



City of Woodland

REPORT TO MAYOR AND CITY COUNCIL

AGENDA ITEM

TO: THE HONORABLE MAYOR
AND CITY COUNCIL

DATE: Nov. 6, 2007

SUBJECT: Cable Franchise Transfer from Charter
Communications to Wave Broadband

Report in Brief

Council is asked to adopt a Resolution rescinding Resolution 4858, adopted September 4, 2007. WAVE Broadband requested extensive revisions to this Resolution to clarify details of the assignment and transfer of the franchise and associated conditions. These conditions have been reviewed extensively by the City Attorney's office and provide no substantive change or cause for concern to the City.

It is recommended that Council adopt Resolution _____, "A Resolution of the City Council of the City of Woodland Conditionally Authorizing the Assignment and Ultimate Transfer of Control of a Cable Television Franchise by Charter Communications Properties, LLC, to WAVE Division VI, LLC, thus rescinding Resolution 4858 previously adopted.

Background

Charter Communication Properties, LLC holds the franchise authorizing the construction, operation and maintenance of a cable television system within the City of Woodland. Such franchise agreement allows for a change in ownership and control of the franchise. Charter entered into an Asset Purchase Agreement in April of 2007 with WAVE Division VI, LLC to effectuate this transfer.

The City Municipal Code Section 8A.250(d) and the Cable Television Consumer Protection and Competition Act, provides for the City to review and approve the financial, technical and legal qualifications of the transferee. The City has so reviewed and has concluded that WAVE Division VI has met the requisite financial, technical and legal qualifications necessary.

The proposed Resolution sets forth those changes as agreed by Charter and WAVE, meets the parameters of the Code and law and protects the City.

Discussion

In June of 2007 the staff met with representatives from Charter and WAVE Division VI, LLC, to discuss the assumption of the Cable Franchise. They presented us with detailed information as required by the FCC and the City’s Municipal Code. Extensive review has been undertaken by City staff and Andrew Morris of the City Attorney’s Office who is the staff member that specializes in Cable Franchise agreements. Staff’s review of all documents has been found to be in order and meet all of the requirements for transfer. Documents reviewed were the Federal Communications Form 394 “Application for Franchise Authority Consent to Assignment or Transfer of Control of Cable Television Franchise” submission materials as required by FCC, the “Asset Purchase Agreement” between Charter Communications Entertainment II, LLC and WAVE DIVISION VI, LLC, statement of “Assignee’s Financial Qualifications”, statement of “Assignee’s Technical Qualifications”, and “WAVE DIVISION Holdings and Subsidiaries Independent Auditor’s Report and Consolidated Financial Statements”.

As noted, the Code precludes Council from unreasonably refusing to consent to the change in ownership, and it requires the transferee to demonstrate qualification in three areas: Financial, Legal and Technical. As described above, through review of this transaction has found that the application meets the financial, legal and technical qualifications necessary and as prescribed by law, and neither review found any reason to challenge the transfer. In fact, the change in ownership will go largely unnoticed by subscribers to Charter Communications. The new name of the entity will be Wave Division VI, LLC.

Fiscal Impact

City Code requires the new owner to reimburse engineering, administrative, publication and legal expenses incurred by the City in connection with the transfer within 60 days following adoption of the Resolution. As well, the Agreement assumes the franchise cost at 5% of the gross revenues of the cable company to be paid in quarterly installments on August 1, November 1, February 1 and May 1 and apply to the preceding three month proceeds. During 2007, we have received three installments from Charter in the amount of \$189,492, with the final installment estimated at \$62,500, with total anticipated revenue of \$251,992. Receipts from 2006 were \$245,595. The new owner will be billed for the Attorney fees associated with the review of the application, contract and determination of adequacy, as well as, preparation of Council and related documents relating to the transfer.

Public Contact

Posting of the City Council agenda, distribution to current mailing lists for the Agenda, dissemination to the representatives from Charter and WAVE, posting on the City WEB site and on the WAVE Public Access channel.

