

ORDINANCE NO. 152

AN ORDINANCE RELATED TO RE-AUTHORIZING THE GRANT OF CABLE COMMUNICATIONS FRANCHISE IN THE CITY OF WASHBURN; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE

BE IT ORDAINED, BY THE CITY OF WASHBURN, NORTH DAKOTA THAT THE FOLLOWING SECTIONS BE RECREATED AND AMENDED:

SECTION 1. SHORT TITLE AND DEFINITIONS

1. Short Title. This Ordinance shall be known and cited as the Cable Communications Regulatory Ordinance.

2. Definitions. For the purposes of this Ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory. The word "may" is directory and discretionary and not mandatory.

(a) "Basic Cable Service" means any service tier which includes the lawful retransmission of local television broadcast signals and any public, educational, and governmental access programming required by the franchise to be carried on the basic tier. Basic Cable Service as defined herein shall not be inconsistent with 47 U.S.C. §543(b)(7).

(b) "Cable Programming Service" means any Video Programming provided over a Cable System, regardless of service tier, including installation or rental of equipment used for the receipt of such Video Programming, other than:

Video Programming carried on the Basic Service Tier;

Video Programming offered on a pay-per-channel or pay-per-program basis; or

A combination of multiple channels of pay-per-channel or pay-per-program Video Programming offered on a multiplexed or time-shifted basis so long as the combined service:

Consists of commonly-identified Video Programming; and

Is not bundled with any regulated tier of service.

Cable Programming Service as defined herein shall not be inconsistent with the definition as set forth in 47 U.S.C. §543(1)(2) and 47 C.F.R. 76.901(b) (1993).

(c) "Cable Service" means the one-way transmission to Subscribers of Video Programming, or other programming service, and Subscriber interaction, if any, which is required for the selection of such Video Programming or other programming service.

(d) "Cable System" or "System" shall have the meaning ascribed to it in federal law.

(e) "Council" means the Washburn, North Dakota City Council.

(f) "Franchise" means an initial authorization, or renewal thereof issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise,

which authorizes the construction or operation of a Cable System or other MVPD facility.

- (g) "Franchise Area" means the area within the legal boundaries of the Grantor.
- (h) "Grantee" is the entity which is granted a Franchise in City pursuant to this Ordinance, its agents and employees, lawful successors, transferees or assignees.
- (i) "Grantor" is the City of Washburn, North Dakota.
- (j) "Gross Revenue" means only those amounts of monthly revenue received from Basic and Premium Cable Service. The term "Gross Revenues" shall not include any other revenue billed or received by the Grantee imposed directly on any Subscriber or user by any municipality, state, or other governmental unit and collected by Grantee for such governmental unit nor shall it include bad debt.
- (k) "Multichannel Video Program Distributor" or "MVPD" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, an OVS provider, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.
- (l) "Open Video Services" or "OVS" means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.
- (m) "Pay Television" means the delivery over the System of pay-per-channel or pay-per-program audio-visual signals to Subscribers for a fee or charge, in addition to the charge for Basic Cable Service or Cable Programming Services.
- (n) "Person" is any person, firm, partnership, association, corporation, company, or other legal entity.
- (o) "Standard Installation" means any residential installation which can be completed using a drop of one hundred fifty (150) feet or less.
- (p) "Street" means the surface of, and the space above and below, any public street, road, highway, freeway, lane, alley, path, court, sidewalk, parkway, or drive, or any easement or right-of-way now or hereafter held by Grantor.
- (q) "Subscriber" means any Person who lawfully receives Cable Service.
- (r) "Video Programming" means programming provided by, or generally considered comparable to programming provided by a television broadcast station.

SECTION 2. GRANT OF AUTHORITY AND GENERAL PROVISIONS

1. Franchise Required. It shall be unlawful for any Person or Entity to construct, operate or maintain a Cable System or MVPD facility or to provide Cable Service, Video Programming or other MVPD services, including OVS, in the Grantor without a Franchise authorizing the same, unless applicable federal or State law prohibits the Grantor's enforcement of such a requirement.

2. Grant of Franchise. Any Franchise that is granted in City shall be subject to the terms and conditions contained herein.

