



CITY OF ALBANY
CITY COUNCIL WORK SESSION
Municipal Court Room
Monday, August 11, 2014
4:00 p.m.

OUR MISSION IS

*"Providing quality public services
for a better Albany community."*

OUR VISION IS

*"A vital and diversified community
that promotes a high quality of life,
great neighborhoods, balanced
economic growth, and quality public
services."*

AGENDA

- 4:00 p.m. **CALL TO ORDER**
- 4:00 p.m. **ROLL CALL**
- 4:05 p.m. **BUSINESS FROM THE PUBLIC**
- 4:10 p.m. **LOWE'S DISCUSSION** – Jim Delapoer, Mark Shepard
Action Requested: Information, discussion, direction.
- 5:00 p.m. **COUNCIL SUBCOMMITTEE ON INDUSTRY ECONOMIC DEVELOPMENT
PROPOSAL REPORT** – Kate Porsche, Councilor Collins, Councilor Kellum
Action Requested: Information.
- 5:10 p.m. **TELECOMMUNICATIONS FRANCHISE AGREEMENTS** – Stewart Taylor
Action Requested: Information, direction; for decision at August 13 Council meeting.
- 5:25 p.m. **150th ANNIVERSARY DISCUSSION** – Marilyn Smith
Action Requested: Discussion, direction.
- 5:30 p.m. **COUNCILOR COMMENTS**
1. Door-to-door solicitors – Councilor Collins
- 5:40 p.m. **CITY MANAGER PRO TEM REPORT**
- 6:00 p.m. **ADJOURNMENT**

Rules of Conduct for Public Meetings

1. No person shall be disorderly, abusive, or disruptive of the orderly conduct of the meeting.
2. Persons shall not testify without first receiving recognition from the presiding officer and stating their full name and residence address.
3. No person shall present irrelevant, immaterial, or repetitious testimony or evidence.
4. There shall be no audience demonstrations such as applause, cheering, display of signs, or other conduct disruptive of the meeting.

City of Albany Web site: www.cityofalbany.net

The location of the meeting/hearing is accessible to the disabled. If you have a disability that requires accommodation, advance notice is requested by notifying the City Manager's Office at 541-917-7508, 541-704-2307, or 541-917-7519.



TO: Albany City Council
VIA: Wes Hare, City Manager
FROM: Mark W. Shepard, P.E., Assistant City Manager, Public Works and Community Development Director *MWS*

DATE: August 5, 2014, for the August 11, 2014, City Council Work Session

SUBJECT: Lowe's Request to Amend the Development Agreement

RELATES TO STRATEGIC PLAN THEME: ● Healthy Economy
● Effective Government

Action Requested:

No action required. This memo provides Council with information in advance of the August 13, 2014, Council Meeting in which Lowe's representative, Mark Stoner, will present a request to Council.

Discussion:

Development Agreement History

The City of Albany negotiated at length to reach an agreement with Lowe's to develop a store in Albany. The City provided Lowe's with incentives that have not been extended to other similarly situated businesses that have located in Albany. The intent of having Lowe's develop a store in Albany was to off-set the economic recession by bringing development and jobs to the City.

Following is a list of what the City promised as part of the agreement to bring a Lowe's store to Albany:

1. The City would complete the design and construction of street infrastructure improvements required to meet Lowe's land use approval through the formation of a Local Improvement District (LID).
2. The City would pay the Lowe's team asking price (with no appraisal) of \$1.67 million for the right-of-way required for the Oak Street punch-through between 9th Avenue and Pacific Boulevard.
3. The City would modify the proposed LID assessment methodology to shift the burden of street improvement costs away from the Lowe's team and onto the City. This change saved Lowe's approximately \$3 million as compared with the assessment methodology initially recommended by staff and required approximately \$3.8 million of City funds.
4. The City would pay Lowe's liquidated damages of \$1,000 per day if the street improvements were not completed by April 30, 2013. The City completed all of its work by November 2012.

The City kept all of its promises. In return for Albany's promises, Lowe's committed to opening a 150,000 square foot Lowe's store as approved in their land use application. The City sought to have the store opened within two years, but agreed to Lowe's request to have four (4) years to complete their store.

In return for the promises made by the City, Lowe's promised to:

1. Construct, staff, and open for business, a 150,000 square foot store on or before December 31, 2014. The store was to be designed and constructed as detailed in the City land use approvals.
2. Pay the City of Albany liquidated damages of \$1,000 per day up to \$2,000,000 if the store was not open and operational by December 31, 2014.

Lowe's Request

The City has been in contact with Lowe's representatives for the past several years in order to understand the status of the Lowe's store development. Recently staff received a request from Lowe's in which they have asked to change their promise to the City. Lowe's requested:

1. Approval of a one year extension to December 31, 2015, to complete and open the store.
2. Allow the store to be redesigned and reduced by approximately 35 percent from the original size (subject to land use approval).
3. Waive the liquidated damages (\$365,000).

A copy of an email from Mark Stoner's emailed request is attached for your reference.

Impact to Albany

The changes requested by Lowe's, if approved, will have an impact on the City. Following is a summary of the financial impacts that staff has identified:

1. Lower property tax revenues. A store that is 35 percent smaller will result in a decrease in the annual property taxes paid by Lowe's. An existing store in Albany very comparable to Lowe's original proposal paid approximately \$140,000 in property taxes in 2014. A 35 percent reduction in the size of the building and a corresponding reduction in the property tax would lower the tax to \$91,000, a difference of \$49,000. All of the overlapping taxing jurisdictions would be impacted by the reduced payment. The impact to the City of Albany would be approximately \$13,500 in 2014, and will continue as long as the development exists on the property. Other taxing districts such as GAPS, Linn County, LBCC, etc., will experience similar permanent reductions in expected property tax revenues.
2. Lower Transportation SDC payment. Based on today's Transportation System Development Charge (TSDC) rates, Lowe's will pay approximately \$220,000 less in TSDC fees than if they build the store they promised. As you will recall, it was TSDC funds that were the primary funding source of the street improvements required for the Lowe's store. Allowing a smaller Lowe's store will mean that there are less TSDC funds available for Council to spend on other improvement projects needed in the City.
3. Lower Building Permit fees. Building permit fees are based partially on building value. While the work required for plan review and inspections will remain approximately the same, building permit fees will be lower for a store that is 35 percent smaller.
4. Fewer jobs. Part of the motivation for assisting the location of the Lowe's store in Albany was the creation of jobs. It is reasonable to assume that a small store will display fewer goods and may, therefore, have lower sales volumes requiring a smaller staff.

Alternatives

After hearing from Mark Stoner at the August 13, 2014, City Council Meeting, the Council will be in a better position to decide how to proceed with the request. Staff has identified three potential paths for Council to follow:

1. Hold Lowe's to its promise. The City fulfilled all of our promises to Lowe's. The City would be well within its contractual rights to hold Lowe's to their promises to the City. This would result in Lowe's being subject to paying the City liquidated damages of \$1,000 per day starting January 1, 2015. These damage payments would continue until a store (in conformance to the Development Agreement) is opened and in operation. If a store is not opened before October 2016, Lowe's would owe the City the balance of the maximum penalty of \$2 million. The biggest downside risk is that Lowe's might abandon construction in Albany altogether.

No action by Council is required if this is the direction the Council would like to take. The existing Development Agreement would remain in effect and staff would work to enforce the conditions of the agreement.

2. Grant Lowe's request to change their promise outright. The City Council could grant Lowe's request for a one year extension and request to construct and open a smaller store with no penalty or payment required. If this is Council's direction, staff will draft an amendment to the Development Agreement with Lowe's for Council review and approval.
3. Grant Lowe's request to change their promise with conditions. Council could accommodate Lowe's request in exchange for some financial or other consideration. Staff may be directed to propose such modifications to the Development Agreement as the Council may require. Upon receiving direction from Council, staff would initiate negotiations with Lowe's for a modified agreement.

It is important that Council understand that there is no rush. The Council should take the time it needs to consider its position. A copy of the original Development Agreement is attached for Council reference.

Budget Impact:

No budget impact at this time. The budget impact is dependent on direction provided by Council.

MWS:kw
Attachment

Shepard, Mark

From: Hare, Wes
Sent: Monday, July 28, 2014 10:43 AM
To: Delapoer, Jim; Shepard, Mark
Subject: FW: Albany OR Lowe's

From: Stoner, Mark - Mark A [mailto:Mark.A.Stoner@Lowe.com]
Sent: Monday, July 28, 2014 10:09 AM
To: Hare, Wes
Subject: Albany OR Lowe's

Hello Wes, Thanks for all your help on the proposed Lowe's store in Albany OR. The project is approved to move forward with an opening in fourth qtr. of 2015. I do not have a specific schedule yet but should have one within a few weeks. The following will hopefully answer the questions you posed in your July 7th e-mail.

- The project was delayed for three principle reasons. Lowe's dramatically slowed its new store program. At a high Lowe's was building approximately 140 stores a year domestically. Lowe's current program is at about 12 stores a year domestically. Secondly Lowe's Oregon stores had a significant drop in sales do the economic recession. The stores started to recover last year and are doing much better. Thirdly Lowe's several years ago started redesigning its prototypical buildings and only recently have we decided which prototype to develop in small markets such as Albany.
- We have commenced design of the 84K site plan and working with the city hope to submit a revised design and development package in a few months. Assuming the city will grant Lowe's an extension Lowe's would start construction in the spring with a fourth qtr. opening 20015.
- Lowe's would like a one year extension on the opening covenant to December 31, 2015. Lowe's has significant sunk costs in the project including carry costs, design costs and site work. We are requesting that no additional financial requirements will be required by the city for the extension.

The city staff in Albany has always been great to work with and we look forward to working with you on developing the revised project. I would like to set up a meeting with city staff to discuss the submittal process for the revised plan and to discuss Lowe's schedule for development. I'm also available for any meetings or phone call with the city council.

Let me know when you are available for a call.

Sincerely,

Mark Stoner
Director - Real Estate West

Lowe's Home Improvement
C 760-213-6542
O 949-891-9017

INFRASTRUCTURE FUNDING AGREEMENT

THIS AGREEMENT ("Agreement") is entered into this 17th day of NOVEMBER, 2011 ("Effective Date"), by and between LOWE'S HIW, INC., a Washington corporation (hereinafter "Lowe's"), and THE CITY OF ALBANY, OREGON, a Municipal corporation organized under the laws of the State of Oregon (hereinafter "City").

RECITALS:

A. Lowe's intends to purchase property from Conser Homes Inc. at the intersection of Oak Street and Ninth Avenue in Albany, Oregon upon which Lowe's intends to develop a Lowe's retail store (the "Lowe's Property"). Also, Lowe's intends to construct such retail store in conformance with City of Albany Site Plan No. SP-37-08, SP-38-08, and VR-09-08. Additionally, Lowe's intends to have two closings to purchase all of the Lowe's Property. A first closing on a portion of the Lowe's Property that has no tenants thereon (the "First Lowe's Closing") and a second closing on the remaining portion of the Lowe's Property after any tenants have been vacated such property (the "Second Lowe's Closing").

B. Pursuant to the terms of the land use approval given by City to Lowe's authorizing construction of the Lowe's proposed store, and as provided herein, the construction of necessary infrastructure improvements including, but not limited to, the extension of Oak Street between Pacific Boulevard and Ninth Avenue (hereinafter the "Punch Through") along with improvements to the Lowe's Property frontage on Oak Street, has been secured through the Albany City Council's establishment of a Local Improvement District ("LID") to make these improvements. All of said improvements are required to be constructed to City standards. Pursuant to this Agreement, City has agreed to construct the Punch Through and the Oak Street Frontage Improvements (as defined below) as a Local Improvement District Project.

C. City has allowed Lowe's to participate in the Local Improvement District referred to above which will provide for the City completing infrastructure improvements along the frontage of the Lowe's Property on Oak Street ("Oak Street Frontage Improvements") and the Punch Through and assessments against specially benefitted properties in order to reimburse the City for the cost of constructing such improvements.

D. City intends to construct the Required City Infrastructure Improvements (as defined below) which shall include the Oak Street Frontage Improvements as provided in the Engineer's Report adopted as a part of Resolution No. 5911 discussed below.

E. On June 9, 2010, Resolution No. 5911 was adopted by City, at the request of Lowe's, Conser, and the Perlenfeins, and with their expressed acceptance and approval in order to provide a mechanism for funding of the required improvements.

F. As a part of Resolution No. 5911, City and Lowe's were required to enter into an

Infrastructure Funding Agreement setting forth the parties' expectations of one another with regard to the construction of the above-referenced improvements and the consequences of the failure by Lowe's, to construct the intended store after City provided substantial public funding for many of the required improvements and the consequences of the failure by the City to construct the Required City Infrastructure Improvements for Lowe's to open a store. This Agreement is made by the parties in response to Resolution No. 5911.

