

ORDINANCE 1635

AN ORDINANCE OF THE CITY OF LYNDEN GRANTING SOUND INTERNET SERVICES, INC. (DBA POGOZONE) A NON-EXCLUSIVE FRANCHISE FOR THE TRANSMISSION OF TELECOMMUNICATIONS IN, THROUGH, OVER AND UNDER THE RIGHTS-OF-WAY OF THE CITY OF LYNDEN.

WHEREAS, Sound Internet Services, Inc., a Washington for-profit corporation, dba PogoZone, ("Grantee") has requested that the City of Lynden, a Washington municipal corporation ("City") grant it the right to install, construct, erect, operate, maintain, repair, relocate and remove its Facilities in, upon, along and/or across those Rights-of-Way for purposes of offering and providing Telecommunications Services utilizing said Facilities ("Grantee Services"); and

WHEREAS, pursuant to RCW 35A.47.040, the City is authorized to grant one or more non-exclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for railroads and other routes and facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for the transmission and distribution of electrical energy, signals and other methods of communication; and

WHEREAS, the City, having determined that the financial, legal, and technical ability of the Grantee is reasonably sufficient to provide services, facilities, and equipment necessary to construct and operate Grantee's Services to meet the future needs of the community; and

WHEREAS, the City has afforded the public adequate notice and opportunity for comment, and now desires to enter into this Franchise with Grantee for the construction, maintenance and operation of Grantee's Services as provided herein; and

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

WHEREAS, the City Council has the authority under state law to grant franchises for the use of its Rights-of-Way; and

WHEREAS, the City is willing to grant the rights requested by Grantee subject to certain terms and conditions.

NOW, THEREFORE, The City Council of the City of Lynden does ordain 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. "City" means the City of Lynden, a municipal corporation of the State of Washington.

C. "Emergency Situation" means a condition of imminent danger to the health, safety and welfare involving likely loss of life or substantial property damage located within the City including without limitation, damage to persons or property from natural consequences, riots, acts of terrorism or wars and as determined by the City in good faith.

D. "Facilities" means Grantee's fiber optic cable system constructed and operated within the City's Rights-of-Way, and shall include all cables, wires, conduits, ducts, pedestals and any associated converter, equipment or other facilities within the City's Rights-of-Way, designed and constructed for the purpose of providing Telecommunications Service and other lawful services not prohibited by this Ordinance.

E. "Franchise" shall mean the initial authorization or renewal thereof, granted by the City, through this Ordinance, or a subsequently adopted Ordinance, which authorizes construction and operation of the Grantee's Facilities for the purpose of offering Telecommunications Service and other lawful services not prohibited by this Ordinance.

F. "Franchise Area" means the present municipal boundaries of the City, and shall include any additions thereto by annexation or other legal means.

G. "Person" means an individual, partnership, association, joint stock company, trust, corporation, limited liability company or governmental entity.

H. "Rights-of-Way" means the surface and the space above and below City streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, rights of way and similar public areas within the City.

I. "Telecommunications Service" means any telecommunications service as defined in RCW 82.04.065, telecommunications capacity, or dark fiber, provided by the Grantee using its Facilities, either directly or as a carrier for its Affiliates, including, but not limited to, the transmission of voice, data or other electronic information, facsimile reproduction, burglar alarm monitoring, meter reading and home shopping, or other subsequently developed technology that carries a signal over fiber optic cable. Telecommunications Service shall also include non-switched, dedicated and private line, high capacity fiber optic transmission services to firms, businesses or institutions within the City and other lawful services not prohibited by this Ordinance. However, Telecommunications Service shall not include the provision of "cable services", as defined by 47 U.S.C. §522, as amended, for which a separate franchise would be required.

J. "Telephone Service" means any telephone business as defined in RCW 82.16.010, which is the business of providing network telephone service. It includes cooperative or farmer line telephone companies or associations operating an exchange.

Section 2. Franchise Area and Authority Granted.

A. Facilities within Franchise Area. The City does hereby grant to Grantee a non-exclusive franchise, subject to the terms of this ordinance between the City and the Grantee. The Grantee is authorized 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 above.