3. Grant of Nonexclusive Authority.

- (a) A Grantee shall have the right and privilege to construct, erect, operate, and maintain, in, upon, along, across, above, over and under the Streets, public ways and public places now laid out or dedicated and all extensions thereof, and additions thereto in Franchise Area, poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in Franchise Area of a Cable System.
- (b) A Franchise shall be nonexclusive, and Grantor reserves the right to grant a similar use of said Streets to any MVPD at any time, provided, however, that all Franchises shall contain the same terms and conditions as this Franchise in order that one MVPD is not granted a competitive advantage over another. In the event a MVPD commences operation without a Franchise or is granted a Franchise to operate by the Grantor, the terms and conditions of which do not comply with this Ordinance, other Grantees shall have the right either (i) to opt in to the competitor's Franchise by providing ten (10) days prior written notice to the Grantor; or (ii) to petition the Grantor for modifications to its Franchise, in which case the Grantor shall work in good faith with the affected Grantee(s) to review and adopt modifications which the Grantee(s) deem necessary, review and approval by Grantor shall not be unreasonably denied.
- (c) Before granting an additional franchise, the Grantor shall give written notice to all Grantees of any new application, identifying the applicant for such additional Franchise and providing at least thirty (30) days prior notice of the date, time, and place at which the Grantor shall consider and/or determine whether such additional Franchise should be granted.
- (d) Every Franchise shall apply to the entire service area of the Grantor, as it exists now or may later be configured.
- (e) In the event Grantor grants one or more additional Franchises or one or more non-franchised MVPD's commence providing Cable Service in the Grantor, a Grantee shall have the right to terminate or reduce the term of this Franchise in its sole discretion.
- (f) Neither City nor Grantee(s) may unilaterally alter the material rights and obligations set forth in this Franchise. In the event of a conflict between any other ordinance and this Franchise, the Franchise shall control.

4. Franchise Term. The term of the Franchise is set to be in effect for a period of ten (10) years after the current expiration date of October 15, 2019 to October 15, 2029.

5. Territorial Area Involved. A Franchise shall be granted for the corporate boundaries of Grantor, as it exists from time to time. In the event of annexation by Grantor, or as development occurs, any new territory shall become part of the area covered. Grantor shall advise Grantee whenever property is annexed. Whenever the Grantee shall receive a request for service from at least fifteen (15) residences within 1,320 cable-bearing strand feet (one-quarter cable mile) of its trunk or distribution cable, it shall extend its system to such subscribers at no cost to said subscribers for system extension, other than the usual collection fees for all subscribers; provided that such extension is technically feasible, and if it will not adversely affect the operation, financial condition, or market development of the system, or as provided for under section 2 item 6 of this franchise.

6. Subscriber charges for extensions of service. No subscriber shall be refused service arbitrarily. However, for unusual circumstances, such as a subscriber's request to locate his cable drop underground, existence of more than one hundred fifty (150) feet of distance from distribution cable to connection of service to subscribers, or a density of less than fifteen (15) residences per 1,320 cable-bearing strand feet of trunk or distribution cable, service may be made available on the basis of a capital contribution in aid of construction, including cost of material, labor and easements. For the purpose of determining the amount of capital contribution in aid of construction to be borne by the Grantee and subscribers in the area in which service

may be expanded, the Grantee will contribute an amount equal to the construction and other costs per mile, multiplied by a fraction whose numerator equals the actual number of residences per 1,320 cable-bearing strand feet of its trunks or distribution cable, and whose denominator equals fifteen (15) residences. Subscribers who request service hereunder, will bear the remainder of the construction and other costs on a pro rata basis. The Grantee may require that the payment of the capital contribution in aid of construction borne by such potential subscribers be paid in advance.

7. Written Notice. All notices, reports, or demands required to be given in writing under this Ordinance shall be deemed to be given when delivered personally to any officer of Grantee or Grantor's Administrator of this Ordinance as specified in a Franchise.

SECTION 3. APPLICATION FOR NEW FRANCHISE

1. An application for an initial Franchise to provide Video Programming shall be in writing on a form provided by the City which shall contain where applicable:

- (a) Applicant name and business address of Applicant.
- (b) A statement as to the proposed Franchise Area, and whether Applicant holds an existing authorization to access the Rights-of-Way in the City and a map of the areas where such authorization exists if for an area other than the entire City.
- (c) Resume of prior history of Applicant, including the legal, technical, and financial expertise of Applicant in the Cable Service field.
- (d) List of officers, directors, and managing employees of Applicant and resumes of each.
- (e) A proposed construction and schedule to provide Cable Service or Video Programming to Subscribers.
- (f) A certificate of insurance consistent with the requirements of this Ordinance.
- (g) A description of the Cable System the Applicant intends to build, including its capacity, the types of equipment proposed for use and the Cable Services or Video Programming which will be offered.
- (h) A description of the financial qualifications of the Applicant to construct and operate the System including a balance sheet, income statement sources and uses of funds statement and pro forma projections for at least three (3) years of operation subsequent to System completion.
- (i) A proposed plan for Public, Educational, and Government Access Channels, including funding, facilities, and equipment and capacity on the System to be dedicated for educational and governmental use if applicable.