G. Contemporaneously with the execution of this Agreement, City intends to have mutually executed with the Perlenfeins an agreement concerning the City's purchase of the Perlenfein property, which property is necessary for the Punch Through (the "Perlenfein Property"). The City intends to purchase the Perlenfein Property contemporaneously with the First Lowe's Closing.

IN CONSIDERATION of the mutual promises set forth herein, the adequacy of which is hereby acknowledged, the parties agree as follows:

Section 1. Incorporation of Recitals:

The Recitals set forth above are hereby incorporated into the body of this Agreement and acknowledged by the parties to be true and correct.

Section 2. City Acquisition of Perlenfein Property:

Contemporaneously with the City's execution of this Agreement, City shall have mutually executed with the Perlenfeins an agreement concerning the City's purchase of the Perlenfein Property which shall allow the City to purchase the Perlenfein Property contemporaneously with the First Lowe's Closing. City agrees that City will exercise its right under the above-referenced agreement and use its best efforts to purchase the Perlenfein Property contemporaneously with Lowe's purchase of the Lowe's Property or a portion thereof. City shall provide Lowe's with a copy of the above fully executed Perlenfein purchase agreement within five (5) days after the Effective Date. It shall be a condition to the obligations of the parties hereto that City shall have purchased the Perlenfein Property contemporaneously with the First Lowe's Closing and that Lowe's has purchased the Lowe's Property.

Section 3. Parties Obligations Subsequent to City Purchase of Perlenfein Property:

Upon the execution of this Agreement and the City's purchase of the Perlenfein property, City shall proceed with the construction of the Required City Infrastructure Improvements defined herein and if City does not perform as set forth in this Agreement, City shall pay the liquidated damages provided in Section 6 below. Lowe's shall be obligated to construct and open the store as called for in Section 7 below or pay the liquidated damages provided in Section 8 below.

Section 4. City Obligations to Construct Infrastructure:

Subject to the limitations set forth herein, City covenants to construct the infrastructure called for in the January 15, 2010, Notice of Decision which is Exhibit "A" attached hereto and by this reference incorporated herein, the Punch Through and the Oak Street Frontage

Improvements (“Required City Infrastructure Improvements”). City covenants to complete the Required City Infrastructure Improvements by April 30, 2013 (“City Liquidated Damages Deadline”).

Section 5. Limitation on City’s Responsibility to Construct Infrastructure:

Notwithstanding Section 4 above, the City will have no responsibility or liability for any delays to completion of the Required City Infrastructure Improvements in the event said delay is caused by any of the following factors:

- (a) Any delay caused by parties other than the City in making the Punch Through property ready and available, in all respects, for construction (at a minimum, clearing the Punch Through property of all prior improvements); or,
- (b) Any litigation challenging any aspect of the infrastructure construction including, but not limited to, challenges to this Agreement, challenges to any aspect of the Local Improvement District process or assessment ordinance, or any other litigation concerning the subject of this Agreement; or,
- (c) Delays caused by unanticipated remediation of any subsurface environmental condition located in the Punch Through property or the Oak Street property from the northern border of the Lowe’s Property south to the intersection of Queen Street; or,
- (d) Delays or failure to receive approvals required by state, federal, or local law or any state, federal, or local regulatory agency in response to unexpected underground conditions including, but not limited to, hazardous materials, buried archeological sites or conditions located in the Punch Through property or the Oak Street property from the northern border of the Lowe’s Property south to the intersection of Queen Street; or,
- (e) Delays or failure to receive required approvals caused by any action or omission by ODOT, including, but not limited to, ODOT’S failure to respond timely to inquiries from City or its contractors, ODOT’s requests for additional information, or ODOT’s reconsiderations; or,
- (f) Delays caused by strikes, civil disturbance, acts of God, or any circumstance outside the control of City or unforeseen by City.

A delay shall be deemed to be caused by any of the factors enumerated above if the occurrence of such an event is a substantial contributing factor of the delay.

City agrees to provide Lowes written notice of such delays within a reasonable time after such delays occur stating with particularity the reasons for such delays as enumerated above.

Upon request from Lowe’s, City will provide monthly, written progress reports to Lowe’s beginning on the first business day of the month following closing of City’s purchase of the Perlenfein Punch Through property and continuing on or about a like day of each month thereafter until the Required City Infrastructure Improvements have been completed. These progress reports shall advise Lowe’s of the progress of the work and any known adverse

conditions which reasonably may be expected to cause a delay in the completion of the Required City Infrastructure Improvements.

Section 6. Liquidated Damages in the Event of a Breach by City:

IF LOWE'S COMPLETES THE CONSTRUCTION OF THE PROPOSED STORE AND IS, IN ALL RESPECTS LEGALLY PERMITTED TO, AND READY TO, OPEN SAID STORE FOR BUSINESS BUT FOR THE FAILURE AND DELAY BY THE CITY TO COMPLETE THE REQUIRED CITY INFRASTRUCTURE IMPROVEMENTS AS REQUIRED HEREIN, THE PARTIES AGREE THAT LOWE'S WILL INCUR SUBSTANTIAL DAMAGES FROM SUCH DELAY. LOWE'S SHALL NOT BE ENTITLED TO LIQUIDATED DAMAGES DUE TO A DELAY IN THE CONSTRUCTION OF ANY REQUIRED CITY INFRASTRUCTURE IMPROVEMENTS WHICH ARE NOT REQUIRED TO ALLOW LOWE'S TO OPEN ITS PROPOSED STORE. IN THE EVENT OF SUCH A DELAY, THE CITY RESERVES THE RIGHT, WITHOUT BEING SUBJECT TO LIQUIDATED DAMAGES, TO WAIVE A REQUIREMENT THAT THE OPENING OF THE LOWE'S STORE BE DELAYED UNTIL THE REQUIRED CITY INFRASTRUCTURE IMPROVEMENTS ARE COMPLETED. HOWEVER, IF ANY OTHER GOVERNMENTAL AGENCIES HAVE CONDITIONED LOWE'S ABILITY TO OPEN ITS PROPOSED STORE UPON THE COMPLETION OF THE REQUIRED CITY INFRASTRUCTURE IMPROVEMENTS AND LOWE'S IS NOT ABLE TO OPEN ITS PROPOSED STORE AS A RESULT OF SUCH DELAY, SUCH WAIVER SHALL HAVE NO EFFECT UPON CITY'S OBLIGATIONS IN THIS AGREEMENT. SUCH DAMAGES WOULD BE DIFFICULT TO ASCERTAIN WITH CERTAINTY AND THE PARTIES AGREE THAT LOWE'S SHOULD THEREFORE BE ENTITLED TO LIQUIDATED DAMAGES FROM CITY IN THE AMOUNT OF ONE THOUSAND AND NO/100 DOLLARS (\$1,000.00) PER DAY FOR EACH DAY THAT CITY HAS NOT COMPLETED THE REQUIRED CITY INFRASTRUCTURE IMPROVEMENTS AFTER THE CITY LIQUIDATED DAMAGES DEADLINE. THIS LIABILITY SHALL BE CAPPED AT TWO MILLION AND NO/100 DOLLARS (\$2,000,000.00). PAYMENT OF THESE LIQUIDATED DAMAGES SHALL BE LOWE'S SOLE AND EXCLUSIVE REMEDY AGAINST CITY FOR CITY'S FAILURE TO COMPLETE THE REQUIRED CITY INFRASTRUCTURE IMPROVEMENTS BY THE DEADLINES PROVIDED IN THIS AGREEMENT.

CITY'S INITIALS

LOWE'S INITIALS

Section 7. Default by Lowe's:

Lowe's will be deemed to be in default if Lowe's fails to open for business a retail store substantially conforming with the site plan attached hereto as Exhibit "B" attached hereto and made a part hereof by December 31, 2014 ("Lowe's Opening Deadline"). The Lowe's store shall be deemed open for purposes of this section in the event that it is fully stocked, staffed, and open for business in conformance with all state and local laws and with Lowe's customary retail

environmental or soils condition;

(d) Delays required by state, federal, or local law or any state, federal, or local regulatory agency related to property conditions including, but not limited to, wetlands, hazardous materials, buried archeological sites or conditions;

(e) Delays caused by any action or omission by ODOT including, but not limited to, ODOT's failure to respond timely to inquiries from City or its contractors, ODOT requests for additional information, and ODOT reconsiderations; or,

(f) Delays caused by strikes, inclement weather, civil disturbance, acts of God, or any circumstances outside the control of Lowe's or unforeseen to Lowe's.

A delay shall be deemed to be caused by any of the factors enumerated above if the occurrence of such an event is a substantial contributing factor of the delay. The circumstances set forth above shall entitle Lowe's to a day for day extension of the Lowe's Opening Deadline but shall not excuse Lowe's performance following such an extension. The cost(s) of compliance with a regulatory requirement or condition shall not be a basis for delay. Lowe's shall provide City with written notice of any delay within a reasonable time after such delays occur stating with particularity, the reasons for such delay as enumerated above.

Section 10. Representations and Warranties of Lowe's:

(a) Lowe's has taken all actions and has obtained all consents necessary to enable it to enter into this Agreement, to be bound hereby, to consummate the transactions contemplated hereby and to perform its obligations hereunder.

(b) The person executing this Agreement on behalf of Lowe's has been duly authorized and empowered to do so.

(c) The execution of this Agreement on behalf of Lowe's will bind and obligate Lowe's to the extent provided by the terms hereof.

(d) To the best of Lowe's knowledge, there exists no litigation or other proceeding pending or threatened against Lowe's that, if determined adversely, would materially and adversely affect the ability of Lowe's to consummate the transactions contemplated hereby or to perform its obligations hereunder.

Section 11. Representations and Warranties of City:

(a) Under the provisions of the Oregon Constitution, the Oregon Revised Statutes, applicable jurisprudence of the State of Oregon, and its charter, the City has the power to enter into this Agreement, to be bound hereby, to consummate the transactions contemplated hereby and to perform its obligations hereunder.

(b) The City has taken all actions and has obtained all consents necessary to enable the City to enter into this Agreement, to be bound hereby, to consummate the transactions contemplated hereby and to perform its obligations hereunder.

(c) The person executing this Agreement on behalf of the City has been duly authorized and empowered to do so.

(d) The execution of this Agreement on behalf of the City will bind and

obligate the City to the extent provided by the terms hereof.

(e) There exists no litigation or other proceeding pending or threatened against the City that, if determined adversely, would materially and adversely affect the ability of the City to consummate the transactions contemplated hereby or to perform its obligations hereunder.

Section 12. Governing Law:

This Agreement and its construction shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding, including discovery proceedings, (collectively, "Claim") between the Parties that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the State of Oregon and venue shall lie in the county wherein the property is located.

Section 13. Severability:

If any provisions of this Agreement or the application thereof to any persons or circumstances shall, to any extent, be invalid or unenforceable, then the remainder of this Agreement or the application of such provision, or portion thereof, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

Section 14. Entire Agreement:

This Agreement and the exhibits attached hereto sets forth the entire understanding among the Parties with respect to the subject matter referenced herein, there being no terms, conditions, warranties or representations with respect to its subject matter other than as contained herein.

Section 15. Third Parties:

Except as expressly provided otherwise in this Agreement, the provisions of this Agreement are for the exclusive benefit of the Parties hereto and not for the benefit of any other persons, as third-party beneficiaries or otherwise, and this Agreement shall not be deemed to have conferred any rights, express or implied, upon any person not a Party to this Agreement.

Section 16. No Partnership:

This Agreement specifically does not create any partnership or joint venture between or among any of the Parties or in any respect render any Party liable for any of the debts or obligations of any other Party.

Section 17. Notices and Demands:

Any notice, demand, or other communication under this Agreement shall be sufficiently given if sent by (i) registered or certified mail return receipt requested, postage prepaid, (ii) nationally recognized overnight courier service or (iii) facsimile transmission, when it is sent by overnight or two day delivery by nationally recognized courier service within two (2) days of the facsimile transmission:

In the case of Lowe's:

Lowe's HIW, Inc.
1530 Faraday Avenue, Suite 140
Carlsbad, CA 92008
Attention: Jack Mandel, Senior Site Development Manager
Fax number: (760)602-1018

With a copy to:

Lowe's HIW, Inc.
1530 Faraday Avenue, Suite 140
Carlsbad, CA 92008
Attention: Rob Doane, Senior Counsel
Fax number: (760)602-8421

In the case of the City:

City of Albany
ATTN: Wes Hare, City Manager
333 Broadalbin SW
P.O. Box 490
Albany, OR 97321-0144
Facsimile: (541)917-7511

With a copy to:

Long, Delapoer, Healy, McCann & Noonan, P.C.
ATTN: James V.B. Delapoer, Albany City Attorney
201 First Avenue W.
P.O. Box 40
Albany, OR 97321
Facsimile: (541)926-7167

Section 18. Binding Effect:

This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors and assigns.