Recommendation for Action

It is recommended that Council adopt Resolution _____ to provide for the transfer of the Cable Franchise Agreement from Charter Communications to WAVE Division VI, WAVE Broadband and to repeal previously adopted Resolution 4858.

Prepared by: Sue Vannucci
City Clerk

Mark G. Deven
City Manager

Attachment: Resolution

RESOLUTION NO. ____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF WOODLAND CONDITIONALLY AUTHORIZING THE ASSIGNMENT AND ULTIMATE TRANSFER OF CONTROL OF A CABLE TELEVISION FRANCHISE BY CHARTER COMMUNICATIONS PROPERTIES, LLC TO WAVE DIVISION VI, LLC

WHEREAS, the City Council of the City of Woodland has previously adopted Resolution No. 4858, conditionally authorizing the assignment and ultimate transfer of the cable television franchise currently held by Charter Communications Properties, LLC ("Franchisee") to Wave Division VI, LLC dba Wave Broadband ("New Franchisee"); and

WHEREAS, Franchisee and New Franchisee have requested that the City Council adopt a second, revised resolution in order to clarify certain details of the assignment and transfer of the franchise and the conditions of the City Council's authorization thereof; and

WHEREAS, Charter Communications Properties, LLC ("Franchisee") is the authorized holder of a franchise ("Franchise") that authorizes the construction, operation, and maintenance of a cable television system within the City of Woodland ("City"), and has the requisite corporate authority to effectuate a change in ownership and control of the Franchise; and

WHEREAS, Charter Communications Entertainment II, LLC, ("CCE-II") entered into an Asset Purchase Agreement dated April 26, 2007 (the "Agreement") with Wave Division VI, LLC dba Wave Broadband ("Wave" or "New Franchisee"), pursuant to which the System and the Franchise will be transferred to Wave (the "Wave Transfer"); and

WHEREAS, immediately prior to the Wave Transfer, Franchisee will transfer the Franchise to CCE-II ("Charter Transfer") solely as an accommodation and not for the purpose of CCE-II becoming the franchisee under the Franchise; and

WHEREAS, upon the closing of the Charter Transfer and the Wave Transfer, Wave will be the new franchisee under the Franchise; and

WHEREAS, Wave has filed Federal Communications Commission ("FCC") Forms 394 to provide details regarding the Charter Transfer and the Wave Transfer and to establish the qualifications of the New Franchisee; and

WHEREAS, in accordance with Section 8A.250(d) of the Woodland Municipal Code and the Cable Television Consumer Protection and Competition Act of 1992, the City has the right to review and to approve the financial, technical, and legal qualifications of the Transferee in connection with the proposed assignment of the Franchise; and

WHEREAS, the staff of the City has reviewed the documentation that accompanied FCC Form 394 and, based upon the representations set forth in that documentation, has concluded that New Franchisee has the requisite financial, technical, and legal qualifications to adequately perform, or to ensure the performance of, all obligations required of the Franchisee under the Franchise, and that New Franchisee will be bound by all existing terms, conditions, and obligations of the Franchise as it currently exists or as it may be modified or superseded prior to the closing of the transaction involving the Franchise; and

WHEREAS, prior to the date of this resolution, and pursuant to Section 8A.190 of the Woodland Municipal Code, New Franchisee has reimbursed or caused to be reimbursed the City's engineering, administrative, publication and legal expenses incurred in connection with the City's processing of the Charter Transfer and Wave Transfer;

BE IT NOW THEREFORE RESOLVED AS FOLLOWS:

SECTION 1. Resolution No. 4858 is hereby revoked, rescinded, and of no further effect.