2. The Initial Franchise Application may be evaluated according to the following criteria, and approved within one-hundred eighty (180) days after City deems the Application is complete. In the event Applicant is already authorized to occupy the Rights-of-Way, the time for review and approval will be ninety (90) days.

- (a) The evidence of legal, technical and financial ability required in the Applicant's proposal will be such as to assure the ability to complete the entire System within a reasonable time from the date the Franchise is granted. The City will also consider the Applicant's ability to operate the System and provide the necessary Cable Services or Video Programming in compliance with the terms of this Ordinance.
- (b) The City Administrator or designee shall prepare a report and make his or her recommendations respecting such application to the City Council

- (c) A public hearing shall be set prior to any grant of a Franchise, at a time and date approved by the City Council. Within thirty (30) days after the close of the hearing, the City Council shall make a decision based upon the evidence received at the hearing as to whether or not the Franchise(s) should be granted, and, if granted subject to what conditions.
- (d) The City may consider any additional information that it deems applicable.

SECTION 4. CONSTRUCTION AND OPERATIONS STANDARDS

- 1. Conditions on Street Use.
 - (a) A Grantee shall obtain all required permits from Grantor before commencing any construction upgrade or extension of the System.
 - (b) The Grantor shall impose no special permit fees upon a Grantee for access to the public way.
 - (c) Conditions of street occupancy. All transmission and distribution structures, poles, other lines, and equipment installed or erected by the Grantee pursuant to the terms hereof shall be located so as to cause a minimum of interference with the proper use of public ways and with the rights and reasonable convenience of property owners who own property that adjoins any of such public ways.
 - (d) Restoration of public ways. If during the course of Grantee's construction, operation, or maintenance of the system there occurs a disturbance of any public way by the Grantee, it shall, at its expense, replace and restore such public way to a condition reasonably comparable to the condition of the public way existing immediately prior to such disturbance.
 - (e) If at any time during the period of this Franchise Grantor shall elect to alter, or change the grade or location of any Street, alley or other public way, a Grantee shall, at its own expense, upon reasonable notice by Grantor, not less than five (5) business days, remove and relocate its poles, wires, cables, conduits, manholes and other fixtures of the System. If Grantor reimburses other occupants of the Street, a Grantee shall be likewise reimbursed.
 - (f) A Grantee shall, on request of any Person holding a moving permit issued by Grantor, temporarily move its wires or fixtures to permit the moving of buildings with the expense of such temporary removal to be paid by the Person requesting the same in advance of the move, and a Grantee shall be given not less than ten (10) days advance notice to arrange for such temporary changes.
 - (g) A Grantee shall have the authority to trim any trees upon and overhanging the Streets, alleys, sidewalks, or public easements of Grantor so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee. The Grantee shall reasonably compensate the franchising authority for any damages caused by such trimming, or shall, in its sole discretion and at its own cost and expense, reasonably replace all trees or shrubs damaged as a result of any construction of the system undertaken by the Grantee. Such replacement shall satisfy any and all obligations the Grantee may have to the franchising authority pursuant to the terms of this section.
 - (h) Nothing contained in this Ordinance shall relieve any Person from liability arising out of the failure to exercise reasonable care to avoid injuring Grantee's facilities.