Section 19. Modifications:

This Agreement cannot be changed orally, and no agreement shall be effective to waive, change, modify or discharge it in whole or in part unless such agreement is in writing and is signed by the Parties against whom enforcement of any waiver, change, modification or discharge is sought.

Section 20. Further Assurances:

Each Party agrees that it will, without further consideration, execute and deliver such other documents and take such other action as may be reasonably requested by another Party to more effectively consummate or achieve the purposes or subject matter of this Agreement.

Section 21. Attorneys' Fees:

In the event of any controversy, claim or dispute between the Parties affecting or relating to the subject matter or performance of this Agreement, each prevailing Party shall, to the extent prohibited by applicable law, be entitled to recover from each non-prevailing Party all of its reasonable expenses, including reasonable attorneys, experts and accountants fees and expenses of litigation, whether incurred at trial or on appeal and including any incurred in or in connection with any bankruptcy proceeding.

Section 22. Counterparts:

The Agreement may be executed in several counterparts, either by manual, facsimile or email signatures and all such executed counterparts shall constitute one and the same agreement.

Section 23. Headings:

The section headings set forth in this Agreement are for convenience and reference only and in no way define or limit the scope or content of this Agreement or in any way affect its provisions.

Section 24. Construction:

The Parties acknowledge that the parties and their counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any exhibits or amendments hereto.

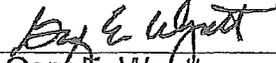
Section 25. Time of the Essence:

Time is of the essence of each and every term, covenant, and condition set forth in this Agreement.

[SIGNATURES TO FOLLOW ON THE FOLLOWING PAGE]

This Agreement is executed by Lowe's and the City of Albany, as of the date first hereinabove written.

LOWE'S HIW, INC.
a Washington corporation

By: 
Name: Gary E. Wyatt
Its: Senior Vice President

CITY OF ALBANY, OREGON
a municipal corporation organized
under the laws of the State of Oregon



By: _____
Name: _____
Its: _____

This Agreement is executed by Lowe's and the City of Albany, as of the date first hereinabove written.

LOWE'S HW, INC.
a Washington corporation

By: *Gar E. Wyatt*
Name: Gar E. Wyatt
Its: Senior Vice President

CITY OF ALBANY, OREGON
a municipal corporation organized
under the laws of the State of Oregon

*RD
M7
June 20*

By: *Wes Hove*
Name: Wes Hove
Its: City Manager

EXHIBIT A
Notice Of Decision



TO: Albany City Council
VIA: Wes Hare, City Manager
FROM: Stewart Taylor, Finance Director
Mike Murzynsky, Senior Accountant
DATE: August 7, 2014, for the August 11, 2014, Work Session
SUBJECT: Franchise Agreement – AT &T CORP.

Action Requested:

Council approval of the ordinance approving the AT&T CORP franchise contract and revising AMC Chapter 3.40 and repealing Ord. No. 5471 which created AMC 3.40.

Discussion:

The City of Albany and AT&T CORP have modeled the franchise agreement (for approval by the City Council) by following the rules created by the Cable Communications Policy Act of 1984, as amended by the "Cable Television Consumer Protection Act of 1992". Within the revised document we have discussed and modified various sections to meet current needs or requirements; i.e. franchise granted, insurance requirements, bonds and other surety, construction and performance bond, payment, tree trimming and continuation - termination.

The current AT&T CORP franchise agreement expired on August 14, 2011. The revised AT&T CORP Franchise agreement has a scheduled expiration date of August 13, 2024. Staff recommends that the City Council approve the agreement until August 13, 2024, as cited under Albany Municipal Code Chapter 3.40.

With the Council's approval of this agreement, a revenue generating agreement is in place with a telecommunication franchisee that has growth potential.

This item will be on the August 13, 2014, agenda for Council approval.

If you have questions, please call Senior Accountant Mike Murzynsky at 541-917-7593.

Budget Impact:

No change from the current budget

ST:mm
Attachment

INITIAL

Chapter 3.40
AT&T CORP. TELECOMMUNICATIONS FRANCHISE

Sections:

- 3.40.010 Franchise granted.
- 3.40.020 Excavations and construction.
- 3.40.030 Tree trimming.
- 3.40.040 Use of poles.
- 3.40.050 Construction and performance bond—~~Liability insurance~~.
- 3.40.060 Rearrangement of facilities to permit moving of building and other objects.
- 3.40.070 Street repair – Expense responsibility.
- 3.40.080 Improvements – Utility obstruction prohibited.
- 3.40.090 Emergency removal and alternate routing of facilities.
- 3.40.100 Cables, wires – Rearrangement – Notice.
- 3.40.110 Compliance with laws, rules and regulations.
- 3.40.120 Sale of subscriber lists prohibited.
- 3.40.130 Payment.
- 3.40.140 Other fees and charges.
- 3.40.150 Reporting of funds.
- 3.40.160 Indemnification - ~~Insurance~~.
- 3.40.170 Continuation – Termination.
- 3.40.180 Forfeiture and remedies.
- 3.40.190 Severability.
- 3.40.200 Attorneys' fees.
- 3.40.210 Successors and assigns.
- 3.40.220 Franchise nonexclusive.

3.40.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City", to AT&T Corp., authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee", the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes unless otherwise regulated. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to property to operate and maintain the same.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by the Franchisee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Franchisee intends to provide services other than telecommunication services, internet services or private line services, Franchisee shall be required to obtain an additional or revised from the City to the extent required by law.

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Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience. This franchise agreement anticipates 8,389 feet of cable and/or of conduit owned and maintained by Franchisee at \$2.00 per foot resulting in an annual fee of \$16,788. The Franchisee agrees to provide a map documenting the location of the 8,389 feet of conduit. This franchise does not authorize a cable television system nor video programming. (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions, public safety, street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. Unless approved by the City no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee. (Ord. 5471 § 1, 2001).

3.40.030 Tree trimming.

✓ 1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided

such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

~~Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennas or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming shall be performed in accordance with City ordinances. (Ord. 5471 § 1, 2001).~~

3.40.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefor. (Ord. 5471 § 1, 2001).

3.40.050 Construction and performance bond—~~Liability insurance.~~

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond. ~~The Franchisee, pursuant to this chapter, shall also maintain in full force and effect public liability insurance in an amount specified by the City sufficient to cover potential claims for bodily injury, death or disability and for property damage, which may arise from or be related to projects and activities of the Franchisee in connection with this franchise, naming the City, and its officers, agents and employees as an additional insured. (Ord. 5471 § 1, 2001).~~

3.40.060 Rearrangement of facilities to permit moving of building and other objects.

Upon seven days' notice in writing from any person desiring to move a building or other object, the Franchisee shall temporarily raise, lower or remove its facilities upon any street, bridge, or public place within the City, when necessary to permit the person to move the building or other object across or along such street, bridge or public place. The raising, lowering, or

removal of the facilities of the Franchisee shall be in accordance with all applicable ordinances and regulations of the City. The notice required by this section shall bear the approval of the City Manager, and shall detail the route of movement of the building or other objects. (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee. (Ord. 5471 § 1, 2001).

3.40.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development. (Ord. 5471 § 1, 2001).

3.40.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire or disaster in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done and any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense; provided, that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time. (Ord. 5471 § 1, 2001).

3.40.100 Cables, wires – Rearrangement – Notice.

Whenever it becomes necessary to temporarily rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, the said Franchisee will perform such rearrangement within a

reasonable period after written notice from the person or persons desiring to move said building, machinery or other objects. Said notice shall bear the approval of such official as Council may designate, shall detail the route of movement of the building, machinery or other objects, shall provide that the costs of such rearrangement shall be borne by the person or persons giving said notice and shall further provide that the person or persons giving said notice will indemnify and save Franchisee harmless of and from any and all damages or claims of whatsoever kind or nature caused directly or indirectly from such temporary rearrangement of the aerial plant of the Franchisee, and, if required by Franchisee, shall be accompanied by a cash deposit or a good and sufficient bond to pay any and all reasonable costs as estimated by Franchisee. (Ord. 5471 § 1, 2001).

3.40.110 Compliance with laws, rules and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the state and federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time. (Ord. 5471 § 1, 2001).

3.40.120 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services. (Ord. 5471 § 1, 2001).

3.40.130 Payment.

Effective ~~August 14, 2000~~ June 11, 2014, and until the franchise's expiration, said Franchisee shall pay to the City, annually, \$2.00 per linear foot of conduit and/or cable owned and maintained by Franchisee. This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Administrative Services Director of the City and postmarked on or before the last business day of September. If a payment is not mailed by the date set forth above, the

payment shall be deemed delinquent and shall accrue interest at the rate of nine percent per annum from the date of the applicable reporting period. The franchise payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter. Franchisee shall also pay to the City as additional consideration under this franchise an administrative fee totaling \$2,000, due on the effective date of this franchise, which may be deducted from Franchisee's payment set forth herein. (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property. (Ord. 5471 § 1, 2001).

3.40.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from an authorized officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable and/or conduit which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due. No interest shall be due with respect to annexation by the City for which notice was not provided to Franchisee pursuant to the provision of ORS 222.005. (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.160 Indemnification and Insurance.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees, which may arise from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. Notwithstanding the above, the Franchisee shall not indemnify the City, its contractors, agents, officers and employees for any negligence or intentional act of the City or its contractors, agents, officers and employees

2. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

a. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits ~~not less than~~ of \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City; and

b. Commercial General Liability Insurance with limits of ~~at least \$5,000,000 per occurrence and \$510,000,000 general aggregate, with the aggregate on a Per Project basis;~~ and

c. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.

d. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on an "Claims Made" basis it must provide a 24 month tail or reporting period.

3. The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

a. City's additional insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Franchisee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of City, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of City, its employees, agents or independent contractors; and, (iii) not exceed Franchisee's indemnification obligation under this Agreement, if any.

4. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage, if not replaced.

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5 Notwithstanding the forgoing, Franchisee may, in its sole discretion; self insure any of the required insurance under the same terms as required by this Agreement. In the event Franchisee elects to self-insure its obligation under this Agreement to include City as an additional insured, the following conditions apply:(i) City shall promptly and no later than thirty (30) days after notice thereof provide Franchisee with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Franchisee with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) City shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Franchisee; and (iii) City shall fully cooperate with Franchisee in the defense of the claim, demand, lawsuit, or the like.

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-(Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.170 Continuation – Termination.

The rights, privileges and franchise herein granted shall continue and be in force until ~~August 14, 2006~~ June 11, 2024 except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon 24 months' notice in writing. ~~Franchisee shall have the right to extend this agreement through August 14, 2011, but the terms for the period August 14, 2006, through August 14, 2011, shall be negotiated prior to August 14, 2006.~~ (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.180 Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the franchise, and all of the Franchisee's rights arising thereunder in the event that Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise. In the event Franchisee violates any material provision of the franchise, the City shall provide written notice of default and shall allow 65 days for Franchisee to remedy the violation. Extraordinary events (earthquake, flood, fire) beyond the control of the Franchisee shall result in an additional 60 days to remedy the violation. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself. (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law. (Ord. 5471 § 1, 2001).

3.40.200 Attorneys' fees.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding. (Ord. 5471 § 1, 2001).

3.40.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent shall be null and void. The City will not unreasonably withhold approval of an assignment. (Ord. 5493, 2001; Ord. 5471 § 1, 2001).

3.40.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law. (Ord. 5471 § 1, 2001).

FINAL

Chapter 3.40
AT&T CORP. TELECOMMUNICATIONS FRANCHISE

Sections:

- 3.40.010 Franchise granted.
- 3.40.020 Excavations and construction.
- 3.40.030 Tree trimming.
- 3.40.040 Use of poles.
- 3.40.050 Construction and performance bond.
- 3.40.060 Rearrangement of facilities to permit moving of building and other objects.
- 3.40.070 Street repair – Expense responsibility.
- 3.40.080 Improvements – Utility obstruction prohibited.
- 3.40.090 Emergency removal and alternate routing of facilities.
- 3.40.100 Cables, wires – Rearrangement – Notice.
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- 3.40.220 Franchise nonexclusive.

3.40.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City", to AT&T Corp., authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee", the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes unless otherwise regulated. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to property to operate and maintain the same.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by the Franchisee in the City's rights of way to provide telecommunications services, internet access services, and private line services **through but, not within the City**. In the event the Franchisee intends to provide services other than telecommunication services, internet services or private line services **or intends to provide any of the services to or for customers**

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with the City's boundaries, Franchisee shall be required to obtain an additional or revised from the City to the extent required by law.

