ENCROACHMENT AGREEMENT
BETWEEN THE CITY OF MENLO PARK
AND WAVE/ASTOUND BROADBAND, LLC,
FOR THE INSTALLATION OF FIBER OPTIC NETWORK FACILITIES
WITHIN THE PUBLIC RIGHT-OF-WAY

This Encroachment Agreement ("Agreement") is dated for identification this 24th day of May, 2016, by and between the CITY OF MENLO PARK (herein termed "City") and Astound Broadband, LLC dba Wave (herein termed "Wave").

RECITALS

WHEREAS, Wave, a limited liability company duly organized and existing under the laws of the State of Washington and authorized by the Public Utilities Commission of the State of California or the Federal Communications Commission, or both, under Certificates of Public Convenience and Necessity to provide telecommunications services, including but not limited to local phone service, interLATA phone service, interLATA phone service, data services, VoIP services, internet access services and other data transport services (the "Services"); and

WHEREAS, in 2005 (CPUC Decision No. 05-10-039) Wave received a Certificate of Public Convenience and Necessity to operate as a telephone corporation to provide the Services from the Public Utilities Commission of the State of California (herein termed "PUC"); and

WHEREAS, Wave desires to construct, install, and maintain Fiber Optic Network Facilities (as defined herein) within the City's Public Right-of-Way (as defined herein) and/or public utility and/or service easements within City.

NOW, THEREFORE, in consideration of the recitals and the mutual promises contained herein, City and Wave agree as follows:

DEFINITIONS

City -- Means the City of Menlo Park, a municipal corporation of the State of California, and includes the duly elected or appointed officers, agents, employees, and volunteers of the City of Menlo Park, individually or collectively.

Fiber Optic Network Facilities or Facilities -- Means fiber optic cables, conduits, converters, splice boxes, cabinets, handholes, manholes, vaults, equipment, drains, surface location markers, appurtenances, and related facilities located by Wave or to be located by Wave in the Public Right-of-Way and used or useful for the delivery or transmission of Telecommunications Services.

LATA -- Means "local access and transport area."
Laws -- Means any order, certificate, judicial decision, statute, constitution, ordinance, resolution, rule, tariff, administrative order, or other requirement of any municipality, county, state, federal, or other agency having joint or several jurisdiction over the parties to this Agreement, in effect either at the time of execution of this Agreement or at any time during the location of the Facilities in the Public Right-of-Way including, without limitation, any regulation or order of an official entity or body. A reference to "Laws" shall include, without limitation, any lawful provision of the Menlo Park Municipal Code or any other City ordinance or regulation.

Wave -- Means Astound Broadband, LLC dba Wave and its lawful successors or assigns.

Public Right-of-Way -- Means the surface, the air space above the surface, and the area below the surface of the public streets, roads, sidewalks, lanes, courts, ways, alleys, boulevards, and places including, without limitation, all public utility easements and public service easements as the same now or may thereafter exist that are under the jurisdiction of the City. This term shall not include any property owned by any person or agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any person.

PW Director -- Means the individual designated as the Director of Engineering Services of the City, including any individual expressly designated to exercise functions with respect to the rights and obligations of the PW Director under this Agreement and any other individual, person, division, department, bureau, or agency of the City as may, from time to time, exercise functions equivalent or similar to those now exercised by the PW Director.

Telecommunications Services -- Means all communications services permitted under Laws.

LIMITATIONS AND RESTRICTIONS

1. Subject to the provisions of this Agreement and all applicable Laws, the City hereby licenses and permits Wave to construct, install, maintain, locate, move, operate, place, protect, reconstruct, reinstall, relocate, remove, and replace the Fiber Optic Network Facilities in, under, over, across and along the Public Right-of-Way for the purposes of providing Telecommunications Services. Any work performed pursuant to the rights granted to Wave under this Agreement shall be subject to the prior review and reasonable approval of the PW Director, which review and approval shall not be unreasonably withheld, delayed or denied.