B. Permission Required to Enter Onto Other City 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 City must be sought on a case by case basis from the City.

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.

D. Except as explicitly set forth herein, this Franchise does not waive any rights that the City has or may hereafter acquire with respect to the Franchise Area or any other City roads, rights of way, property, or any portions thereof. This Franchise shall be subject to the power of eminent domain.

E. City reserves the right to change, regrade, relocate, abandon, or vacate any Right-of-Way within the Franchise Area. If, at any time during the term of this Franchise, the City vacates any portion of the Franchise Area containing Grantee's Facilities, City shall reserve an easement for public utilities within that vacated portion, pursuant to RCW 35.79.030, within which Grantee may continue to operate any existing Grantee's Facilities under the terms of this Franchise for the remaining period set forth under Section 8.

F. Grantee agrees that its use of Franchise Area shall at all times be subordinated to and subject to City and the general public's need for municipal infrastructure, travel, and access to the Franchise Area, as applied in a non-discriminatory manner, except as may be otherwise required by law.

Section 3. Construction and Maintenance.

A. Grantee's Facilities shall be located, relocated and maintained within the Rights-of-Way in accordance with City Engineering Design and Development Standards (hereafter, Standards) and any applicable Lynden Municipal Codes (hereafter, LMC), including but not limited to Chapter 13.16, 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 City of Lynden Public Works Department, pay the applicable permit fees, and obtain any necessary permits for the excavation work. Upon completion of such excavation, Grantee shall restore the surface of the Rights-of-Way to the specifications established within the City's Standards and / or the LMC. If Grantee should leave any portion of the excavation in a condition that does not meet the City's specifications per the Standards or the LMC, the City may, on five (5) days' notice to Grantee, which notice shall not be required in case of an Emergency Situation, cause all work to occur necessary to restore the excavation to a safe condition consistent with the City's Standards. Grantee shall pay to the City the reasonable cost of such work; which shall include, among other things, the City's overhead in obtaining completion of said work, and any engineering, planning, consulting and / or legal fees incurred (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 Franchise caused by any excavation by Grantee shall be repaired to the City's specifications, within thirty (30) days, or, upon five (5) days written notice to Grantee, the City may order all work necessary to restore the damaged area to a safe and acceptable condition and Grantee shall pay the reasonable costs of such work to the City, including City overhead (provided that in no event shall such overhead exceed 5% of the total costs, fees and expenses of third parties).

C. In the event of an Emergency Situation, Grantee may commence such emergency and repair work as required under the circumstances, provided that Grantee shall notify the City Public Works Director in writing as promptly as possible before such repair or emergency work commences, or as soon thereafter as possible, if advanced notice is not reasonably possible. The City may act, at any time, without prior written notice in the case of an Emergency Situation but shall notify Grantee in writing as promptly as possible under the circumstances.

D. Grantee agrees that if any of its actions under the Franchise materially impair or damage any City property, survey monument, or property owned by a third-party, Grantee will restore, at its own cost and expense, the impaired or damaged property to the same condition as existed prior to such action. Such repair work shall be performed and completed to the reasonable satisfaction of the Public Works Director.

Section 4. Location and Relocation of Facilities.

A. Grantee shall place any new Facilities underground where existing telecommunications and cable facilities are located underground. Any new Facilities to be located above-ground shall be placed on existing utility poles. Most utility poles in the City are owned and maintained by Puget Sound Energy. Attachment to existing poles must be documented by a pole attachment agreement. No new utility poles shall be installed in connection with placement of new above-ground Facilities.

B. Grantee recognizes the need for the City to maintain adequate width for installation and maintenance of sanitary sewer, water and storm drainage utilities owned by the City and other public utility providers. Thus, the City reserves the right to maintain clear zones within the Right-of-Way for installation and maintenance of said utilities. The clear zones for each Right-of-Way segment shall be noted and conditioned with the issuance of each permit necessary for Grantee's installation or maintenance of said utilities ("Street Obstruction/Excavation Permit"). If adequate clear zones are unable to be achieved on a particular Right-of-Way, Grantee shall locate in an alternate Right-of-Way, obtain easements from private property owners, or propose alternate construction methods which maintain and/or enhance the existing clear zones.