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Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience. This franchise agreement anticipates 8,389 feet of cable and/or of conduit owned and maintained by Franchisee at \$2.00 per foot resulting in an annual fee of \$16,788. The Franchisee agrees to provide a map documenting the location of the 8,389 feet of conduit. This franchise does not authorize a cable television system nor video programming..

3.40.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions, public safety, street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. Unless approved by the City no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.40.030 Tree trimming.

1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

3.40.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefore.

3.40.050 Construction and performance bond.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond.

3.40.060 Rearrangement of facilities to permit moving of building and other objects.

Upon seven days' notice in writing from any person desiring to move a building or other object, the Franchisee shall temporarily raise, lower or remove its facilities upon any street, bridge, or public place within the City, when necessary to permit the person to move the building or other object across or along such street, bridge or public place. The raising, lowering, or removal of the facilities of the Franchisee shall be in accordance with all applicable ordinances and regulations of the City. The notice required by this section shall bear the approval of the City Manager, and shall detail the route of movement of the building or other objects.

3.40.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.40.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.40.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire or disaster in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done and any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense; provided, that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.40.100 Cables, wires – Rearrangement – Notice.

Whenever it becomes necessary to temporarily rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the person or persons desiring to move said building, machinery or other objects. Said notice shall bear the approval of such official as Council may designate, shall detail the route of movement of the building, machinery or other objects, shall provide that the costs of such rearrangement shall be borne by the person or persons giving said notice and shall further provide that the person or persons giving said notice will indemnify and save Franchisee harmless of and from any and all damages or claims of whatsoever kind or nature caused directly or indirectly from such temporary rearrangement of the aerial plant of the Franchisee, and, if required by Franchisee, shall be accompanied by a cash deposit or a good and sufficient bond to pay any and all reasonable costs as estimated by Franchisee.

3.40.110 Compliance with laws, rules and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the

City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the state and federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.40.120 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.40.130 Payment.

Effective **June 11, 2014**, and until the franchise's expiration, said Franchisee shall pay to the City, annually, \$2.00 per linear foot of conduit and/or cable owned and maintained by Franchisee. This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Administrative Services Director of the City and postmarked on or before the last business day of September. If a payment is not mailed by the date set forth above, the payment shall be deemed delinquent and shall accrue interest at the rate of nine percent per annum from the date of the applicable reporting period. The franchise payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter. Franchisee shall also pay to the City as additional consideration under this franchise an administrative fee totaling \$2,000, due on the effective date of this franchise, which may be deducted from Franchisee's payment set forth herein.

3.40.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.40.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from an authorized officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable and/or conduit which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due. If the additional payment amount exceeds five percent (5%) of the amount reported, Franchisee shall reimburse City for all audit costs. No interest shall be due with respect to annexation by the City for which notice was not provided to Franchisee pursuant to the provision of ORS 222.005.

3.40.160 Indemnification and Insurance.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees, which may arise from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. Notwithstanding the above, the Franchisee shall not indemnify the City, its contractors, agents, officers and employees for any negligence or intentional act of the City or its contractors, agents, officers and employees

2. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:
 - a. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits of \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City: and
 - b. Commercial General Liability Insurance with limits of \$5,000,000 per occurrence and ~~\$~~10,000,000 general aggregate; and

- c. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
- d. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on an "Claims Made" basis it must provide a 24 month tail or reporting period.

- 3. The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

a. City's additional insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Franchisee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of City, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of City, its employees, agents or independent contractors; and, (iii) not exceed Franchisee's indemnification obligation under this Agreement, if any.

4. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage, if not replaced.

5 Notwithstanding the forgoing, Franchisee may, in its sole discretion; self insure any of the required insurance under the same terms as required by this Agreement. In the event Franchisee elects to self-insure its obligation under this Agreement to include City as an additional insured, the following conditions apply:(i) City shall promptly and no later than thirty (30) days after notice thereof provide Franchisee with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Franchisee with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) City shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Franchisee; and (iii) City shall fully cooperate with Franchisee in the defense of the claim, demand, lawsuit, or the like.

3.40.170 Continuation – Termination.

The rights, privileges and franchise herein granted shall continue and be in force until June 11, 2024 except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon 24 months' notice in writing. Upon the fourth year anniversary of this agreement, City shall have absolute discretion to terminate this franchise without cause upon one year written notice to Franchisee.

Comment [MM1]: AT&T requested that this section be struck....I have agreed to the removal of this section.

3.40.180 Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the franchise, and all of the Franchisee's rights arising thereunder in the event that Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise. In the event Franchisee violates any material provision of the franchise, the City shall provide written notice of default and shall allow ~~65~~45 days for Franchisee to remedy the violation. Extraordinary events (earthquake, flood, fire) beyond the control of the Franchisee shall result in an additional 60 days to remedy the violation. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.40.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.40.200 Attorneys' fees and Jurisdiction.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding. —

Jurisdiction for all litigation will rest exclusively with the courts of the state of Oregon with venue in Linn County.

3.40.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent shall be null and void. The City will not unreasonably withhold approval of an assignment.

3.40.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

AN ORDINANCE AMENDING CHAPTER 3.40 OF THE ALBANY MUNICIPAL CODE (AMC) AND GRANTING A NON-EXCLUSIVE TELECOMMUNICATION SYSTEM FRANCHISE TO AT&T CORP. FOR THE CONSTRUCTION AND OPERATION OF A TELECOMMUNICATION SYSTEM; FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE; AND DECLARING AN EMERGENCY.

WHEREAS, the City of Albany has determined that the financial, legal and technical ability of AT&T CORP. is reasonably sufficient to provide services, facilities, and equipment necessary to meet the future cable-related needs of the community.

NOW THEREFORE, the people of the City of Albany do ordain as follows;

Section 1. AMC Chapter 3.40.010 through 3.40.220 is amended to read as follows:

3.40.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City", to AT&T CORP., authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee", the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes unless otherwise regulated. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to property to operate and maintain the same.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by the Franchisee in the City's rights of way to provide telecommunications services, internet access services, and private line services through but not within the City. In the event the Franchisee intends to provide services other than telecommunication services, internet services or private line services or intends to provide any of the services to or for customers within the City's boundaries, Franchisee shall be required to obtain an additional or revised agreement from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience. This franchise agreement anticipates 8,389 feet of cable and/or of conduit owned and maintained by Franchisee at \$2.00 per foot resulting in an annual fee of \$16,788. The Franchisee agrees to provide a map documenting the location of the 8,389 feet of conduit. This franchise does not authorize a cable television system nor video programming.

3.40.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of

the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions, public safety, street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. Unless approved by the City no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.40.030 Tree trimming.

Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

3.40.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefore.

3.40.050 Construction and performance bond.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond.

3.40.060 Rearrangement of facilities to permit moving of building and other objects.

Upon seven days' notice in writing from any person desiring to move a building or other object, the Franchisee shall temporarily raise, lower or remove its facilities upon any street, bridge, or public place within the City, when necessary to permit the person to move the building or other object across or along such street, bridge or public place. The raising, lowering, or removal of the facilities of the Franchisee shall be in accordance with all applicable ordinances and regulations of the City. The notice required by

this section shall bear the approval of the City Manager, and shall detail the route of movement of the building or other objects.

3.40.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.40.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.40.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire or disaster in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done and any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense; provided, that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.40.100 Cables, wires – Rearrangement – Notice.

Whenever it becomes necessary to temporarily rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the person or persons desiring to move said building, machinery or other objects. Said notice shall bear the approval of such official as Council may designate, shall detail the route of movement of the building, machinery or other objects, shall provide that the costs of such rearrangement shall be borne by the person or persons giving said notice and shall further provide that the person or persons giving said notice will indemnify and save Franchisee harmless of and from any and all damages or claims of whatsoever kind or nature caused directly or indirectly from such temporary rearrangement of the aerial plant of the Franchisee, and, if required by Franchisee, shall be accompanied by a cash deposit or a good and sufficient bond to pay any and all reasonable costs as estimated by Franchisee.

3.40.110 Compliance with laws, rules and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise

of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the state and federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.40.120 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.40.130 Payment.

Effective August 13, 2014, and until the franchise's expiration, said Franchisee shall pay to the City, annually, \$2.00 per linear foot of conduit and/or cable owned and maintained by Franchisee. This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Administrative Services Director of the City and postmarked on or before the last business day of September. If a payment is not mailed by the date set forth above, the payment shall be deemed delinquent and shall accrue interest at the rate of nine percent per annum from the date of the applicable reporting period. The franchise payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter. Franchisee shall also pay to the City as additional consideration under this franchise an administrative fee totaling \$2,000, due on the effective date of this franchise, which may be deducted from Franchisee's payment set forth herein.

3.40.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.40.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from an authorized officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable and/or conduit which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall,

office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due. . If the additional payment amount exceeds five percent (5%) of the amount reported, Franchisee shall reimburse City for all audit costs. No interest shall be due with respect to annexation by the City for which notice was not provided to Franchisee pursuant to the provision of ORS 222.005.

3.40.160 Indemnification and Insurance.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees, which may arise from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. Notwithstanding the above, the Franchisee shall not indemnify the City, its contractors, agents, officers and employees for any negligence or intentional act of the City or its contractors, agents, officers and employees

The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

1. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits of \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City: and
2. Commercial General Liability Insurance with limits of \$5,000,000 per occurrence and \$10,000,000 general aggregate; and
3. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
4. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on a "Claims Made" basis it must provide a 24 month tail or reporting period.

The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

1. City's additional insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Franchisee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of City, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of City, its employees, agents or independent contractors; and, (iii) not exceed Franchisee's indemnification obligation under this Agreement, if any.

Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage, if not replaced.

1. Notwithstanding the forgoing, Franchisee may, in its sole discretion; self insure any of the required insurance under the same terms as required by this Agreement. In the event Franchisee elects to self-insure its obligation under this Agreement to include City as an additional insured, the following conditions apply:(i) City shall promptly and no later than thirty (30) days after notice thereof provide Franchisee with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Franchisee with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) City shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Franchisee; and (iii) City shall fully cooperate with Franchisee in the defense of the claim, demand, lawsuit, or the like.

3.40.170 Continuation – Termination.

The rights, privileges and franchise herein granted shall continue and be in force until August 13, 2024 except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon 24 months' notice in writing.

3.40.180 Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the franchise, and all of the Franchisee's rights arising there under in the event that Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise. In the event Franchisee violates any material provision of the franchise, the City shall provide written notice of default and shall allow 45 days for Franchisee to remedy the violation. Extraordinary events (earthquake, flood, fire) beyond the control of the Franchisee shall result in an additional 60 days to remedy the violation. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.40.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.40.200 Attorneys' fees and Jurisdiction.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal there from or petitions for review thereof. Such sum shall include an amount estimated by the court as the

reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding. Jurisdiction for all litigation will rest exclusively with the courts of the state of Oregon with venue in Linn County.

3.40.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent shall be null and void. The City will not unreasonably withhold approval of an assignment.

3.40.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

Section 2: Franchise effective only upon acceptance of Franchisee.

This franchise is effective on the date provided herein only upon written acceptance of its terms by an authorized representative of Franchisee.

Section 3: Emergency Clause.

In as much as this ordinance is necessary for the immediate preservation of the public peace, health, and safety of the City of Albany, or to facilitate the prompt and timely completion of important City business, an emergency is hereby declared to exist; and this Ordinance shall take effect and be in full force and effect when signed by the Mayor.

Passed by Council: _____

Approved by Mayor: _____

Effective Date: _____

Mayor

ATTEST:

City Clerk



TO: Albany City Council
VIA: Wes Hare, City Manager
FROM: Stewart Taylor, Finance Director
Mike Murzynsky, Senior Accountant
DATE: August 7, 2014, for the August 11, 2014, City Council Work Session
SUBJECT: Franchise Agreement – Lightspeed Networks Inc.

Action Requested:

Council approval of the ordinance approving the Lightspeed Networks Inc. franchise contract and revising AMC Chapter 3.70 and repealing Ord. No. 5652, which created AMC 3.70.

Discussion:

The City of Albany and Lightspeed Networks have modeled the franchise agreement (for approval by the City Council) by following the rules created by the Cable Communications Policy Act of 1984, as amended by the “Cable Television Consumer Protection Act of 1992”. Within the revised document we have discussed and modified various sections to meet current needs or requirements; i.e. franchise granted, insurance requirements, bonds and other surety, construction and performance bond, payment, tree trimming and continuation - termination.

The current Lightspeed Networks franchise agreement expired on July 1, 2010. The revised Lightspeed Networks Franchise agreement has a scheduled expiration date of August 13, 2024. Staff recommends that the City Council approve the agreement until August 13, 2024, as cited under Albany Municipal Code Chapter 3.70.

With the Council’s approval of this agreement, a revenue generating agreement is in place with a telecommunication franchisee that has growth potential.

This item will be on the August 13, 2014, agenda for Council approval.