SECTION 2. In accordance with Sections 8A.150 and 8A.250(d) of the Woodland Municipal Code, the City Council hereby determines that the New Franchisee has complied with all requirements of the City's Municipal Code ("Code"), including but not limited to Chapter 8A, with the exception of the reimbursement obligations specified in Section 8A.190, which shall be fulfilled no later than upon the close of the Wave Transfer, and possesses the requisite financial, technical, and legal qualifications to adequately perform the obligations of the Franchisee under the Franchise, and consents to and approves the proposed assignment of the Franchise from Franchisee to New Franchisee, under the terms and conditions set forth in this resolution.

SECTION 3. The City Council hereby approves and consents to the Charter Transfer and the Wave Transfer, subject to New Franchisee's compliance with Section 8A.190 of the City's Municipal Code, the standards and practices required by FCC regulations and applicable law with regard to the transfer of cable television franchises and the operation of the Franchise, and the terms of this Resolution.

SECTION 4. The City's approval of the transfer does not constitute a waiver of any rights or remedies that the City may have as a result of any existing or future non-compliance on the part of Franchisee or New Franchisee with the applicable provisions of the franchise agreement and/or applicable law, and the City may assert at any time (subject to all applicable statutes of limitations) any non-compliance and pursue all remedies available to the City for any non-compliance.

SECTION 5. Upon the close of the Wave Transfer, New Franchisee shall assume and be bound by the obligations under the Franchise arising after such closing, and neither Franchisee nor CCE-II will have any obligations or liabilities arising under the Franchise after such closing.

SECTION 6. Within 30 days after the closing of the Wave Transfer, New Franchisee shall execute and return to the City an acceptance of this Resolution together with an executed Assignment and Assumption Agreement in substantially the form attached hereto as Exhibit A which shall become effective upon the close of the Wave Transfer. The Mayor is authorized to execute that document as evidence of the consent of the City to the assignment and assumption of all rights and obligations under the Franchise. If this condition is not timely satisfied, the authorization and consent of the City to the proposed assignment and ultimate transfer of control as provided for in this Resolution shall be revoked and rescinded without further action by the City, and the FCC Form 394 application will be denied in all respects. In such event, the City Manager is authorized and directed to give written notice to all affected parties of that revocation and rescission, which will be deemed to be without prejudice to the right of those parties to submit a new FCC Form 394 to the City if required by the Franchise or local ordinance.

SECTION 7. The City Clerk is directed to transmit a copy of this resolution to the following persons:

Shannon Dunham
Vice President & Senior Counsel
Charter Communications
12405 Powerscourt Dr.
St. Louis, MO 63131
Phone: (314) 543-2418
Fax: 314-965-6640
Email: sdunham@chartercom.com

Jim Penney, Executive Vice President
Business and Legal Affairs
Wave Broadband and Astound Broadband
401 Kirkland Parkplace, Suite #500
Kirkland, WA 98033
Phone: (425) 896-1891
Fax: (425) 896-1911
Email: jpenney@wavebroadband.com

SECTION 8. The Mayor shall sign this resolution and the City Clerk shall attest and certify to the passage and adoption thereof.

PASSED, APPROVED AND ADOPTED this _____th day of November, 2007.

DAVID M. FLORY
Mayor

ATTEST:

SUE VANNUCCI
City Clerk

ACCEPTED BY:

WaveDivision VI, LLC

By: _____

EXHIBIT A
ASSIGNMENT AND ASSUMPTION AGREEMENT
AND
GUARANTEE OF ASSIGNEE'S OBLIGATIONS
(CABLE TELEVISION FRANCHISE AGREEMENT)

THIS ASSIGNMENT AND ASSUMPTION AGREEMENT ("Agreement") is entered into this ___ day of _____, 2007, by and between Charter Communications Entertainment II, LLC, a Delaware limited liability company ("Assignor"), and Wave Division VI, LLC, a Washington limited liability company ("Assignee"), and has been executed by the City of Woodland, a California municipal corporation ("Franchise Authority") solely to reflect the Franchise Authority's consent to this Agreement.