C. Except as otherwise required by law, Grantee agrees to relocate, remove or reroute its Facilities as ordered by the City, at no expense or liability to the City, except as may be required by RCW Chapter 35.99. Pursuant to the provisions of Section 5, Grantee agrees to protect and save harmless the City from any third-party claims for service interruption or other losses in connection with any such change or relocation except to the extent caused by the City's negligence or willful misconduct.

D. If the City 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 sixty (60) days prior to the commencement of the project, the City shall provide the Grantee with written notice requiring relocation; provided that in the event of an Emergency Situation, the City shall give the Grantee written notice as soon as practicable;

2. The City shall provide the Grantee with 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 City 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 City.

E. The Grantee may, after receipt of written notice requesting a relocation of its Facilities, promptly submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the Grantee in writing if one or more of the alternatives are suitable to accommodate the project, which would otherwise necessitate relocation of the Facilities. If so requested by the City, the Grantee shall submit additional information to assist the City in making such evaluation. The City 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 City, in its sole discretion, ultimately decides against any other proposed 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 City, where the Facilities to be constructed by said Person or entity are not or will not become City-owned, operated or maintained Facilities; provided, that such arrangements shall not unduly delay a City construction project.

G. The Grantee shall indemnify, hold harmless and pay the costs of defending the City against any and all third party claims, suits, actions, damages, or liabilities for delays on City construction projects caused by or arising out of the failure of the Grantee to relocate its Facilities in a timely manner; provided, that the Grantee shall not be responsible for damages due to delays caused by the City or circumstances beyond the reasonable control of the Grantee, such as natural weather related disasters, acts of God, fire, or emergencies relating to war or terrorism.

H. In the event that the City orders the Grantee to relocate its Facilities for a project which is primarily for private benefit, the private party or parties causing the need for such project shall reimburse the Grantee for the cost of relocation in the same proportion as their contribution to the total cost of the project.

I. In the event of an unforeseen Emergency Situation that creates a threat to public safety, health or welfare, the City may require the Grantee to relocate its Facilities at its own expense, any other portion of this Section notwithstanding.

Section 5. Indemnification.

A. Grantee shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all third party claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and reasonable attorney's fees made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of Grantee or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of Grantee's Facilities or in exercising the rights granted Grantee in the Franchise; *provided, however*, such indemnification shall not

extend to injury or damage to the extent caused by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

B. In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify Grantee thereof (and in any event prior to the date that Grantee's rights to defend such claim or demand would be prejudiced), and Grantee shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand, provided further, that in the event any suit or action be begun against the City based upon any such claim or demand, it shall likewise promptly notify Grantee thereof, and Grantee shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election. Prior to entering into a settlement or compromise, Grantee shall notify the City and the City shall have the right to, at its election and at its sole cost and expense, to settle and compromise the claim, demand, suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

Section 6. Default.

A. If Grantee shall fail to comply with any of the provisions of the Franchise, unless otherwise provided in the Franchise, the City will serve upon Grantee a written order to comply within thirty (30) days from the date such order is received by Grantee. If Grantee is not in compliance with the Franchise after expiration of the thirty (30) day period, the City may act to remedy the violation and may charge the reasonable costs and expenses of such action to Grantee which shall be the responsibility of the Grantee. The City 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 shall so comply may 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 City 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 City may place a moratorium on issuance of pending Grantee Street Obstruction/Excavation 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 City 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 City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

Section 8. Franchise Term.

Unless earlier terminated by Grantee upon notice to the City, the Franchise is and shall remain in full force and effect for a period of twenty-five (25) years from and after the effective date of this Ordinance; provided 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 City its written acceptance of the Franchise, in a form acceptable to the City Attorney.

Section 9. Compliance with Codes and Regulations.