If you have questions, please call Senior Accountant Mike Murzynsky at 917-7593.

Budget Impact:

No change from the current budget.

ST:mm
Attachment

Chapter

LIGHTSPEED (LS) NETWORKS FRANCHISE

Sections:

- [3.70.010](#) Franchise granted.
- [3.70.020](#) Excavations and construction.
- [3.70.030](#) Tree trimming.
- [3.70.040](#) Use of poles.
- [3.70.050](#) Construction and performance bond – Liability insurance.
- [3.70.070](#) Street repair – Expense responsibility.
- [3.70.080](#) Improvements – Utility obstruction prohibited.
- [3.70.090](#) Emergency removal and alternate routing of facilities.
- [3.70.100](#) Cables, wires – Rearrangement – Notice.
- [3.70.110](#) Compliance with laws, rules, and regulations.
- [3.70.120](#) Sale of subscriber lists prohibited.
- [3.70.130](#) Payment.
- [3.70.135](#) Abandonment.
- [3.70.140](#) Other fees and charges.
- [3.70.150](#) Reporting of funds.
- [3.70.160](#) Indemnification and insurance requirements.
- [3.70.170](#) Continuation – Termination.
- [3.70.180](#) Forfeiture and remedies.
- [3.70.190](#) Severability.
- [3.70.200](#) Attorneys' fees.
- [3.70.210](#) Successors and assigns.
- [3.70.220](#) Franchise nonexclusive.

3.70.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City," to LightSpeed Networks, Inc. dba LS Networks, dba LSN, hereinafter referred to as "Grantee", an Oregon corporation authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee," the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to property to operate and maintain the same.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by Grantee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Grantee intends to provide services other than telecommunications services, internet access services, or private line services, Grantee shall be required to obtain an additional or revised franchise from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience.

3.70.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary

apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this Franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 day of notice from the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.70.030 Tree trimming.

1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.
2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

3.70.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefor.

3.70.050 Construction and performance bond.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond

be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond. The Franchisee, pursuant to this chapter, shall also maintain in full force and effect public liability insurance in an amount specified by the City, see section 3.70.160.

3.70.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.70.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.70.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.70.100 Cables, wires – Rearrangement – Notice.

Whenever the City determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other alteration or improvement which will require rearrangement of franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by any third persons who activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.70.110 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this Franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this Franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, re-arrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.70.120 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.70.130 Payment.

Effective May 1, 2014 and until the franchise's expiration, which is set as April 30, 2024, as said Franchisee shall pay to the City quarterly as specified below, 7% percent of gross revenues derived within the corporate limits of the City. A **minimum** fee of \$750.00 per quarter will be due the City for administration of this agreement and for use of the City's right of way unless the 7% percent of gross revenue exceeds the \$750 fee, then the greater amount will be due the City. This Franchise Fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Finance Director of the City and postmarked on or before the last business day of the quarter that said revenue was received by the Franchisee.

Payment of Franchise Fees. Payments due under this provision shall be computed and paid quarterly for the preceding quarter, as of March 31, June 30, September 30, and December 31, each quarterly payment due and payable no later than 45 days after such dates.

If a payment is not mailed or sent electronically within 45 days of the due date set forth above, the payment shall be deemed delinquent and shall accrue a late fee of 9% interest per day until collected. Payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter.

"Gross Revenues" mean any revenue derived by the Grantee from the operation of the system in the Service Area, following Generally Accepted Accounting Principles ("GAAP"), consistent with federal and state law. However, such phrase shall not include: (1) any tax, fee or assessment of general applicability collected by the Franchisee from Customers for pass-through to a government agency, including the Federal Communications Commission user fee; (2) unrecovered bad debt; (3) advertising agency commissions and launch fees to the extent

consistent with GAAP, and (4) franchise fees and any Public, Education and Government (PEG) amounts received from Customers. Grantee shall report Gross Revenues to the City using the accrual method of accounting, consistent with Generally Accepted Accounting Principles ("GAAP"). Nothing in this Section shall impair the City's ability to challenge Grantee's interpretation of GAAP.

3.70.135 Abandonment.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

3.70.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.70.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the calculation of the Franchise Fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the Franchise Fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the Franchise Fee. The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the Franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the Franchise Fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of 9% percent per annum from the date the original payment was due. If the additional payment amount exceeds five percent (5%) of the amount reported, Franchisee shall reimburse City for all audit costs.

3.70.160 Indemnification and Insurance Requirements.

1. Franchisee shall pay, save harmless, and indemnify the City from any loss or claim against the City on account of, or in connection with, any activity of Franchisee in the construction, operation, or maintenance of its technical facilities and systems services. The Franchisee will not be required to indemnify the City for the negligent or intentional acts of the City or its officials, boards, commissions, agents or employees.
2. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the Franchise Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

- a. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits not less than \$1,000,000; Franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City: and
 - b. Commercial General Liability Insurance with limits of at least \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a Per Project basis; and
 - c. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
 - d. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on a "Claims Made" basis it must provide a 24 month tail or reporting period.
3. The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.
 4. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City notice as allowed per insured's insurance policy in advance of the effective date of the alteration or cancellation of the coverage.
5. **Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City.**

The insurance policy limits required in section 3.70.160 may be satisfied by Provider through a combination of the underlying insurance policy and umbrella (excess) liability policy(ies) so long as said umbrella policies are, at a minimum, "follow form" and provide insurance equal to or greater than coverage afforded by the underlying liability policy(ies).

3.70.170 Continuation – Termination.

The rights, privileges and franchise herein granted shall continue and be in force until April 30, 2024, except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon six months' notice in writing. Upon the fourth year anniversary of this agreement, City shall have absolute discretion to terminate this franchise without cause upon one year written notice to Franchisee.

Comment [MM1]: LSN asked that this section be removed... was removed.

3.70.180 Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the Franchise, subject to 45 day right to cure, and all of the Franchisee's rights arising thereunder in the event that Franchisee violates any material provision of the Franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of Franchise Fees to the City under this Franchise, failure by Franchisee to submit timely reports regarding the calculation of its Gross Revenues-

Comment [MM2]: We are okay with 45 days to cure

based Franchise Fees to the City, failure to maintain the liability insurance and/or bonds required under this Franchise, or failure to comply with all other state, federal or local laws as set forth in this Franchise. All remedies and penalties under this chapter, including termination of the Franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the Franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.XX.XXX Bonds and Other Surety.

Except as expressly provided herein, Franchisee shall not be required to obtain or maintain bonds or other surety as a condition of being awarded the Franchise or continuing its existence at the time this Franchise is granted. The City acknowledges that the legal, financial, and technical qualifications of Franchisee are sufficient to afford compliance with the terms of the Franchise and the enforcement thereof. Initially, no bond or other surety will be required. In the event that one is required in the future, the City agrees to give the Franchisee at least ninety (90) days prior written notice thereof stating the exact reason for the requirement and the amount. Such reason must demonstrate a change in the Franchisee's legal, financial, or technical qualifications that would materially prohibit or impair its ability to comply with the terms of the Franchise or afford compliance therewith.

3.70.190 Severability.

In the event any of the provisions of this Franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this Franchise so as not to cause the invalidity or unenforceability of the remainder of this Franchise. All remaining provisions of this Franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.70.200 Attorneys' fees and Jurisdiction.

In the event an attorney is employed to enforce the provisions of this Franchise (including any bankruptcy, insolvency or similar proceedings affecting creditor's rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceeding is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this Franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding.

Jurisdiction for all litigation will rest exclusively with the courts of the state of Oregon with venue in Linn County.

3.70.210 Successors and assigns.

This Franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent shall be null and void.

3.70.220 Franchise nonexclusive.

This Franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a Franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 759.005(1) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

LSN Authorized Agent

Date: _____

Printed Name

Title

City of Albany, Authorized Agent

Date: _____

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Created by Mike Muirzynsky
Updated: 08/03/2014 05:23/2014

Chapter

LIGHTSPEED (LS) NETWORKS FRANCHISE

Sections:

- [3.70.010](#) Franchise granted.
- [3.70.020](#) Excavations and construction.
- [3.70.030](#) Tree trimming.
- [3.70.040](#) Use of poles.
- [3.70.050](#) Construction and performance bond – Liability insurance.
- [3.70.070](#) Street repair – Expense responsibility.
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- [3.70.150](#) Reporting of funds.
- [3.70.160](#) Indemnification **and Insurance Requirements**.
- [3.70.170](#) Continuation – Termination.
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- [3.70.190](#) Severability.
- [3.70.200](#) Attorneys' fees.
- [3.70.210](#) Successors and assigns.
- [3.70.220](#) Franchise nonexclusive.

3.70.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City," to **LightSpeed Networks, Inc. dba LS Networks, dba LSN**, hereinafter referred to as "**LS NetworksLSN**", an Oregon corporation authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee," the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to properly to operate and maintain the same. The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by Grantee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Grantee intends to provide services other than telecommunications services, internet access services, or private line services, Grantee shall be required to obtain an additional or revised franchise from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience.

3.70.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary

apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 day of notice from the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.70.030 Tree trimming.

1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

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2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

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~~Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming shall be performed in accordance with City ordinances and ANSI 300 Standards.~~

3.70.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall

not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefor.

3.70.050 Construction and performance bond – Liability insurance.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond. The Franchisee, pursuant to this chapter, shall also maintain in full force and effect public liability insurance in an amount specified by the City, ~~see section 3.70.160, sufficient to cover potential claims for bodily injury, death or disability and for property damage, which may arise from or be related to projects and activities of the Franchisee in connection with this franchise, naming the City, and its officers, agents and employees as an additional insured.~~

3.70.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.70.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.70.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.70.100 Cables, wires – Rearrangement – Notice.

Whenever ~~it becomes~~ the City determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other alteration or improvement which will require rearrangement of franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from ~~the person or persons desiring to move said building, machinery, other objects, or widen/realign City streets~~ the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by ~~the person or persons giving said notice~~ any third persons who activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.70.110 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, re-arrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.70.120 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.70.130 Payment.

Effective May 1, 2005 and until the franchise's expiration, which is set as July 19, 2010, as said Franchisee shall pay to the City monthly, seven percent of gross revenues derived within the corporate limits of the City. A minimum fee of \$750.00 per month, payable quarterly, will be due the City for administration of this agreement and for use of the City's right of way. If the seven percent of gross revenues exceeds the minimum fee each month, then the greater amount will be due the City. This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Assistant City Manager-Finance Director of the City and postmarked on or before the last business day of the month following the month revenues were received by the Franchisee.

if a payment is not mailed or sent electronically by the date set forth above, the payment shall be deemed delinquent and shall accrue a late fee? P-payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However,

Comment [RS1]: LS Networks has franchises with 78 other entities and pays all of them quarterly. The League of Oregon Cities recommends quarterly payments. Personally I understand but all I can do is pass it on.

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Comment [RS2]: Is this different than the requirement in 3.70.150? Or is this already covered by that provision? You're right... it is the same so I have deleted it. MM

Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter.

Comment [RS3]: We may need to discuss this new section on the phone, I added some minor changes, but want to be sure of intent.

Payment of Franchise Fees. Payments due under this provision shall be computed and paid quarterly for the preceding quarter, as of March 31, June 30, September 30, and December 31, each quarterly payment due and payable no later than 45 days after such dates. Not later than the date of each payment, the Franchisee shall file with the City a written statement, in a form satisfactory to the City and signed under penalty of perjury by an officer of the Franchisee, identifying in detail the amount of gross revenue received by the Franchisee, the computation basis and method, for the quarter for which payment is made.

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Comment [RS4]: We strongly prefer quarterly payments and that is what 78 other municipalities accept as standard.

3.70.135 Abandonment.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

3.70.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.70.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due.

3.70.160 Indemnification and Insurance Requirements.

~~The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees which may arise, from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. The Franchisee will not be required to indemnify the City for the negligent acts of the City or its officials, boards, commissions, agents or employees.~~

See new section....

1. Franchisee shall pay, save harmless, and indemnify the City from any loss or claim against the City on account of, or in connection with, any activity of Franchisee in the construction, operation, or maintenance of its technical facilities and systems services. The Franchisee will not be required to indemnify the City for the negligent or intentional acts of the City or its officials, boards, commissions, agents or employees.-

2. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

Robin.....the following four sections have been rewritten by our insurance consultant. What follow is the minimum City requirements.

a. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability, with limits not less than \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City; and

b. Commercial General Liability Insurance with limits of at least \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a Per Project basis; and

c. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.

d. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on a "Claims Made" basis it must provide a 24 month tail or reporting period.

3. The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

4. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage.