2. Except as permitted by applicable Laws or this Agreement, in the performance and exercise of its rights and obligations under this Agreement, Wave shall not interfere in any manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles,
overhead and underground electric and telephone wires, electroliers, cable television, and other telecommunications, utility, and municipal property without the approval of the owner(s) of the affected property or properties.

3. Both the City and Wave shall comply with all applicable Laws in the exercise and performance of their respective rights and obligations under this Agreement. Each party preserves all of its rights under all Laws.

4. This Agreement is not a grant by the City of any property interest but is made subject and subordinate to the prior and continuing right of the City to use all the Public Right-of-Way in the performance of its duties, including, but not limited to, public use as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing, and removing sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, electroliers, cable television, and other utility and municipal uses together with appurtenances thereof and with right of ingress and egress, along, over, across, and in said Public Right-of-Way. The preceding sentence shall not be construed to give City the right to damage or destroy Wave's Fiber Optic Network Facilities.

5. This Agreement is made subject to all easements, restrictions, conditions, covenants, encumbrances, and claims of title which may affect the Public Right-of-Way which are recorded in the public record or of which City notifies Wave in writing on or before the date of this Agreement, and it is understood that Wave, at its own cost and expense, shall obtain such permission as may be necessary and consistent with any other existing rights.

6. The construction, installation, operation, maintenance, and removal of said Fiber Optic Network Facilities shall be accomplished without cost or expense to City subject to reasonable approval of the PW Director in such a manner as not to endanger personnel or property, or unreasonably obstruct travel on any road, walk, or other access thereon within said Public Right-of-Way.

COMPLIANCE WITH STANDARDS

7. Wave agrees to keep said Fiber Optic Network Facilities in good and safe condition and free from any nuisance, to the reasonable satisfaction of the PW Director.

SERVICES

8. Wave provides Telecommunications Services in California pursuant to all Laws, including federal law and its Certificates of Public Convenience and Necessity received from the PUC. The type of services Wave offers to its customers through the Fiber Optic Network Facilities in Public Right-of-Way consists of Services as defined above. If the nature and character of Wave's service changes to include additional services, including community antenna television systems or commercial video programming, Wave shall give City as much advance written notice as practicable, up to
and including three (3) months' prior notice, of its intent to change the service provided by way of the Fiber Optic Network Facilities installed under this Agreement, and comply with the City's lawful requirements. Wave acknowledges that any expansion or changes in the regulatory authority over such services may, if mandated by law, require Wave to enter into a new Agreement consistent with the requirements of a City ordinance regulating such services or the expansion or change in services, if such service changes fall under the lawful regulation, jurisdiction, and authority of City in accordance with Laws.

**NO FRANCHISE RIGHTS CREATED**

9. Nothing in this Agreement shall be construed as granting or creating any franchise rights.

**RESERVATION OF RIGHTS**

10. The City is uncertain as to its legal ability to regulate and to impose taxes, charges and fees on the provision or use of fiber optics infrastructure and technology and related activities and services that may be provided pursuant to the installation subject to this Agreement. Therefore, the City reserves any and all rights it may have now or in the future to legally regulate or otherwise condition the use of the fiber optics infrastructure and technology and related activities and services to be provided pursuant to the installation subject to this Agreement.

The City's agreement hereto is not a waiver of and is without prejudice to any right City may have under law to regulate, tax or impose fees or charges on Wave or any right Wave may have under the law to provide services through the fiber optic infrastructure pursuant to state or federal laws, rules or regulations. Wave shall be subject to any future taxes, fees or charges that the City lawfully imposes on the fiber optics infrastructure and fiber optic services in the future. Nothing herein shall affect in any way City's power or right to impose or collect any tax or fee on users or providers of the services to be provided by Wave. Nothing herein is intended to impose regulations or conditions on Wave that City is preempted from imposing by state or federal laws.

