

# TOWN OF EATONVILLE

## Agenda Staff Report

Agenda Item No.:	_____	Meeting Date:	<u>March 14, 2016</u>
Subject:	<u>Ordinance No. 2016-8 Granting</u>	Prepared by:	<u>Greg Jacoby</u>
	<u>Astound Broadband dba Wave</u>		<u>Town Attorney</u>
	<u>A Non-Exclusive Franchise for the</u>	Atty Routing No:	<u>047-15</u>
	<u>Transmission of Telecommunications</u> <u>in the Town's Public Rights-of-Way</u>	Atty Review Date:	<u>March 8, 2016</u>

**Summary:** Astound Broadband, LLC is one of the wholly owned subsidiaries of WaveDivision Holdings, LLC, which operates Wave Broadband. This franchise grants Wave the authority to use the town's rights-of-way to provide telecommunications services. Wave may be subject to a variety of fees associated with the act of building facilities in the rights-of-way, and having these facilities inspected.

The Town has agreements with other service providers to use the public rights-of-way. The Town's authority to charge those providers for the use of its public rights-of-way depends on the nature of the service. For this analysis, it is worth distinguishing between four different types of services: cable, internet, telecommunications, and telephone. Cable services are subject to a franchise fee. Internet and telecommunications services are classified as "information services" by the Federal Communications Commission and federal law prohibits the imposition of any taxes or fees. Telephone providers, on the other hand, are subject to a utility tax, which in Eatonville is 6% of gross revenue. Accordingly, Wave is not subject to a franchise fee until or unless they choose to provide "cable services." Should Wave decide in the future to offer cable services, they would be required to enter into a separate cable television franchise agreement with the Town. It is possible, however, that the services Wave provides to its customers in the future may include services defined as "network telephone service." In that event, those services will be subject to the Town's 6% telephone utility tax and Section 9 of the franchise agreement provides for quarterly payments to the Town.

The franchise has 10-year term, which will expire in March 2026. There is also a provision for an additional 5-year extension. Wave has also agreed to reimburse the Town its costs of drafting and processing this agreement, not to exceed \$2,000.

Under RCW 35.27.330, the Town Council may not adopt a franchise until five days after its introduction. As a result, staff recommends that Council conduct the "first reading" of the Ordinance at this meeting. If Council has concerns about the Ordinance or wants to propose revisions, those issues should be discussed at the first reading so that staff can address them prior to bringing the Ordinance back for final adoption. If there are not proposed changes, staff will bring back the Ordinance for final adoption on March 28, 2016.

**ORDINANCE NO. 2016-8**

**AN ORDINANCE OF THE TOWN OF EATONVILLE, WASHINGTON, GRANTING ASTOUND BROADBAND, LLC DBA WAVE A NON-EXCLUSIVE FRANCHISE FOR THE TRANSMISSION OF TELECOMMUNICATIONS IN, THROUGH, OVER AND UNDER THE RIGHTS-OF-WAY OF THE TOWN OF EATONVILLE**

**WHEREAS**, Astound Broadband, LLC, a Washington limited liability company (“Grantee”) has requested that the Town grant it the right to install, operate and maintain a fiber optic-based telecommunications system within the public Rights-of-Way of the Town; and

**WHEREAS**, the Eatonville Town Council finds it desirable for the welfare of the Town and its residents that such a non-exclusive franchise be granted to Grantee; and

**WHEREAS**, pursuant to RCW 35.27.330, the Town Council has the authority under state law to grant non-exclusive franchises for the use of its Rights-of-Way; and

**WHEREAS**, the Town is willing to grant the rights requested by Grantee subject to certain terms and conditions; now, therefore,

**BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF EATONVILLE AS FOLLOWS:**

**Section 1. Definitions.** Where used in this Ordinance and the franchise granted hereby (the “Franchise”) these terms have the following meanings:

A. “Affiliate” means an entity which owns or controls, is owned or controlled by, or is under common ownership with Grantee.

B. “Town” means the Town of Eatonville, a municipal corporation of the State of Washington.

C. “Emergency Situation” means an emergency involving likely loss of life or substantial property damage as determined by the Town in good faith.

D. “Facilities” means Grantee’s fiber optic cable system constructed and operated within the Town’s Rights-of-Way, and shall include all cables, wires, conduits, ducts, pedestals and any associated converter, equipment or other facilities within the Town’s Rights-of-Way, designed and constructed for the purpose of providing

§522, as amended, for which a separate franchise would be required.

**Section 2. Franchise Area and Authority Granted.**

A. Facilities within Franchise Area. The Town does hereby grant to Grantee the right, privilege, authority and franchise to construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across Rights-of-Way in the Franchise Area for purposes of telecommunications service as defined in RCW 82.04.065.