~~a. Bodily Injury Insurance with limits of at least \$1,000,000 personal injury each person and \$1,000,000 each occurrence; and~~

~~b. Property Damage Insurance with limits of at least \$1,000,000 each accident and \$1,000,000 each occurrence; and~~

~~c. Compensation Insurance in compliance with all Worker's Compensation Insurance and Safety Laws of the State of Oregon and amendments~~

Comment [RS5]: We can agree to 2 million per occurrence with an umbrella of 10 million.

~~thereto; franchisee shall ensure that each of its sub-contractors complies with the following requirements.~~

Worker's Compensation	Statutory
Employers' Liability:	
Each accident	\$1,000,000
Disease - Each employee	\$1,000,000
Disease - Policy limit	\$1,000,000

~~3. The Commercial General Liability insurance policy shall be endorsed to include the following additional insured language : The City of Albany, its officers, agents, and employees, shall be named an additional insured with respect to liability arising out of the activities performed under this franchise agreement.~~

~~4. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage.~~

~~5. Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City.~~

~~The insurance policy limits required in section 3.70.160 may be satisfied by Provider through a combination of the underlying insurance policy and umbrella (excess) liability policy(ies) so long as said umbrella policies are, at a minimum, "follow form" and provide insurance equal to or greater than coverage afforded by the underlying liability policy(ies).~~

Comment [RS6]: Insurance companies can no longer comply with this language. There is a standard that provides for notice based on the policy. I can provide this language if needed.

3.70.170 Continuation – Termination.

The rights, privileges and franchise herein granted shall continue and be in force until ~~July 19 April 23, 2010 20072019~~, except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon six months' notice in writing.

Comment [RS7]: We would prefer the ten years you proposed in your email.

3.70.180 Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the franchise, and all of the Franchisee's rights arising thereunder in the event that Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.XX.XXX Bonds and Other Surety.

Except as expressly provided herein, Franchisee shall not be required to obtain or maintain bonds or other surety as a condition of being awarded the franchise or continuing its existence at the time this franchise is granted. The City acknowledges that the legal, financial, and technical qualifications of Franchisee are sufficient to afford compliance with the terms of the franchise and the enforcement thereof. Initially, no bond or other surety will be required. In the event that one is required in the future, the City agrees to give the Franchisee at least ninety (90) days prior written notice thereof stating the exact reason for the requirement and the amount. Such reason must demonstrate a change in the Franchisee's legal, financial, or technical qualifications that would materially prohibit or impair its ability to comply with the terms of the franchise or afford compliance therewith.

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3.70.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.70.200 Attorneys' fees.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding.

3.70.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent shall be null and void.

3.70.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

LS Networks LSN Authorized Agent

Date: _____

Printed Name

Title

City of Albany, Authorized Agent

Date: _____

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Created by Mike Murzynsky

Updated: 08/03/2014 03/25/2014 03/24/2014 03/22/2012

DRAFT

ORDINANCE NUMBER _____

AN ORDINANCE AMENDING CHAPTER 3.70 OF THE ALBANY MUNICIPAL CODE (AMC) AND GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO LIGHTSPEED NETWORKS, INC. FOR THE CONSTRUCTION AND OPERATION OF A TELECOMMUNICATION SYSTEM; AND FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE; AND DECLARING AN EMERGENCY.

WHEREAS, the City of Albany has determined that the financial, legal and technical ability of Lightspeed Networks is reasonably sufficient to provide services, facilities, and equipment necessary to meet the telecommunications needs of the community.

NOW THEREFORE, the people of the City of Albany do ordain as follows;

Section 1: AMC Chapter 3.70.010 through 3.70.220 is amended to read as follows:

3.70.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City," to LightSpeed Networks, Inc. dba LS Networks, dba LSN, hereinafter referred to as "Grantee", an Oregon corporation authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee," the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliances and conductors for all telephone, telegraph and other communication purposes. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to property to operate and maintain the same.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by Grantee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Grantee intends to provide services other than telecommunications services, internet access services, or private line services, Grantee shall be required to obtain an additional or revised franchise from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience.

3.70.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this Franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect

or relocate any of its equipment required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 day of notice from the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.70.030 Tree trimming.

1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.
2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

3.70.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefore.

3.70.050 Construction and performance bond.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond. The Franchisee, pursuant to this chapter, shall also maintain in full force and effect public liability insurance in an amount specified by the City, see section 3.70.160.

3.70.060 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and

restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.70.070 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.70.080 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.70.090 Cables, wires – Rearrangement – Notice.

Whenever the City determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other alteration or improvement which will require rearrangement of franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by any third persons whose activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.70.100 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City. No provision of this Franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and

maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this Franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, re-arrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.70.110 Sale of subscriber lists prohibited.

The Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.70.120 Payment.

Effective August 13, 2014 and until the franchise's expiration, which is set as August 13, 2024, said Franchisee shall pay to the City quarterly as specified below, 7% percent of gross revenues derived within the corporate limits of the City. A minimum fee of \$750.00 per quarter will be due the City for administration of this agreement and for use of the City's right of way unless the 7% percent of gross revenue exceeds the \$750 fee, then the greater amount will be due the City. This Franchise Fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Finance Director of the City and postmarked on or before the last business day of the quarter that said revenue was received by the Franchisee.

Payment of Franchise Fees. Payments due under this provision shall be computed and paid quarterly for the preceding quarter, as of March 31, June 30, September 30, and December 31, each quarterly payment due and payable no later than 45 days after such dates.

If a payment is not mailed or sent electronically within 45 days of the due date set forth above, the payment shall be deemed delinquent and shall accrue a late fee of 9% interest per annum until collected. Payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter.

"Gross Revenues" mean any revenue derived by the Grantee from the operation of the system in the Service Area, following Generally Accepted Accounting Principles ("GAAP"), consistent with federal and state law. However, such phrase shall not include: (1) any tax, fee or assessment of general applicability collected by the Franchisee from Customers for pass-through to a government agency, including the Federal Communications Commission user fee; (2) unrecovered bad debt; (3) advertising agency commissions and launch fees to the extent consistent with GAAP, and (4) franchise fees and any Public, Education and Government (PEG) amounts received from Customers. Grantee shall report Gross Revenues to the City using the accrual method of accounting, consistent with Generally Accepted Accounting Principles ("GAAP"). Nothing in this Section shall impair the City's ability to challenge Grantee's interpretation of GAAP.

3.70.130 Abandonment.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease

or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

3.70.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.70.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the calculation of the Franchise Fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the Franchise Fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the Franchise Fee. The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the Franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the Franchise Fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of 9% percent per annum from the date the original payment was due.. If the additional payment amount exceeds five percent (5%) of the amount reported, Franchisee shall reimburse City for all audit costs.

3.70.160 Indemnification and Insurance Requirements.

Franchisee shall defend, save harmless, and indemnify the City from any loss or claim against the City on account of, or in connection with, any activity of Franchisee in the construction, operation, or maintenance of its technical facilities and systems services. The Franchisee will not be required to indemnify the City for the negligent or intentional acts of the City or its officials, boards, commissions, agents or employees.

The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the Franchise Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

1. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits not less than \$1,000,000; Franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City: and
2. Commercial General Liability Insurance with limits of at least \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a Per Project basis; and
3. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
4. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on a "Claims Made" basis it must provide a 24 month tail or reporting period.

The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City notice as allowed per insured's insurance policy in advance of the effective date of the alteration or cancellation of the coverage.

Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City.

The insurance policy limits required in section 3.70.160 may be satisfied by Provider through a combination of the underlying insurance policy and umbrella (excess) liability policy(ies) so long as said umbrella policies are, at a minimum, "follow form" and provide insurance equal to or greater than coverage afforded by the underlying liability policy(ies).

3.70.170 Term and negotiation.

The rights, privileges and franchise herein granted shall continue and be in force until August 13, 2024. Upon a material change in technology either party may provide six months notice, in writing, to renegotiate this agreement.

3.70.180 Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the Franchise, subject to 45 day right to cure, and all of the Franchisee's rights arising thereunder in the event that Franchisee violates any material provision of the Franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of Franchise Fees to the City under this Franchise, failure by Franchisee to submit timely reports regarding the calculation of its Gross Revenues-based Franchise Fees to the City, failure to maintain the liability insurance and/or bonds required under this Franchise, or failure to comply with all other state, federal or local laws as set forth in this Franchise. All remedies and penalties under this chapter, including termination of the Franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the Franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.70.190 Bonds and Other Surety.

Except as expressly provided herein, Franchisee shall not be required to obtain or maintain bonds or other surety as a condition of being awarded the Franchise or continuing its existence at the time this Franchise is granted. The City acknowledges that the legal, financial, and technical qualifications of Franchisee are sufficient to afford compliance with the terms of the Franchise and the enforcement thereof. Initially, no bond or other surety will be required. In the event that one is required in the future, the City agrees to give the Franchisee at least ninety (90) days prior written notice thereof stating the exact reason for the requirement and the amount. Such reason must demonstrate a change in the Franchisee's legal, financial, or technical qualifications that would materially prohibit or impair its ability to comply with the terms of the Franchise or afford compliance therewith.

3.70.195 Severability.

In the event any of the provisions of this Franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this Franchise so as not to cause the invalidity or unenforceability of the remainder of this Franchise. All remaining provisions of this Franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.70.200 Attorneys' fees and Jurisdiction.

In the event an attorney is employed to enforce the provisions of this Franchise (including any bankruptcy, insolvency or similar proceedings affecting creditor's rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceeding is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this Franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding.. Jurisdiction for all litigation will rest exclusively with the courts of the state of Oregon with venue in Linn County.

3.70.210 Successors and assigns.

This Franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent shall be null and void.

3.70.220 Franchise nonexclusive.

This Franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a Franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 759.005(1) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

Section 2: Franchise effective only upon acceptance of Franchisee.

This franchise is effective on the date provided herein only upon written acceptance of its terms by an authorized representative of Franchisee.

Section 3: Emergency Clause.

In as much as this ordinance is necessary for the immediate preservation of the public peace, health, and safety of the City of Albany, or to facilitate the prompt and timely completion of important City business, an emergency is hereby declared to exist; and this Ordinance shall take effect and be in full force and effect when signed by the Mayor.

Passed by Council: _____

Approved by Mayor: _____

Effective Date: _____

Mayor

ATTEST:

City Clerk



TO: Albany City Council
VIA: Wes Hare, City Manager
FROM: Stewart Taylor, Finance Director
Mike Murzynsky, Senior Accountant
DATE: August 7, 2014, for the August 11, 2014, City Council Work Session
SUBJECT: Franchise Agreement – ASTOUND (aka Wave Technologies)

Action Requested:

Council approval of the ordinance approving the ASTOUND (aka Wave Technologies) franchise contract and creating Albany Municipal Code Chapter 3.80.

Discussion:

The City of Albany and ASTOUND have modeled the franchise agreement (for approval by the City Council) by following the rules created by the Cable Communications Policy Act of 1984, as amended by the “Cable Television Consumer Protection Act of 1992”. Within the revised document we have modified various sections to meet current needs or requirements; i.e. definitions, franchise review, construction standards, and insurance requirements. The entire agreement was thoroughly discussed because it is new to ASTOUND.

This item will be on the August 13, 2014, agenda for Council approval.

Budget Impact:

Budget impact unknown at this time.

ST:mm
Attachment

Chapter

ASTOUND NETWORKS FRANCHISE

Sections:

- [3.70.010](#) Franchise granted.
- [3.70.020](#) Excavations and construction.
- [3.70.030](#) Tree trimming.
- [3.70.040](#) Use of poles.
- [3.70.050](#) Construction and performance bond – Liability insurance.
- [3.70.070](#) Street repair – Expense responsibility.
- [3.70.080](#) Improvements – Utility obstruction prohibited.
- [3.70.090](#) Emergency removal and alternate routing of facilities.
- [3.70.100](#) Cables, wires – Rearrangement – Notice.
- [3.70.110](#) Compliance with laws, rules, and regulations.
- [3.70.120](#) Sale of subscriber lists prohibited.
- [3.70.130](#) Payment.
- [3.70.135](#) Abandonment.
- [3.70.140](#) Other fees and charges.
- [3.70.150](#) Reporting of funds.
- [3.70.160](#) Indemnification and insurance requirements.
- [3.70.170](#) Continuation – Termination.
- [3.70.180](#) Forfeiture and remedies.
- [3.70.190](#) Severability.
- [3.70.200](#) Attorneys' fees.
- [3.70.210](#) Successors and assigns.
- [3.70.220](#) Franchise nonexclusive.