RECITALS:

A. This Agreement is made pursuant to that certain Asset Purchase Agreement dated as of April 26, 2007, by and between Assignor and Assignee (as the same may be amended, the "Purchase Agreement"). Capitalized terms used and not otherwise defined herein shall have the meanings given to them in the Purchase Agreement

B. Assignor has received an assignment (the "Charter Transfer") from Charter Communications Properties, LLC ("CCP"), of a franchise between the Franchise Authority and CCP that authorizes the construction, operation, and maintenance of a cable television system within the City of Woodland, California ("Franchise Agreement"). Assignor and CCP are affiliates, each wholly-owned by the same indirect parent, and the Charter Transfer has been consummated solely as an accommodation in connection with the Wave Transfer, and not for the purpose of Assignor becoming the franchisee under the Franchise.

C. The Purchase Agreement provides for, among other things, the sale, assignment, transfer, conveyance and delivery to Assignee of the Assets and for the assumption by Assignee of certain liabilities, for the consideration and on the terms and conditions set forth in the Purchase Agreement, and the parties desire to carry out the intent and purpose of the Purchase Agreement with respect to the Franchise Agreement by the execution and delivery of this instrument evidencing the vesting in Assignee of all right, title and interest in and to the Franchise Agreement and Assignee's assumption of the Assignor's obligations under the Franchise Agreement as contemplated by the Purchase Agreement (the "Closing"). All other Assets are being transferred by a separate instrument.

D. Subject to the prior consent of the Franchise Authority, Assignor desires to assign and transfer to Assignee (the "Wave Transfer"), and Assignee desires to assume, all rights, duties, and obligations under the Franchise Agreement from and after Closing.

THE PARTIES AGREE AS FOLLOWS:

1. Assignor hereby assigns sells, grants, transfers, sets over, bargains, remises, releases and delivers to Assignee, its successors and assigns, all of Assignor's rights, duties, and obligations under the Franchise Agreement, free and clear of all Encumbrances other than Permitted Encumbrances.

2. As partial consideration for Assignee's receipt of the Franchise Agreement, Assignee covenants and agrees with Assignor and with the Franchise Authority to assume all rights and to abide by and to pay, discharge, perform and fulfill, as and when due or required all duties, liabilities and obligations of the Assignor under the Franchise Agreement. Notwithstanding anything to the contrary contained herein or in the Purchase Agreement, Assignee's assumption of the duties, liabilities and obligations of the Assignor under the Franchise Agreement shall not be construed to defeat, impair or limit in any way any right or remedy of Assignee to contest or dispute the validity or amount of any such duty, liability or obligation.

3. Assignor hereby covenants that it shall do, execute and deliver any and all such further acts and instruments that Assignee may reasonably request in order to more fully effectuate Assignor's sale and assignment of the Franchise Agreement to Assignee as set forth herein. Assignee hereby covenants that it shall do, execute and deliver any and all such further acts and instruments that Assignor may reasonably request in order to more fully effectuate Assignee's assumption of the Franchise Agreement as set forth herein.

4. Franchise Authority consents to the Charter Transfer and the Wave Transfer , **contingent upon the execution by WaveDivision Holdings, LLC, as guarantor, of the "Guarantee of Assignee's Obligations" that is attached as Schedule 1 to this Agreement.**

TO EFFECTUATE THIS AGREEMENT, the parties have caused this Assignment and Assumption Agreement to be executed by their authorized representatives as of the date set forth below the authorized signature.