A. The rights, privileges and authority herein granted are subject to and governed by this Ordinance, the applicable laws of the State of Washington and the applicable laws of the United States, and all other applicable ordinances and codes of the City of Lynden, as they now exist or may hereafter be amended, including the City's Public Works Policies and Standards. Nothing in this Ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by Grantee shall be performed by Grantee in accordance with applicable federal, state and city rules and regulations, including the City's Public Works Policies and Standards, and any required permits, licenses or posted fees, and applicable safety standards then in effect.

B. In the event that any territory served by Grantee is annexed to the City after the effective date of the Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

C. The Grantee shall be subject to taxes of general applicability including without limitation the City Utility Tax. City acknowledges that Washington law currently limits the tax the City may impose on Grantee's activities hereunder to 6% of revenue derived from the provision of network Telephone Service (i.e., "telephone business" as defined in RCW 82.16.010) and that the federal Internet Tax Freedom Act prohibits the imposition of a tax or other fee on revenue derived by Grantee from Grantee's provision of Internet access services. Grantee agrees that if federal or Washington law is changed, Grantee, following not less than ninety (90) days written notice from the City, will negotiate in good faith with the City to amend the Franchise to expand the revenue base on which such tax is applied. Grantee agrees that should Washington law increase the tax the City may impose on Grantee's activities hereunder applicable to network telephone service, City may in its discretion, increase the tax it imposes for such service.

Section 10. Undergrounding. New Facilities shall be installed underground pursuant to Section 4 of the Franchise. Grantee acknowledges the City's policy of undergrounding of Facilities within the Franchise Area. Grantee will cooperate with the

City in the undergrounding of Grantee's existing Facilities within the Franchise Area. If, during the term of the Franchise, the City shall direct Grantee to underground Facilities within any Franchise Area, such undergrounding shall be at no cost to the City except as may be provided in RCW Chapter 35.99. Grantee shall comply with all federal, state, and City regulations on undergrounding. If the City undertakes any street improvement which would otherwise require relocation of Grantee's above-ground Facilities, the City may, by written notice to Grantee, direct that Grantee convert any such Facilities to underground Facilities.

Section 11. Record of Installations and Service.

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

B. Upon written request of the City, Grantee shall provide the City 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 City within ten (10) working days of the City's written request. The Grantee shall provide an updated system map showing the general location of all facilities located on City property annually each December. These plans and maps shall be provided at no cost to the City 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 City 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 City may request that Grantee install additional conduit, ducts and related access structures for the City pursuant to contract, under which Grantee shall recover its incremental costs of providing such facilities to the City.

B. The City 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 the above limit of five (5) year street trenching.

C. The City 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 connection with the performance of work under the Franchise by Grantee, its agents, representatives or employees in the amounts and types set forth below.

1. Commercial General Liability insurance with limits no less than \$5,000,000 combined single limit for bodily injury (including death) and property damage, including premises operation, products and completed operations and explosion, collapse and underground coverage extensions;

2. Automobile liability for owned, non-owned and hired vehicles with a combined single limit of \$3,000,000 for each accident for bodily injury and property damage; and

3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000 for each accident/disease/policy limit or as required by law.

B. Grantee's insurance coverage shall be primary insurance as respects the City. The policies mentioned above shall name the City, its officers, boards, commissions, agents and employees, as additional insureds. Any insurance, self-insurance or insurance pool coverage maintained by the City shall be in excess of Grantee's insurance and shall not contribute with it.

C. Grantee shall furnish the City with certificates of the foregoing insurance coverage or a copy of amendatory endorsements, including but not necessarily limited to the additional insured endorsement. A certificate of insurance acceptable to the City shall be filed with the City Clerk. The insurance company shall be approved by the state Insurance Commissioner pursuant to RCW 48, and have at least an A- Best Rating.

D. Grantee shall have the right to self-insure any or all of the above-required insurance, subject to approval by the City, in City's sole discretion.

E. Grantee's maintenance of insurance as required by the Franchise shall not be construed to limit the liability of Grantee to the coverage provided by such insurance, or otherwise limit City's recourse to any remedy to which the City is otherwise entitled at law or in equity. Grantee shall promptly deliver to the City written notice of cancellation or reduction in coverage thirty (30) days in advance of the effective date thereof.

Section 14. Assignment.

