC a Washington limited liability company, (“Franchisee”) qualified to do business in Oregon:

RECITALS

1. Pursuant to Federal law, State statutes, and City Charter and local ordinances, the City is authorized to grant non-exclusive franchises to occupy the rights-of-way as defined in Chapter 15.06 of the Tigard Municipal Code (“TMC”), in order to place and operate a Utility System within the municipal boundaries of the City of Tigard (“Franchise Area”); and
2. Franchisee has requested a franchise to place and operate a telecommunications system (the “Utility System”), as defined in TMC 15.06.020, within the Franchise Area; and
3. The City has found that Franchisee meets all lawful requirements to obtain a franchise, and therefore approves the application.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

AGREEMENT

1. GRANT OF AUTHORITY

The City grants Franchisee the non-exclusive right to occupy City rights-of-way to place and operate a Utility System for a term of ten (10) years from and after the Effective Date of this Agreement (the “Term”), except as set forth below.

2. AUTHORITY NOT EXCLUSIVE

This Agreement shall be nonexclusive, and is subject to all prior rights, interests, agreements, permits, easements or licenses granted by the City to any person to use the rights-of-way for any purpose whatsoever, including the right of the City to use same for any purpose they deem fit, including the same or similar purposes allowed Franchisee hereunder. The City may, at any time, grant to other persons authorization to use the rights-of-way for any purpose. This Agreement does not confer on Franchisee any right, title or interest in any right-of-way.

3. PERFORMANCE & FRANCHISE FEE

During the term of this Agreement, Franchisee agrees to comply with all lawful terms and conditions of TMC Chapter 15.06, including but not limited to the permit and permit fee requirements set forth in TMC 15.06.200 and TMC Chapter 15.04, the provisions of which are incorporated herein as though fully set forth. Notwithstanding the foregoing or the provisions of TMC 15.06.100, pursuant to the Agreement for Installation of Dark Fiber between the City and Franchisee dated _____ attached hereto as Exhibit A and incorporated herein as though fully set forth (“Dark Fiber Agreement”), Franchisee shall receive a credit in the amount of thirty thousand dollars (\$30,000.00) (the “Credit”) that shall be applied toward the right-of-way usage fee payments due pursuant to TMC 15.06.100, provided that Franchisee complies with all terms and conditions of the Dark Fiber Agreement. The Credit shall apply to the right-of-way usage fee payments due commencing on the date the executed Bill of Sale (as described in the Dark Fiber Agreement) is delivered to the City, and thereafter for each consecutive right-of-way usage fee payment due until the full amount of the Credit has been applied, except as provided in Section 11 of the Dark Fiber Agreement. In the event the Bill of Sale is delivered to the City other than on the first day of a payment period, Franchisee shall pay the prorated portion of the right-of-way usage fee due for the payment period in which the Bill of Sale is delivered. Franchisee shall submit the reports required in TMC 15.06.100.F showing its calculation of the right-of-way usage fee for the payment period and the credit applied thereto. After the full amount of the Credit has been applied, Franchisee will pay the right-of-way usage fee as required in TMC 15.06.100. In the event the Credit is insufficient to offset the full right-of-way usage fee payment due, Franchisee shall pay the balance owed for that payment period as required in TMC 15.06.100. The Credit shall expire and may not be used to offset any right of way usage fee following the expiration of the original ten-year (10) term of this Agreement. Notwithstanding any other provision of this Section, in the event Franchisee for any reason fails to install and convey to the City the New City Network Facilities, as defined and required in the Dark Fiber Agreement, there shall be no Credit applied to the right-of-way usage fee. Notwithstanding TMC 15.06.100, Franchisee shall pay an annual right-of-way usage fee that is the greater of the applicable percentage set forth in TMC 15.06.100 (as amended from time to time) or four thousand dollars (\$4,000), subject to any applicable limitation under state or federal law.

All other provisions of TMC 15.06.100 shall apply to Grantee Franchisee as though fully set forth herein.

4. CHANGE OF LAW; AMENDMENT OF FRANCHISE AGREEMENT

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

b. Except as set forth in Section 3 of this Agreement, to the extent any lawful City rule, ordinance or regulation, including any amendment to the provisions of TMC Chapter 15.06, is adopted on a jurisdiction-wide basis and is generally imposed on similarly situated persons or entities, the rule, ordinance or regulation shall apply without need for amendment of this Agreement. The City shall provide Franchisee notice of any such change in local law.