“ASSIGNOR”

CHARTER COMMUNICATIONS
PROPERTIES, LLC,
a Delaware limited liability company

By: _____
(Authorized Officer)

Title: _____

Date: _____

“ASSIGNEE”

WAVE DIVISION VI, LLC,
a Washington limited liability company

By: _____
(Authorized Officer)

Title: _____

Date: _____

“FRANCHISE AUTHORITY”

CITY OF WOODLAND

By: _____
Mayor

Date: _____

APPROVED AS TO FORM:

CITY ATTORNEY

ATTEST:

CITY CLERK

SCHEDULE 1

to

ASSIGNMENT AND ASSUMPTION AGREEMENT

AND

GUARANTEE OF ASSIGNEE'S OBLIGATIONS

GUARANTEE

GUARANTEE, dated as of July XX, 2007, made by WAVEDIVISION HOLDINGS, LLC, a Washington limited liability company ("Guarantor"), in favor of the City of Woodland, California, ("Beneficiary").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Beneficiary to timely consent to the transfer of the cable television franchise issued by Beneficiary and currently held by Charter Communications Properties, LLC (the "Franchise") to Charter Communications Entertainment II, LLC, a subsidiary of Charter Communications Properties, LLC and then to Wave Division VI, LLC, a subsidiary of Guarantor ("Transferee") in accordance with the Federal Communications Commission Form 394 filed by Transferee, Guarantor agrees as follows:

I. Interpretive Provisions

- A. The words "hereof," "herein" and "hereunder" and words of similar import, when used in this Guarantee, shall refer to this Guarantee as a whole and not to any particular provision of this Guarantee, and section and paragraph references are to this Guarantee unless otherwise specified.
- B. The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.
- C. For purposes of this Guarantee, "Transaction" shall refer to the Asset Purchase Agreement, dated April 26, 2007, entered into by Franchisee and Transferee (as amended, the "Agreement") under which Transferee will acquire assets of Franchisee, including the Franchise effective as of the date of the closing of the Transaction (the "Closing").

II. Guarantee.

- A. From and after the Closing, Guarantor unconditionally and irrevocably guarantees to Beneficiary the timely and complete performance of all Transferee obligations under the Franchise (the "Guaranteed Obligations"). The Guarantee is an

irrevocable, absolute, continuing guarantee of payment and performance, and not a guarantee of collection. If Transferee fails to pay any of its monetary Guaranteed Obligations in full when due in accordance with the terms of the Franchise, Guarantor will promptly pay the same to Beneficiary or procure payment of same to Beneficiary. Anything herein to the contrary notwithstanding, Guarantor shall be entitled to assert as a defense hereunder any defense that is or would be available to Transferee under the Franchise or otherwise.

- B. This Guarantee shall remain in full force and effect until the earliest to occur of: (i) performance in full of all Guaranteed Obligations at a time when no additional Guaranteed Obligations remain outstanding or will accrue to Transferee under the Franchise; and (ii) subject to any required consent of the Beneficiary, any direct or indirect transfer of the Franchise from Transferee to (or direct or indirect acquisition of Transferee or any successor thereto by (whether pursuant to a sale of assets or stock or other equity interests, merger or otherwise)) any other person or entity a majority of whose equity and voting interests are not beneficially owned and controlled, directly or indirectly, by Guarantor; and (iii) Grantee commences serving customers in the City of Woodland, California pursuant to authority granted by the Digital Infrastructure and Video Competition Act of 2006; and (iv) agreement by the Beneficiary to terminate this Guarantee. Upon termination of this Guarantee in accordance with this Section II(B), all contingent liability of Guarantor in respect hereof shall cease, and Guarantor shall remain liable solely for Guaranteed Obligations accrued prior to the date of such termination.

III. Waiver. Guarantor waives any and all notice of the creation, renewal, extension or accrual of any of the Guaranteed Obligations and notice of or proof of reliance by Beneficiary upon this Guarantee or acceptance of this Guarantee. Guarantor waives diligence, presentment, protest and demand for payment to Transferee or Guarantor with respect to the Guaranteed Obligations; provided, however, that Guarantor shall be furnished with a copy of any notice of or relating to default under the Franchise to which Transferee is entitled or which is served upon Transferee at the same time such notice is sent to or served upon Transferee.