3.70.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City," to ASTOUND BROADBAND, LLC, hereinafter referred to as "ASTOUND", a Washington limited liability company authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee," the nonexclusive right and privilege to provide telecommunications service (as defined in ORS 759.005(8)), private telecommunication network (as defined in ORS 759.005(4)) service, and internet access service (as defined in ORS 305.822(1)(b)) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City (collectively, "Public Ways"), poles, wires, conduits, cabinets, appurtenances, and other appliances and conductors (collectively, "Facilities") for all communication purposes. Such Facilities may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to properly operate and maintain the same unless otherwise regulated.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by the Franchisee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Franchisee intends to provides services other than telecommunications services, internet access services or private line services, Franchisee shall be required to obtain an additional or revised franchise from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience.

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3.70.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of Public Ways, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 day of notice from the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.70.030 Tree trimming.

1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

~~Franchisee may trim trees when necessary in public rights-of-way for the operation of the Facilities lines wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming shall be performed in accordance with City ordinances and ANSI 300 Standards.~~

3.70.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need ~~therefor~~therefore.

3.70.050 Construction and performance bond – Liability insurance.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond. ~~The Franchisee, pursuant to this chapter, shall also maintain in full force and effect public liability insurance in an amount specified by the City, see section 3.70.160.~~

3.70.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.70.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. If City vacates any portion of the Public Way containing Facilities, City shall reserve an appurtenant easement for public utilities within that vacated portion within which Franchisee may continue to operate existing Facilities under the terms of this Franchise for at least the remaining term as set forth in Section 3.70.170. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planing, rock, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.70.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other imminent threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the ~~system~~of system of the Franchisee, such cutting or moving may be done in a manner that minimizes disruption to Franchisee's services and Facilities, and City shall provide prompt notice to Franchisee. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees,

officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.70.100 Cables, wires – Rearrangement – Notice.

Whenever the City reasonably determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other alteration or improvement which will require rearrangement of franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by any third persons whose activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.70.110 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City, and are adopted and enforced in a reasonable, uniform, and non-discriminatory manner. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.70.120 Sale of subscriber lists prohibited.

Except as otherwise permitted by law, the Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.70.130 Payment.

Effective May 1, ~~2005-2014~~ and until the franchise's expiration as provided in Section 3.70.170, ~~which is set as July 19, 2010, as said~~ Franchisee shall pay to the City monthly the greater of: (a) seven percent of gross revenues collected by Franchisee and derived from Franchisee's provision of telecommunications services within the corporate limits of the City or (b) A-a fee of \$750.00 per month will be due the City for administration of this agreement and for use of the City's right of way. If the seven percent of gross revenues exceeds the fee each month, then the greater amount will be due the City. This franchise fee shall be

deposited in the U.S. mail, postage prepaid, addressed to the Finance Director of the City and postmarked on or before the last business day of the month following the month revenues were received by the Franchisee. If a payment is not mailed by the date set forth above, the payment shall be deemed delinquent and shall accrue interest at a rate of 9% per year. Payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter.

3.70.135 Abandonment.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

3.70.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any uniform, nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.70.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 5 business days of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due.

3.70.160 Indemnification and Insurance Requirements.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees which may arise, from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. The Franchisee will not be required to indemnify the City for the negligent or intentional acts of the City or its officials, boards, commissions, agents or employees.

1. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

- a. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits of \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City; and
- b. Commercial General Liability Insurance with limits of \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a Per Project basis; and
- c. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
- d. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on an "Claims Made" basis it must provide a 24 month tail or reporting period.

2. The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

3. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage, if not replaced.

~~1. Franchisee shall pay, save harmless, and indemnify the City from any loss or claim against the City on account of, or in connection with, any activity of Franchisee in the construction, operation, or maintenance of its Facilities, except to the extent the claim arises from the negligent or intentional act of the City or its officials, boards, commissions, agents, or employees technical facilities and systems services.~~

~~2. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise evidence thereto with the City Recorder, a Certificate of Insurance covering:~~

- ~~a. Bodily Injury Insurance with limits of at least \$1,000,000 5,000,000 personal injury each person and \$5,000,000 each occurrence; and~~
- ~~b. Property Damage Insurance with limits of at least \$1,000,000 5,000,000 each accident and \$1,000,000 5,000,000 each occurrence; and~~
- ~~c. Auto Liability, Bodily Injury, and Property Damage for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$1,000,000 5,000,000.~~
- ~~d. Compensation Insurance in compliance with all Worker's Compensation Insurance and Safety Laws of the State of Oregon and amendments thereto; franchisee shall use commercially reasonable efforts to ensure that each of its sub-contractors maintains insurance in compliance with all Worker's Compensation Insurance and Safety Laws of the State of Oregon and amendments thereto, complies with the following requirements:~~

Worker's Compensation	Statutory
Employers' Liability:	
Each accident	\$1,000,000
Disease - Each employee	\$1,000,000
Disease - Policy limit	\$1,000,000

- ~~3. The Certificate shall be endorsed to include the following additional insured language: The City of Albany, its officers, agents, and employees, shall be named an additional insured with respect to liability arising out of the activities performed under this franchise agreement.~~
- ~~4. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage.~~
54. Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City.

3.70.170 Continuation – Termination.

The rights, privileges and franchise herein granted shall continue and be in force until ~~June 1, 2024~~~~April 1, 2020~~, except that it is understood and agreed that either party may at any time terminate or renegotiate this agreement upon six months' notice in writing.

3.70.180 Breach Forfeiture and remedies.

In addition to any other rights set out elsewhere in this franchise, the City ~~may terminate this franchise if reserves the right to declare a forfeiture of the franchise, and all of the Franchisee's rights arising thereunder in the event that~~ Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.70.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.70.200 Attorneys' fees.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding.

3.70.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any **Any** assignment made without the City's consent, shall be null and void.

3.70.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

ASTOUND Authorized Agent Date: _____

Printed Name

Title

City of Albany, Authorized Agent Date: _____

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Created by Mike Murzynsky
Updated: 09/03/2014 09/08/2014

FINAL

Chapter

ASTOUND NETWORKS FRANCHISE

Sections:

- [3.70.010](#) Franchise granted.
- [3.70.020](#) Excavations and construction.
- [3.70.030](#) Tree trimming.
- [3.70.040](#) Use of poles.
- [3.70.050](#) Construction and performance bond – Liability insurance.
- [3.70.070](#) Street repair – Expense responsibility.
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- [3.70.100](#) Cables, wires – Rearrangement – Notice.
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- [3.70.190](#) Severability.
- [3.70.200](#) Attorneys' fees.
- [3.70.210](#) Successors and assigns.
- [3.70.220](#) Franchise nonexclusive.

3.70.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City," to ASTOUND BROADBAND, LLC, hereinafter referred to as "ASTOUND", a Washington limited liability company authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee," the nonexclusive right and privilege to provide telecommunications service (as defined in ORS 759.005(8)), private telecommunication network (as defined in ORS 759.005(4)) service, and internet access service (as defined in ORS 305.822(1)(b)) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City (collectively, "Public Ways"), poles, wires, conduits, cabinets, appurtenances, and other appliances and conductors (collectively, "Facilities") for all communication purposes. Such Facilities may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to properly operate and maintain the same unless otherwise regulated.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by the Franchisee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Franchisee intends to provide cable services/system (shall have the meaning specified in the definition of "cable system" in 602(6) of the Cable Communication Policy Act of 1984), Franchisee shall be required to obtain an additional or revised franchise from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience.

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3.70.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of Public Ways, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 day of notice from the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.70.030 Tree trimming.

1. Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

2. Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

3.70.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefore.

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3.70.050 Construction and performance bond.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond.

3.70.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.70.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. If City vacates any portion of the Public Way containing Facilities, City shall reserve an appurtenant easement for public utilities within that vacated portion within which Franchisee may continue to operate existing Facilities under the terms of this Franchise for at least the remaining term as set forth in Section 3.70.170. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.70.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other imminent threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done in a manner that minimizes disruption to Franchisee's services and Facilities, and City shall provide prompt notice to Franchisee. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.70.100 Cables, wires – Rearrangement – Notice.

Whenever the City reasonably determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other

alteration or improvement which will require rearrangement of franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by any third persons whose activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.70.110 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City, and are adopted and enforced in a reasonable, uniform, and non-discriminatory manner. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, rearrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.70.120 Sale of subscriber lists prohibited.

Except as otherwise expressly permitted by law, the Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.70.130 Payment.

Effective May 1, 2005-2014 and until the franchise's expiration as provided in Section 3.70.170, Franchisee shall pay to the City monthly the greater of: (a) seven percent of gross revenues collected by Franchisee and derived from Franchisee's provision of all services authorized and delivered pursuant to this agreement telecommunications services within the corporate limits of the City or (b) a minimum fee of \$750.00 per month will be due the City for administration of this agreement and for use of the City's right of way. If the seven percent of gross revenues exceeds the minimum fee each month, then the greater amount will be due the City. In lieu of all or part of the franchise fees required under this section, Franchisee may, with the consent of the City, provide to the City in-kind services with a value equal to or greater than the franchisee fees, or portion of franchise fees, that the in-kind services replace. The value of in-kind services will be determined based upon the standard rates Franchisee charges to third parties for substantially equivalent services.

This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Finance Director of the City and postmarked on or before the last business day of the month following the month revenues were received by the Franchisee. If a payment is not mailed by the date set forth above, the payment shall

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be deemed delinquent and shall accrue interest at a rate of 9% per year. Payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter.

3.70.135 Abandonment.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

3.70.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any uniform, nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.70.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due. If the additional payment amount exceeds five percent (5%) of the amount reported, Franchisee shall reimburse City for all audit costs. Any action by the City to recover an underpayment of the franchise fee shall be commenced within two (2) years of the date the original payment was due.

3.70.160 Indemnification and Insurance Requirements.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees which may arise, from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. The Franchisee will not be required to indemnify the City for the negligent or intentional acts of the City or its officials, boards, commissions, agents or employees.

1. The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

- a. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits of \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City; and
 - b. Commercial General Liability Insurance with limits of \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a Per Project basis; and
 - c. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
 - d. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on an "Claims Made" basis it must provide a 24 month tail or reporting period.
2. The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.
 3. Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage, if not replaced.
 4. Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City.

3.70.170 Continuation – Renegotiation and Termination.

The rights, privileges and franchise herein granted shall continue and be in force until June 1, 2024. If any change in federal or state law materially affects any provision of this franchise, the parties agree to negotiate in good faith to amend the affected provisions of this franchise to conform to the changed law.

Upon the fourth year anniversary of this agreement, City shall have absolute discretion to terminate this franchise without cause upon one year written notice to Franchisee.

3.70.180 Breach and remedies.

In addition to any other rights set out elsewhere in this franchise, the City may terminate this franchise if Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise, and the violation continues for ~~60~~ 45 days after Franchisee receives notice of the violation from the City. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this

chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.70.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.70.200 Attorneys' fees and Jurisdiction.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding. Jurisdiction for all litigation will rest exclusively with the courts of the state of Oregon with venue in Linn County.

3.70.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent, shall be null and void. Notwithstanding the previous sentence, Franchisee may assign this franchise without the City's consent (a) to an entity controlled by, under common control with, or controlling Franchisee, or (b) by mortgage, hypothecation, or other security instrument to secure indebtedness.)

3.70.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

ASTOUND Authorized Agent

Date: _____

Printed Name

Title

City of Albany, Authorized Agent

Date: _____

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Created by Mike Murzynsky
Updated: 08/03/2014 08/08/2014

DRAFT

AN ORDINANCE ADOPTING CHAPTER 3.80 OF THE ALBANY MUNICIPAL CODE (AMC) AND GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS SYSTEM FRANCHISE TO ASTOUND BROADBAND, LLC. FOR THE CONSTRUCTION AND OPERATION OF A TELECOMMUNICATION SYSTEM; FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE AND DECLARING AN EMERGENCY.

WHEREAS, the City of Albany has determined that the financial, legal and technical ability of ASTOUND Broadband, LLC. is reasonably sufficient to provide services, facilities, and equipment necessary to meet the future telecommunication needs of the community.

NOW THEREFORE, the people of the City of Albany do ordain as follows;

Section 1: AMC Chapter 3.80.010 through 3.80.220 is amended to read as follows:

3.80.010 Franchise granted.

There is hereby granted by the City of Albany, hereinafter referred to as "City," to ASTOUND BROADBAND, LLC, hereinafter referred to as "ASTOUND", a Washington limited liability company authorized to conduct business in Oregon, their successors and assigns, hereinafter each referred to as "Franchisee," the nonexclusive right and privilege to provide telecommunications service (as defined in ORS 759.005(8)), private telecommunication network (as defined in ORS 759.005(4)) service, and internet access service (as defined in ORS 305.822(1)(b)) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City (collectively, "Public Ways"), poles, wires, conduits, cabinets, appurtenances, and other appliances and conductors (collectively, "Facilities") for all communication purposes. Such Facilities may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary to properly operate and maintain the same unless otherwise regulated.

