

**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 on the date when Franchisee begins construction of Facilities in the City, 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.

Commencing on March 1, 2016 and annually thereafter, the minimum franchise fee (the "Fee") will be adjusted in accordance with the Consumer Price Index, published by the United States Department of Labor, Bureau of Labor Statistics, as reported each January ("CPI"). The CPI adjustment will be based on the increase in the CPI, if any, computed by reference to the schedule entitled "CPI-U, U.S. City Average, Portland-Salem, All Items, 1982-84 = 100" and calculated using the following formula:  $\text{new year Fee} = (\text{prior year Fee}) \times (\text{CPI} + (\text{prior year Fee}))$ ; provided however, in no event will the increase in the Fee exceed five percent (5%) in one year. In the event the CPI is converted to a different standard reference base or otherwise revised, the determination of the Fee will be made with the use of such conversion factor, formula or table for converting the CPI as may be published by the Bureau of Labor Statistics, or if the Bureau should fail to publish same, then with the use of such conversion factor, formula or table for converting the CPI as may be published by Prentice Hall, Inc., Commerce Clearinghouse or any other nationally recognized publisher of similar statistical information. If the CPI ceases to be published and there is no successor thereto, such other index as the parties may agree in writing will be substituted for the CPI. 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. .

#### **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.

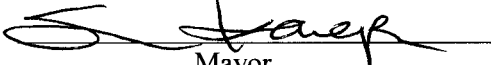
**Section 3:** Emergency Clause.

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: Aug 13, 2014

Approved by Mayor: Aug 13, 2014

Effective Date: Aug 13, 2014

  
Mayor

ATTEST:

  
City Clerk