B. Permission Required to Enter Onto Other Town Property. Nothing contained in this Ordinance is to be construed as granting permission to Grantee to go upon any other public place other than Rights-of-Way within the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by the Town must be sought on a case by case basis from the Town.

C. Compliance with WUTC Regulations. At all times during the term of the Franchise, Grantee shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission.

**Section 3. Construction and Maintenance.**

A. Grantee's Facilities shall be located, relocated and maintained within the Rights-of-Way in accordance with Eatonville Municipal Code ("EMC") Chapter 12.08 and so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington. Whenever it is necessary for Grantee, in the exercise of its rights under the Franchise, to make any excavation in the Rights-of-Way, Grantee shall obtain prior approval from the Town of Eatonville Public Works Department, pay the applicable permit fees, and obtain any necessary permits for the excavation work pursuant to EMC Title 12. Upon completion of such excavation, Grantee shall restore the surface of the Rights-of-Way to the specifications established within the Eatonville Municipal Code and City of Eatonville Public Works Policies and Standards. If Grantee should fail to leave any portion of the excavation in a condition that meets the Town's specifications per the EMC and Public Works Policies and Standards, the Town may, on five (5) days' notice to Grantee, which notice shall not be required in case of an Emergency Situation, cause all work necessary to restore the excavation to a safe condition. Grantee shall pay to the Town the reasonable cost of such work; which shall include, among other things, the Town's overhead in obtaining completion of said work (provided that in no event shall such overhead exceed 5% of the total costs, fees and expenses of third parties).

B. Any surface or subsurface failure occurring during the term of this Agreement

relocation other than Town's negligence or willful misconduct.

D. If the Town determines that a project necessitates the relocation of the Grantee's existing Facilities, then:

1. Within a reasonable time, which shall be no less than ninety (90) days prior to the commencement of the project, the Town shall provide the Grantee with written notice requiring relocation; provided that in the event of an Emergency Situation beyond the control of the Town and which will result in severe financial consequences to the Town or its citizens or businesses, the Town shall give the Grantee written notice as soon as practicable;

2. The Town shall provide the Grantee with copies of information for such improvement project and a proposed location for the Grantee's Facilities so that Grantee may relocate its Facilities in other Rights-of-Way in order to accommodate the project; and

3. The Grantee shall complete relocation of its Facilities at no charge or expense to the Town so as to accommodate the project at least ten (10) days prior to commencement of the project. In the event of an Emergency Situation as described in this Section, the Grantee shall relocate its Facilities within the reasonable time period specified by the Town.

E. The Grantee may, after receipt of written notice requesting a relocation of its Facilities, submit to the Town written alternatives to such relocation. The Town shall evaluate such alternatives and advise the Grantee in writing if one or more of the alternatives are suitable to accommodate the work, which would otherwise necessitate relocation of the Facilities. If so requested by the Town, the Grantee shall submit additional information to assist the Town in making such evaluation. The Town shall give each alternative proposed by the Grantee full and fair consideration, within a reasonable time, so as to allow for the relocation work to be performed in a timely manner. In the event the Town ultimately determines that there is no other reasonable alternative, the Grantee shall relocate its Facilities as otherwise provided in this Section.

F. The provisions of this Section shall in no manner preclude or restrict the Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any Person or entity other than the Town, where the Facilities to be constructed by said Person or entity are not or will not become Town-owned, operated or maintained Facilities; provided, that such arrangements shall not unduly delay a Town construction project.

G. The Grantee shall indemnify, hold harmless and pay the costs of defending the Town against any and all third party claims, suits, actions, damages, or liabilities for

Grantee is not in compliance with the Franchise after expiration of the thirty (30) day period, the Town may act to remedy the violation and may charge the reasonable costs and expenses of such action to Grantee. The Town may act without the thirty (30) day notice in case of an Emergency Situation. If any failure to comply with the Franchise by Grantee cannot be corrected with due diligence within said thirty (30) day period, then the time within which Grantee may so comply shall be extended for such time as may be reasonably necessary and so long as Grantee works promptly and diligently to effect such compliance. During such a period, if Grantee is not in compliance with the Franchise, and is not proceeding with due diligence in accordance with this section to correct such failure to comply, then the Town may in addition, by ordinance and following written notice to Grantee, declare an immediate forfeiture of the Franchise and all of Grantee's rights and obligations thereunder.

B. In addition to other remedies provided in this Franchise or otherwise available at law, if Grantee is not in compliance with requirements of the Franchise, and if a good faith dispute does not exist concerning such compliance, the Town may place a moratorium on issuance of pending Grantee Right-of-Way use permits until compliance is achieved.