**REMOVAL AND RELOCATION**

11. Subject to the provisions of this Section 11, Wave shall remove or relocate, without cost or expense to City, any Fiber Optic Network Facilities installed, used, and maintained under this Agreement if and when made necessary by any City required lawful change of grade, alignment, or width of any street, including the construction, maintenance, or operation of any underground subway or viaduct by City and/or the construction, maintenance, or operation of any other City underground or aboveground facilities. In the event all or any portion of said Public Right-of-Way occupied by said Fiber Optic Network Facilities shall be needed by City or in the event the existence of said Fiber Optic Network Facilities shall be considered detrimental to City governmental activities, including, but not limited to, interference with City construction projects, or it
conflicts vertically and/or horizontally with any proposed City installation, Wave shall remove and relocate said Fiber Optic Network Facilities to such other location or locations on said Public Right-of-Way as may be designated by City. Said removal or relocation shall be completed within ninety (90) days of notification by City; provided that if removal or relocation cannot reasonably be accomplished within ninety (90) days, then Wave shall commence such removal or relocation within such ninety (90) days and thereafter continue the same diligently until completion thereof. In the event said Fiber Optic Network Facilities are not removed or relocated within the period of time specified in the preceding sentence, City may cause the same to be done at the sole expense of Wave.

12. Wave shall, at its sole cost and expense, replace aerial and/or aboveground Fiber Optic Network Facilities, if any, with underground facilities in accordance with the same Rule No. 32 that applies to Pacific Bell, as it now reads or may hereinafter be amended.

13. If any portions of the Fiber Optic Network Facilities covered under this Agreement are no longer used by Wave, or are abandoned for a period in excess of one (1) year, Wave shall notify City and shall either promptly vacate and remove the Facilities at its own expense or, at City’s discretion, may abandon some or all the Facilities in place. After such removal or abandonment, Wave shall have no further obligations to the City.

14. When removal or relocation are required under this Agreement, Wave shall, after the removal or relocation of the Fiber Optic Network Facilities, at its own cost, repair and return the Public Right-of-Way or public utility or service easements on which the Facilities were located to a safe and satisfactory condition in accordance with the construction-related conditions and specifications as established by City according to its standard practice. Should Wave remove the Fiber Optic Network Facilities from the Public Right-of-Way, Wave shall, within ten (10) days after such removal, give notice thereof to City specifying the right-of-way affected and the location thereof as well as the date of removal. Before proceeding with removal or relocation work, Wave shall obtain a street excavation permit from the City.

CONSTRUCTION PERMIT AND FEES

15. Wave shall apply for an encroachment permit for all work and each job within the Public Right-of-Way. Wave shall furnish detailed plans of the work and other such information as required by the PW Director and shall pay all processing, field marking, engineering, and inspection fees prior to issuance of a permit in accordance with the rates in effect at the time of submission of the permit. Said improvements shall be constructed and installed in accordance with the Menlo Park Municipal Code, the requirements of the PW Director, existing easements and right-of-way grants benefiting other utility companies, and as further provided for in the provisions of this Agreement.
PERFORMANCE BOND

16. Prior to the issuance of an encroachment permit, Wave shall provide City with a performance bond naming City as obligee in the amount equal to one hundred percent (100%) of the value of the work to be performed by or on behalf of Wave within and affecting the Public Right-of-Way to guarantee and assure the faithful performance of Wave's obligations under this Agreement. City shall have the right to draw against the surety bond in the event of a default by Wave or in the event that Wave fails to meet and fully perform any of its obligations; provided that Wave is first given written notice of any intent to draw against the bond and an opportunity to cure. Following completion of the work by Wave and its inspection and acceptance by the PW Director, the performance bond shall remain in effect to the extent of ten percent (10%) of the value of the work to guarantee and assure that faithful performance of Wave's obligations under this Agreement for a period of one (1) year from the City's acceptance of the work. City shall have the right to draw against the bond in the event of a default by Wave or in the event that Wave fails to meet and fully perform any of its obligations. The form of the performance bond shall be furnished and reasonably approved by the City.