IV. Representations and Warranties. Each of Guarantor and Beneficiary represents and warrants that: (i) the execution, delivery and performance by it of this Guarantee are within its corporate, limited liability company or other powers, have been duly authorized by all necessary corporate, limited liability company or other action, and do not contravene any law, order, decree or other governmental restriction binding on or affecting it; and (ii) no authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution, delivery and performance by it of this Guarantee, except as may have been obtained or made, other than, in the case of clauses (i) and (ii), contraventions or lack of authorization, approval, notice, filing or other action that

would not, individually or in the aggregate, impair or delay in any material respect such party's ability to perform its obligations hereunder.

V. Binding Effect. This Guarantee, when executed and delivered by Beneficiary, will constitute a valid and legally binding obligation of Guarantor, enforceable against it in accordance with its terms, except as such enforcement may be limited by applicable bankruptcy, insolvency or other similar laws applicable to creditors' rights generally and by equitable principles (whether enforcement is sought in equity or at law).

VI. Notices. All notices, requests, demands, approvals, consents and other communications hereunder shall be in writing and shall be deemed to have been duly given and made if served by personal delivery upon the party for whom it is intended or delivered by registered or certified mail, return receipt requested, or if sent by facsimile, provided that the facsimile is promptly confirmed by telephone confirmation thereof, to the party at the address set forth below, or such other address as may be designated in writing hereafter, in the same manner, by such party:

To Guarantor and Transferee:

WaveDivision Holdings, LLC
401 Kirkland Park Place, Suite 500
Kirkland, WA 98033
Telephone: (425) 576-8200
Fax: (425) 576-8221
Attention: Steve Weed, CEO, and Jim Penney, EVP

To Beneficiary:

City of Woodland
300 First Street
Woodland, CA 95695
Telephone: (530) 661-5800
Fax: (530) 661-5813
Attention: City Manager

VII. Integration. This Guarantee represents the agreement of Guarantor with respect to the subject matter hereof and there are no promises or representations by Guarantor or Beneficiary relative to the subject matter hereof other than those expressly set forth herein.

VIII. Amendments in Writing. None of the terms or provisions of this Guarantee may be waived, amended, supplemented or otherwise modified except by a written instrument executed by Guarantor and Beneficiary, provided that any right, power or privilege of Beneficiary arising under this Guarantee may be waived by Beneficiary in a letter or agreement executed by Beneficiary.

IX. Section Headings. The section headings used in this Guarantee are for convenience of reference only and are not to affect the construction hereof or be taken into consideration in the interpretation hereof.

X. No Assignment or Benefit to Third Parties. This Agreement shall be binding upon and inure to the benefit of the parties hereto. Nothing in this Agreement, express or implied, is intended to confer upon anyone other than Guarantor and Beneficiary and their respective permitted assigns, any rights or remedies under or by reason of this Guarantee.

XI. Expenses. All costs and expenses incurred in connection with this Guarantee and the transactions contemplated hereby shall be borne by the party incurring such costs and expenses.

XII. Counterparts. This Guarantee may be executed by Guarantor and Beneficiary on separate counterparts (including by facsimile transmission), and all of said counterparts taken together shall be deemed to constitute one and the same instrument.

XIII. Governing Law. This guarantee shall be governed by and construed and interpreted in accordance with the laws of the state of California without regard to principles of conflicts of law.

XIV. Waiver of Jury Trial. Each party hereto hereby irrevocably and unconditionally waives trial by jury in any legal action or proceeding relating to this guarantee and for any counterclaim therein.

TO EFFECTUATE THIS GUARANTEE, each of the undersigned has caused this Guarantee to be duly executed and delivered by its duly authorized officer on the date set forth below the authorized signature.

“GUARANTOR”

WAVEDIVISION HOLDINGS, LLC

By: _____

Name: _____

Title: _____

Date: _____

“BENEFICIARY”

CITY OF WOODLAND

By: _____

Name: _____

Title: _____

Date: _____

SACRAMENTO\AMORRIS\43774.6