5. TAXES

Nothing contained in this Agreement shall be construed to exempt Franchisee from any license, occupation, franchise or excise tax or assessment, which is or may be hereafter lawfully imposed on Franchisee.

6. INSURANCE

By the Effective Date of this Agreement, Franchisee shall provide a certificate of insurance that names the City as an additional insured and is otherwise consistent with the requirements of TMC 15.06.180.

7. SEVERABILITY

If any section, subsection, sentence, paragraph, term, or provision hereof is determined to be invalid, or unconstitutional by any court of competent jurisdiction, such determination shall have no effect on the validity of any other section, subsection, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Agreement. If any material portion of the Agreement becomes invalid or unconstitutional so that the intent of the Agreement is frustrated, the parties agree to negotiate replacement provisions to fulfill the intent of the Agreement consistent with applicable law, or, if a replacement provision is not feasible, to negotiate a new agreement.

8. REMEDIES

a. This Agreement shall be subject to termination as set forth in TMC 15.06.310, provided that the City complies with the requirements set forth in TMC 15.06.320 and 15.06.330.

b. All remedies under this Agreement, including revocation of the Agreement, are cumulative and not exclusive, and the recovery or enforcement by one available remedy is not a bar to recovery or enforcement by any other such remedy. The City reserves the right to enforce the penalty provisions of any ordinance or resolution, and both parties reserve the right to avail themselves of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon Franchisee or City by or pursuant to this Agreement. A specific waiver of a particular breach of any term, condition or obligation imposed upon Franchisee or City by or pursuant to this Agreement shall not be a waiver of any other, subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

c. The right is hereby reserved to the City to adopt, in addition to the reservations contained herein and existing applicable ordinances, such additional regulations as it shall find necessary for the regulation of the right-of-way, provided that such regulations, by ordinance or otherwise, shall be reasonable and not in conflict with the rights herein granted. Franchisee shall, at all times during the life of this Agreement, be subject to all lawful exercise of the police power by the City, and to such reasonable regulations as the City may hereafter by resolution or ordinance provide. The City hereby reserves the right to exercise, with regard to this Agreement, all authority now or hereafter granted to the City by state statute or City charter, except where such authority may be modified or superseded by the Constitution of the State of Oregon or the Constitution of the United States or any other applicable law that preempts City authority.

9. ASSIGNMENT

All rights and privileges granted and duties imposed by this Agreement upon Franchisee shall extend to and be binding upon Franchisee's successors, legal representatives and assigns. This Agreement may not be transferred or assigned to another person unless such person is authorized under all applicable laws to own or operate the Utility System and the transfer or assignment is approved by all agencies or organizations required or expressly authorized under federal or state laws to approve such transfer or assignment. Franchisee shall provide the City with written notice of any transfer or assignment of this Agreement within twenty (20) days of requesting approval from any state or federal agency. Notwithstanding the foregoing, Franchisee may transfer or assign the Credit once during the term of this Agreement to a parent company or a wholly-owned subsidiary of Franchisee or its parent company; the

Credit is non-transferrable after such transfer or assignment and is non-transferrable to any third party. Except as expressly provided in this Section, any transfer or assignment of this Agreement will require the transferee or assignee to pay the full right-of-way usage fee required in Section 3 without the application of the Credit.

10. NOTICE

Unless specifically provided otherwise herein, all notices shall be mailed, postage prepaid, to the following addresses or to such other addresses as Franchisee or the City may designate in writing:

If to Franchisee: **Astound Broadband, LLC**
Attn: Jim Penney, EVP
401 Kirkland Parkplace, Suite 500
Kirkland, WA 98033

If to City: **City of Tigard**
Attention: City Manager
13125 SW Hall Blvd.
Tigard, Oregon 97223

11. GOVERNING LAW

The laws of the State of Oregon, exclusive of choice of law rules, govern the validity of this Agreement, and its interpretation, performance and enforcement. Any action or suit to enforce or construe any provision of this Agreement by any party shall be brought in the Circuit Court of the State of Oregon for Washington County, or the United States District Court for the District of Oregon.

12. EFFECTIVE DATE

The effective date of this Agreement ("Effective Date") shall be the date it is fully executed by the City and Franchisee.

CITY OF TIGARD

FRANCHISEE

By: _____
Mayor

By: _____

Title: _____

Date: _____

Date: _____