DAMAGE TO FACILITIES IN PUBLIC RIGHT-OF-WAY

17. Wave shall be responsible for any damage to City street pavements, existing utilities, curbs, gutters, sidewalks or to any private property or improvements to the extent attributable to its installation, maintenance, repair or removal of its Fiber Optic Network Facilities in Public Right-of-Way and shall repair, replace and restore in kind any such damaged facilities at its sole expense and to the approval of City.

18. If Public Right-of-Way to be used by Wave has preexisting installation(s) placed in said Right-of-Way, Wave shall assume the responsibility to verify the location of the preexisting installation and notify City and any third party of Wave's proposed installation. The cost of any work required of such third party or City to provide adequate space or required clearance to accommodate Wave's installation shall be borne solely by Wave.

RECORDS AND FIELD LOCATIONS

19. Wave shall maintain accurate maps and improvement plans of said Fiber Optic Network Facilities located within the City of Menlo Park. The maps and plans are to accurately show in detail the location, size, depth and description of all Facilities as constructed. Prior to City acceptance of the work, Wave shall deliver to the office of the Engineering Department free of charge such maps and plans of all Wave Fiber Optic Network Facilities installed within said Public Right-of-Way. When required by the City for the purpose of confirming the location of Wave Facilities to accomplish the design or construction of public facilities by City, Wave shall, at its sole cost and expense, expose by potholing to a depth of one (1) foot below the bottom of its subsurface Fiber Optic Network Facilities, within thirty (30) days of receipt of a written request from City to do
so. To the fullest extent permitted by Law, City agrees to keep such maps and plans confidential or, in the event of a required disclosure under Laws, to notify Wave of the need for disclosure in order to allow Wave sufficient time to obtain a nondisclosure agreement from the party seeking disclosure or, in the case of a judicial or administrative requirement, a protective order.

20. Wave shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark, at its sole expense, the locations of its underground Fiber Optic Network Facilities upon notification in accordance with the requirements of Section 4216 of the State of California Government Code, as it now reads or may hereinafter be amended.

**HOLD HARMLESS AND INDEMNIFICATION**

21. Wave for itself, its agents, contractors and employees, agrees to indemnify, defend and hold harmless City, its officers, employees, and agents and any successors to City's interest from and against any and all claims, demands, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense (collectively, the "Losses") to the extent arising directly out of the activities of Wave described in this Agreement, except to the extent arising from the City's or its officers', employees', agents', contractors' and subcontractors' willful actions or negligent acts or omissions.

**INSURANCE**

22. Wave shall obtain and maintain at all times during the term of this Agreement comprehensive general and automobile liability insurance protecting Wave in an amount of not less than Two Million Dollars ($2,000,000) per occurrence, including bodily injury and property damage, as a combined single limit or equivalent. Such insurance shall include City, as defined above, as additional insured parties, as its or their interest may appear. Coverage shall be in accordance with the limits specified and the provisions indicated herein. Claims made policies are not acceptable. When an umbrella or excess coverage is in effect, it must follow the form of the underlying coverage.

23. Wave shall file the required original Certificate of Insurance with endorsements with City, subject to City's reasonable approval, and shall clearly state:

a) Policy number; name of insurance company; name, address and telephone number of the agent or authorized representative; name, address and telephone number of insured; project name and address; policy expiration date; and specific coverage amounts.

b) That Wave's insurance is primary.
Wave will provide the City with thirty (30) day's prior notice of any cancellation of the policy. The Certificate, with endorsements and notices shall be mailed to: City of Menlo Park, Engineering Department, 701 Laurel Street, Menlo Park, California, 94025.

24. **Workers Compensation Insurance:** Wave shall obtain and maintain at all times during the term of this Agreement statutory Workers Compensation and Employer's Liability Insurance as required by law, but at least in an amount not less than One Hundred Thousand Dollars ($100,000) and shall furnish City with a certificate showing proof of such coverage.