A. All of the provisions, conditions, and requirements herein contained shall be binding upon Grantee, and no right, privilege, license or authorization granted to Grantee hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold. Notwithstanding the foregoing, Grantee, without the consent of, but upon notice to the City, may assign this agreement in whole or in part to: (a) an Affiliate (as defined in this Ordinance); or (b) a lender for security purposes only provided that, in the event of such an assignment Grantee shall retain exclusive control over its Facilities and remain fully responsible for performance of all terms and conditions of this Franchise.

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 City within ninety (90) days of receiving notice from the City's Public Works Director; *provided however*, that the City may permit the Grantee's improvements to be abandoned in place in such a manner as the City may prescribe. Upon permanent abandonment, and Grantee's agreement to transfer ownership of the Facilities to the City, the Grantee shall submit to the City a proposal and instruments for transferring ownership to the City. Nothing contained within this Section shall prevent the City from compelling the Grantee to remove any such Facilities through judicial action when the City has not permitted the Grantee to abandon said Facilities in place.

Section 16. Records Inspection.

A. Grantee agrees to supply, upon written request, at no cost to City, any information reasonably requested by the City to coordinate municipal functions with Grantee activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum, as-built drawings of Grantee's Facilities, installation inventory, and maps and plans showing the location of existing or planned facilities within City. Said information may be requested either in hard copy and/or electronic format, if reasonably possible in a format compatible with City's database system, as now or hereinafter existing, including City's geographic information Service (GIS) data base.

B. Any information submitted shall be for informational purposes only and shall not obligate Grantee to undertake any specific improvement, nor shall such plan be construed as a proposal to undertake any specific improvements. Grantee shall use its

commercially reasonable efforts to keep the City informed of its long-range plans for coordination with City's long-range plans.

C. The City agrees not to disclose the information described in this Section to third parties unless required to do so pursuant to the Washington Public Records Act, RCW Chapter 42.56. The City agrees to notify Grantee of the anticipated disclosure of such information at least five (5) days prior to such disclosure and provide Grantee the opportunity to prevent the disclosure via court order.

Section 17. 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 City's reasonable administrative costs including without limitation, legal review, 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 or other document related to this Franchise. In the event of a conflict between said permit, approval, license, agreement or other document, with the provisions of this Franchise, this Franchise shall control.

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

D. Notwithstanding anything to the contrary herein, any determination by the City with respect to matters contained in this Ordinance and matters related to the Franchise shall be made in accordance with applicable federal law, including without limitation any applicable rules and regulations promulgated by the Federal Communications Commission, applicable state law and in a reasonable and non-discriminatory manner.

E. Dispute Resolution, Venue and Applicable Law – In the event of a dispute arising hereunder, venue for such disputes shall solely be the Whatcom County Superior Court. The applicable governing law shall be the Laws of the State of Washington.

Section 18. Notice. Any notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

City: Public Works Director City of Lynden 300 4th St Lynden, WA 98264	Grantee: Sound Internet Services, Inc. dba: PogoZone Internet 114 W. Magnolia St. Suite 400-147 Bellingham, WA 98225 Attn: JD Sinclair
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Notice shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the United States Mail in the case of regular mail, or the next day in the case of overnight delivery.

Section 19. Effective date. This Ordinance, being in compliance with RCW 35A.47.040, shall be in force and effect five (5) days from and after its passage, approval and publication, but only if the Grantee has endorsed this ordinance and accepted the terms and conditions thereof.

PASSED BY THE CITY COUNCIL BY AN AFFIRMATIVE VOTE, _____ IN FAVOR _____ AGAINST, AND SIGNED BY THE MAYOR THIS ____ DAY OF SEPTEMBER, 2021.

MAYOR SCOTT KORTHUIS

Attest:

Approved as to Form:

City Clerk Pamela D. Brown

City Attorney Robert A. Carmichael

Acceptance:

Sound Internet Services, Inc. dba PogoZone for itself, its successors and assigns, accepts and agrees to be bound by all lawful terms, conditions, and provisions of the Franchise.

By: _____
Name: JD Sinclair
Title: President

Date: _____