The scope of this grant allows the installation, maintenance and repair of telecommunications facilities by the Franchisee in the City's rights of way to provide telecommunications services, internet access services, and private line services. In the event the Franchisee intends to provide cable services/system (shall have the meaning specified in the definition of "cable system" in 602(6) of the Cable Communication Policy Act of 1984), Franchisee shall be required to obtain an additional or revised franchise from the City to the extent required by law.

Notwithstanding the foregoing, the City Manager or his/her designee shall have the authority to prescribe which public ways will be used and the location of communications facilities within the public way as may be reasonably necessary to minimize public inconvenience.

3.80.020 Excavations and construction.

It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. Said work shall be done in compliance with state and federal laws, as well as local rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines, and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the proper use of Public Ways, and to cause minimum interference with the rights or

reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 day of notice from the City. Unless approved by the City, no newly overlaid street or newly constructed street shall be excavated by the Franchisee for a period of five years from the time of completion of the street overlay or the street construction. In any such case, Franchisee shall be excused by the City from extending services if a practical alternate route cannot be found. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

3.80.030 Tree trimming.

Subject to the provisions of this ordinance, Franchisee may trim trees when necessary in public rights-of-way for the operation of the lines, wires, cables and antennae or other appurtenances, provided such trimming shall be done by competent employees, agents, or contractors; and it shall be done without cost or expense to the City.

Said tree trimming shall be allowed only after Franchisee makes application and a written permit is approved by the City Manager of the City of Albany or any person appointed by the City Manager to exercise this function. Tree trimming and applications therefore shall be in accordance with City ordinances, and in the absence of any specific ordinance requirement, subject to such terms as the City shall reasonably require for such purposes.

3.80.040 Use of poles.

The City reserves to itself the right at any time to use the poles and other installations of the Franchisee erected or installed under the authority granted in this chapter for any City-owned facilities of whatsoever nature, but it is agreed that such use shall not interfere with the Franchisee's use thereof. Franchisee shall not be required to own or operate any facilities the City is using if the Franchisee ceases to have a need therefore.

3.80.050 Construction and performance bond.

Prior to the commencement of any construction work by the Franchisee, the Franchisee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by the Franchisee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Franchisee. In no event shall the amount of said bond be construed to limit the liability of the Franchisee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond.

3.80.070 Street repair – Expense responsibility.

Whenever Franchisee shall disturb any of the streets for the purpose aforesaid, it or they shall restore the same to good order and condition in accordance with the City of Albany Standard Construction Specifications and the permit issued for the work as soon as practicable without unnecessary delay, and

failing to do so the City shall have the right to fix a reasonable time within which such repairs and restoration of streets shall be completed, and upon failure of such repairs being made by said company, its successors and assigns, the City shall cause such repairs to be made at the expense of Franchisee.

3.80.080 Improvements – Utility obstruction prohibited.

The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. If City vacates any portion of the Public Way containing Facilities, City shall reserve an appurtenant easement for public utilities within that vacated portion within which Franchisee may continue to operate existing Facilities under the terms of this Franchise for at least the remaining term as set forth in Section 3.80.170. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development.

3.80.090 Emergency removal and alternate routing of facilities.

If, at any time, in case of fire, disaster, or other imminent threat to public safety in the franchise territory, it shall become necessary in the reasonable judgment of the City to cut or move any of the wires, cable, amplifiers or other appurtenances to the system of the Franchisee, such cutting or moving may be done in a manner that minimizes disruption to Franchisee's services and Facilities, and City shall provide prompt notice to Franchisee. Any repairs rendered necessary thereby shall be made by the Franchisee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall hold the Franchisee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the City's cutting or moving of Franchisee's facilities. In the event continued use of any street is denied to the Franchisee by the City for any reason, the Franchisee shall provide service to affected subscribers over such alternate routes as shall be determined by Franchisee within a reasonable period of time.

3.80.100 Cables, wires – Rearrangement – Notice.

Whenever the City reasonably determines that the public interest requires that it is necessary to rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the Franchisee to permit the passage of any building, machinery or other object, or to widen/realign City streets, or to make any other alteration or improvement which will require rearrangement of franchisee's facilities or equipment, the said Franchisee will perform such rearrangement within a reasonable period after written notice from the City. Said notice shall bear the approval of such official as Council may designate and shall provide that the costs of such rearrangement shall be borne by any third persons whose activities create the need for rearrangement except that a request by the City of Albany, on behalf of itself or any other unit of government to rearrange aerial cables or wires or other apparatus of the Franchisee shall be accomplished by the Franchisee within 120 days at no cost to the City.

3.80.110 Compliance with laws, rules, and regulations.

At all times during the term of this franchise, Franchisee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Albany, including all agencies and subdivisions thereof. Franchisee shall be subject to the lawful exercise of the police power of the City of Albany and to such reasonable regulations of general applicability as the City may from time to time hereafter by resolution or ordinance provide insofar as such regulations or

ordinances do not materially alter or impair the rights and obligations of Franchisee and are adopted pursuant to the lawful police power of the City, and are adopted and enforced in a reasonable, uniform, and non-discriminatory manner. No provision of this franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Franchisee shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of the facilities of the Franchisee shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, re-arrangements, removals, lowering or raising of aerial cables or wiring or other apparatus shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

3.80.120 Sale of subscriber lists prohibited.

Except as otherwise expressly permitted by law, the Franchisee shall not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency or entity, except as needed to maintain current services or implement new services to subscribers in connection with Franchisee's services.

3.80.130 Payment.

Effective August 13, 2014, and until the franchise's expiration as provided in Section 3.80.170, Franchisee shall pay to the City monthly the greater of: (a) seven percent of gross revenues collected by Franchisee and derived from Franchisee's provision of all services authorized and delivered pursuant to this agreement within the corporate limits of the City or (b). a minimum fee of \$750.00 per month will be due the City for administration of this agreement and for use of the City's right of way. If the seven percent of gross revenues exceeds the minimum fee each month, then the greater amount will be due the City. In lieu of all or part of the franchise fees required under this section, Franchisee may, with the consent of the City, provide to the City in-kind services with a value equal to or greater than the franchisee fees, or portion of franchise fees, that the in-kind services replace. The value of in-kind services will be determined based upon the standard rates Franchisee charges to third parties for substantially equivalent services.

This franchise fee shall be deposited in the U.S. mail, postage prepaid, addressed to the Finance Director of the City and postmarked on or before the last business day of the month following the month revenues were received by the Franchisee. If a payment is not mailed by the date set forth above, the payment shall be deemed delinquent and shall accrue interest at a rate of 9% per year. Payments made by Franchisee will be accepted by the City from the Franchisee, in payment of any separate permit fees that are imposed by the City on Franchisee for street openings, construction or inspection or maintenance of fixtures or facilities. However, Franchisee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions, or permit conditions from the franchise fee required by this chapter.

3.80.135 Abandonment.

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all poles and underground conduits by the former Franchisee at its own expense.

3.80.140 Other fees and charges.

Nothing in this chapter shall give the Franchisee any credit against any uniform, nondiscriminatory business tax to the extent such tax applies to revenues other than those revenues that are the subject of the franchise fee, or any ad valorem property tax now or hereafter levied against real property or personal property within the City, or against any local improvement assessments levied on the Franchisee's property.

3.80.150 Reporting of funds.

With each franchise fee payment, the Franchisee shall furnish a sworn statement or declaration under oath from the Chief Finance Officer or designee, setting forth the amount and calculation of the payment. The statement shall detail the gross linear feet of cable which exists within the Albany City limits and the calculation of the franchise fee paid, and shall specify the nature and amount of all exclusions and deductions from such revenue claimed by the Franchisee in calculating the franchise fee. The City Manager of the City may require the Franchisee to provide any additional information reasonably necessary for administration of the franchise fee. The Franchisee shall keep available and open to inspection by the City Manager of the City, all accounts, books, and other records reasonably necessary for ascertaining the franchise liability. Franchisee shall provide any additional information requested by the City within 48 hours of any such request delivered to Franchisee, to be produced at Albany City Hall, office of the City Manager, during regular office hours. In the event that an audit of the franchise fee payments results in a determination that an additional payment is due to the City, such additional payment shall be subject to interest at the rate of nine percent per annum from the date the original payment was due. If the additional payment amount exceeds five percent (5%) of the amount reported, Franchisee shall reimburse City for all audit costs. Any action by the City to recover an underpayment of the franchise fee shall be commenced within two (2) years of the date the original payment was due.

3.80.160 Indemnification and Insurance Requirements.

The Franchisee shall defend, indemnify and hold harmless the City, its agents, officers and employees from any and all claims, demands, and damages of any kind, including attorney's fees which may arise, from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise. The Franchisee will not be required to indemnify the City for the negligent or intentional acts of the City or its officials, boards, commissions, agents or employees.

The Franchisee shall, for the purposes of carrying out the provisions of this section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the franchise a Certificate of Insurance evidence thereto with the City Recorder, good and sufficient policies covering:

1. Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits of \$1,000,000; franchisee shall ensure that each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City: and
2. Commercial General Liability Insurance with limits of \$5,000,000 per occurrence and \$5,000,000 general aggregate, with the aggregate on a Per Project basis; and
3. Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$5,000,000 each accident.
4. Pollution Liability Insurance with limits of \$5,000,000 Each Incident and in the aggregate. If policy is on a "Claims Made" basis it must provide a 24 month tail or reporting period.

The City of Albany, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.

Upon any material alteration or cancellation of any of the coverage, the Franchisee shall give the City 30 days notice in advance of the effective date of the alteration or cancellation of the coverage, if not replaced.

Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City.

3.80.170 Continuation – Renegotiation and Termination.

The rights, privileges and franchise herein granted shall continue and be in force until August 13, 2024. If any change in federal or state law materially affects any provision of this franchise, the parties agree to negotiate in good faith to amend the affected provisions of this franchise to conform to the changed law. Upon the fourth year anniversary of this agreement, City shall have absolute discretion to terminate this franchise without cause upon one year written notice to Franchisee.

3.80.180 Breach and remedies.

In addition to any other rights set out elsewhere in this franchise, the City may terminate this franchise if Franchisee violates any material provision of the franchise, including but not limited to failing to pay or any suspension of Franchisee's payments of franchise fees to the City under this franchise, failure by Franchisee to submit timely reports regarding the calculation of its gross revenues-based franchise fees to the City, failure to maintain the liability insurance and/or bonds required under this franchise, or failure to comply with all other state, federal or local laws as set forth in this franchise, and the violation continues for 45 days after Franchisee receives notice of the violation from the City. All remedies and penalties under this chapter, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Franchisee by, or pursuant to, this chapter or acceptance of any payment due shall not be waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation itself.

3.80.190 Severability.

In the event any of the provisions of this franchise are deemed to be void, invalid or unenforceable, that provision shall be severed from the remainder of this franchise so as not to cause the invalidity or unenforceability of the remainder of this franchise. All remaining provisions of this franchise shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

3.80.200 Attorneys' fees and Jurisdiction.

In the event an attorney is employed to enforce the provisions of this franchise (including any bankruptcy, insolvency or similar proceedings affecting creditors rights generally), the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred, irrespective of whether any legal proceedings is commenced. If any legal action, arbitration or other proceeding is brought to construe, interpret or enforce the terms of this franchise, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith, both at trial and on any appeal therefrom or petitions for review thereof. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise in enforcing any order, judgment or decree entered in such suit, action or other proceeding. Jurisdiction for all litigation will rest exclusively with the courts of the state of Oregon with venue in Linn County.

3.80.210 Successors and assigns.

This franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Franchisee, however, shall not make any assignment without the written consent of the City, and any assignment made without the City's consent, shall be null and void. Notwithstanding the previous sentence, Franchisee may assign this franchise without the City's consent (a) to an entity controlled by, under common control with, or controlling Franchisee, or (b) by mortgage, hypothecation, or other security instrument to secure indebtedness.

3.80.220 Franchise nonexclusive.

This franchise is not exclusive and shall not be construed as a limitation on the City in granting rights, privileges and authority to other persons similar to, or different from, those granted by this chapter, or in constructing, installing, maintaining or operating any City-owned public utility. In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than Franchisee to enter into the City's streets and public ways for the purpose of conducting business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City, the material provisions thereof shall be reasonably comparable to those contained herein, insofar as this is not in conflict with rules of government, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

Section 2: Franchise effective only upon acceptance of Franchisee.

This franchise is effective on the date provided herein only upon written acceptance of its terms by an authorized representative of Franchisee.

Section 3: Emergency Clause.

In as much as this ordinance is necessary for the immediate preservation of the public peace, health, and safety of the City of Albany, or to facilitate the prompt and timely completion of important City business, an emergency is hereby declared to exist; and this Ordinance shall take effect and be in full force and effect when signed by the Mayor.

Passed by Council: _____

Approved by Mayor: _____

Effective Date: _____

Mayor

ATTEST:

City Clerk