25. **Insurance Companies:** Insurance companies must be admitted or authorized to do business in California and rated at least B+: IX in Best's Insurance Guide. Non-admitted insurance companies will be considered if they are rated at least A:X in the latest Best's Insurance Guide.

26. **Deductible and Self-Insured Retentions and Proof of Insurance:** Prior to the execution of this Agreement, any deductibles or self-insured retentions must be stated on Certificates of Insurance, and the Certificate of Insurance must be sent to and reasonably approved by the City.

**MISCELLANEOUS**

27. This Agreement shall not be assigned by Wave without the prior written approval of City, which approval shall not be unreasonably withheld, conditioned, or delayed; provided, however, that Wave may assign the rights granted hereunder to a parent, corporate successor, subsidiary, joint venture partner, limited liability company member, or other affiliate of Wave, now or hereinafter existing, by only notice to City of such assignment.

28. This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements or understanding (whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein. This Agreement may not be amended except pursuant to a written instrument signed by all parties.

**SEVERABILITY**

29. If any one or more of the covenants or agreements or portions thereof provided in this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such covenant or covenants, such agreement or agreements, or such portions thereof shall be null and void and shall be deemed separable from the remaining covenants or agreements or portions thereof and shall in no way affect the validity or enforceability of the remaining portions of this agreement.
THIRD-PARTY MODIFICATIONS

30. This Agreement shall be subject to such changes or modifications as may be required or authorized by any regulatory commission in the exercise of its lawful jurisdiction.

TERMINATION

31. This Agreement may be terminated by the City in the event Wave breaches any of its obligations under this Agreement, City notifies Wave of such breach in writing, and Wave fails to fully cure any such breach within six (6) months after Wave's receipt of such notice, or, if such cure cannot reasonably be effected within said six (6) months, Wave fails to commence such cure within said six (6) month period and thereafter diligently continue to cure the default until completion thereof.

32. A failure on the part of any party to perform any material obligation imposed upon such party shall constitute a default and a material breach of this Agreement. Each party shall be entitled to exercise all rights and remedies in the event of a breach, subject to Paragraph 29 above, and hereby reserves all rights under applicable Laws.

33. Wave may terminate this Agreement at any time upon prior written notice to City. Such termination by Wave shall not relieve it of any obligation to the City regarding any existing breach of this Agreement. Within ninety (90) days after such termination Wave shall, at its election unless directed to do so by the City, remove its fiber from the Public Right-of-Way and repair and restore such Right-of-Way to ameliorate all effects caused by such removal. Notwithstanding such termination, Wave's obligations under Paragraph 19 hereof regarding third-party claims arising out of the work or improvements owned or installed by Wave shall survive the termination of this Agreement.

NOTICE

34. Wave's Network Operations Control Center shall be available to City staff twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the Fiber Optic Network Facilities installed pursuant to this Agreement and may be contacted by telephone at:

1-888-317-0488

regarding such problems or complaints. Any service of process shall be made to Wave's registered agent on file with the Office of the Secretary of State of California.

35. All notices given or which may be given pursuant to this Agreement shall be in writing and transmitted by United States mail or by private delivery systems if followed by United States mail or private delivery systems as follows:
To City at: City of Menlo Park
Attention: Director of Public Works
701 Laurel Street
Menlo Park, California 94025
FAX Number: (650) 327-5497

To Wave at: Astound Broadband, LLC
Attn: General Counsel
401 Parkplace Center, Suite 500
Kirkland, WA 98033

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate on the date and year first written herein:

CITY OF MENLO PARK

[Signature]
Justin I.C. Murphy
Director of Public Works

Astound Broadband, LLC

[Signature]
By: James A. Penney
Title: General Counsel

APPROVED AS TO FORM:

[Signature]
City Attorney