**Section 7. Nonexclusive Franchise.** The Franchise granted by this Ordinance is not and shall not be deemed to be an exclusive franchise. The Franchise granted by this Ordinance shall not in any manner prohibit the Town from granting other and further franchises over, upon, and along the Franchise Area. The Franchise granted by this Ordinance shall not prohibit or prevent the Town from using the Franchise Area or affect the jurisdiction of the Town over the same or any part thereof.

**Section 8. Franchise Term.**

A. Unless earlier terminated by Grantee upon notice to the Town, the Franchise is and shall remain in full force and effect for a period of ten (10) years from and after the effective date of this Ordinance, provided that the term may be extended for an additional five (5) years upon the agreement of Grantee and the Town; and provided further, however, Grantee shall have no rights under the Franchise nor shall Grantee be bound by the terms and conditions of the Franchise unless Grantee shall, within thirty (30) days after the effective date of this Ordinance, file with the Town its written acceptance of the Franchise, in a form acceptable to the Town Attorney.

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

A. With respect to excavations by Grantee and the Town within the Franchise Area, Grantee and the Town shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state or federal law.

B. Upon written request of the Town, Grantee shall provide the Town with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

C. As-built drawings and maps of the precise location of any Facilities placed by Grantee in any Rights-of-Way shall be made available by Grantee to the Town within ten (10) working days of the Town's written request. These plans and maps shall be provided at no cost to the Town and shall include hard copies and/or digital copies in a format commonly used in the telecommunications industry.

**Section 12. Shared Use of Excavations and Trenches.**

A. If either the Town or Grantee shall at any time after installation of the Facilities plan to make excavations in the area covered by the Franchise and as described in this Section, the party planning such excavation shall afford the other, upon receipt of written request to do so, an opportunity to share such an excavation, *provided that*: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs; (2) such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. In addition, pursuant to RCW 35.99.070, the Town may request that Grantee install additional conduit, ducts and related access structures for the Town pursuant to contract, under which Grantee shall recover its incremental costs of providing such facilities to the Town.

B. The Town reserves the right to not allow open trenching for five years following a street overlay or improvement project. Grantee shall be given written notice at least ninety (90) days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five (5) year street trenching moratoriums.

C. The Town reserves the right to require Grantee to joint trench with other franchisees if both entities are anticipating trenching within the same franchise area and provided that the terms of this Section are met.

**Section 13. Insurance.**

A. Grantee shall procure and maintain for the duration of the Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in

B. Grantee may lease the Facilities or any portion thereof to another or provide capacity or bandwidth in its Facilities to another, *provided that*: Grantee at all times retains exclusive control over such Facilities and remains responsible for locating, servicing, repairing, relocating or removing its Facilities pursuant to the terms and conditions of the Franchise.

**Section 15. Abandonment and Removal of Facilities.** Upon the expiration, termination, or revocation of the rights granted under the Franchise, the Grantee shall remove all of its Facilities from the Rights-of-Way of the Town within ninety (90) days of receiving notice from the Town's Public Works Director; *provided however*, that the Town may permit the Grantee's improvements to be abandoned in place in such a manner as the Town may prescribe. Upon permanent abandonment, and Grantee's agreement to transfer ownership of the Facilities to the Town, the Grantee shall submit to the Town a proposal and instruments for transferring ownership to the Town. Any such Facilities which are not permitted to be abandoned in place which are not removed within ninety (90) days of receipt of said notice shall automatically become the property of the Town; *provided however*, that nothing contained within this Section shall prevent the Town from compelling the Grantee to remove any such Facilities through judicial action when the Town has not permitted the Grantee to abandon said Facilities in place.

**Section 16. Miscellaneous.**

A. If any term, provision, condition or portion of this Ordinance shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Ordinance which shall continue in full force and effect. The headings of sections and paragraphs of this Ordinance are for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

B. Grantee shall pay for the Town's reasonable administrative costs in drafting and processing this Ordinance and all work related thereto, which payment shall not exceed \$2,000. Grantee shall further be subject to all published permit fees associated with activities and the provisions of any such permit, approval, license, agreement of other document, the provisions of the Franchise shall control.

C. Failure of the Town to declare any breach or default under this Franchise or any delay in taking action shall not waive such breach or default, but the Town shall have the right to declare any such breach or default at any time. Failure of the Town to declare one breach or default does not act as a waiver of the Town's right to declare another breach or default.

D. Notwithstanding anything to the contrary herein, any determination by the Town with respect to matters contained in this Ordinance and matters related to the Franchise

ATTEST:

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Kathy Linnemeyer  
Town Clerk

APPROVED AS TO FORM:

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Gregory A. Jacoby  
Town Attorney