- (i) In areas where all other utility lines are placed underground, Grantee shall construct and install its cables, wires and other facilities underground. In any area where one or more public utilities are aerial, Grantee may construct and install its cables, wires and other facilities from the same pole with the consent of the owner of the pole.
- (j) A Grantee shall at all times construct and operate its System in accordance with applicable FCC Technical specifications.
- (k) In the event that the use of any part of the system is discontinued for any reason for a continuous period of twelve (12) months, or in the event such systems or property has been installed in any street or public place without complying with the requirements of this Ordinance, or the rights granted hereunder have been terminated, cancelled or have expired, Grantee shall, subject to the rights of the City to acquire the system as specified in Section 3.1.(j) herein, promptly remove from the streets, or public places all such property and poles of such system other than any which the City may permit to be abandoned in place. In the event of such removal, Grantee shall promptly restore the street or other area from which such property has been removed to a condition satisfactory to the City.
- (l) Any property of Grantee to be abandoned in place shall be abandoned in such a manner as the City may prescribe. Upon permanent abandonment of the property of Grantee in place, it shall submit to the City an instrument to be approved by the City, transferring to the City the ownership of such property.
- (m) All cable and passive equipment for cable television reception service installed by Grantee at a subscriber's location shall remain the property of Grantee and Grantee shall have the right to remove said cable and equipment. Upon termination of service to any subscriber, the Grantee shall promptly remove all its above ground facilities and equipment from the premises of such subscriber upon his request.
- (n) No poles or other wire-holding structures shall be erected by the Grantee without prior approval of the designated representative of the City Council with regard to locations, height, type or any other pertinent aspect, which approval shall not be unreasonably withheld. However, no locations of any pole or wire-holding structure of the Grantee shall be a vested interest and such poles or structures shall be removed or modified by the Grantee at its own expense whenever the City Council or its designated representative determines that the public convenience would be enhanced thereby.
- (o) Where poles or other wire-holding structures already existing in use in serving the City are available for use by Grantee, but it does not make arrangements for such use, the City Council may require the Grantee to use such poles and structures if it determines that the public convenience would be enhanced thereby and the terms of the use available to the Grantee are just and reasonable.
- (p) Where the City or a public utility serving the City desires to make use of poles or other wire-holding structures of the Grantee but agreement therefore with the Grantee cannot be reached, the City Council may require the Grantee to permit such use for such consideration as is just and reasonable and upon such terms as the Council determines the use would enhance the public convenience and would not unduly interfere with the Grantee's operations.
- (q) Subject to Federal Law and Regulation, Grantee shall at all times maintain on file with the Finance Officer a schedule setting forth all rates and charges to be made to subscribers for basic cable service, including installation charges.

- (f) During the term hereof, the City may regulate rates only if authorized to do so by Federal Communications Commission regulations and then such regulation shall only be in accordance with the provisions of such regulations.

SECTION 5. SYSTEM PROVISIONS AND PUBLIC SERVICES

1. Operation and Maintenance of System. A Grantee shall render effective service, make repairs promptly, and interrupt service only for good cause and for the shortest time possible.

2. Service to Schools and City. A Grantee shall, subject to the line extension requirements of Section 2.5 herein, provide one (1) Drop and one (1) outlet of Basic Cable Service at no cost to those locations listed in Appendix A, attached and annexed to this Agreement. Grantor understands the value of these no charge services will be included in the Five percent (5%) franchise fee cap. The outlets of Basic Service shall not be used to distribute or sell services in or throughout such buildings, nor shall such outlets be located in areas open to the public. Users of such outlets shall hold the Grantee harmless from any and all liability or claims arising out of their use of such outlets, including but limited to, those arising from copyright liability. The Grantee shall not be required to provide an outlet to such buildings where the drop line from the feeder cable to said building or premises exceeds 150 cable feet or unless the appropriate governmental entity agrees to pay the incremental cost of such drop line in excess of 150 cable feet. If additional outlets of Basic Service are provided to such buildings, the building owner shall pay the usual installation fees associated therewith, including, but not limited to, labor and materials.

- (a) PEG Channel. Grantee, if requested by Grantor, shall dedicate one (1) channels for public, educational and governmental ("PEG") programming. Every Subscriber receiving Cable Service over a Grantee's System shall receive the PEG channel at no additional charge. The PEG channel shall be provided as part of Basic Cable Service and shall not be moved without the City's written approval which shall not be unreasonably withheld. The Grantee shall cablecast all PEG programming produced or created by the City, or its designee, including any live programming. The City may use the PEG channel for any lawful purpose including to cablecast programming produced by the City, local educational institutions or other public institutions, or members of the public.
- (b) The City shall have sole responsibility for managing and controlling the PEG channel. The City shall establish rules for the programming, operation or administration of the PEG channel, which shall be subject to Grantee's review and approval. Grantee shall have no responsibility whatsoever for the programming, operation or administration of the PEG channel.
- (c) City understands that pursuant to federal law, a Grantee may collect the Capital Grant from Subscribers as a separate line item on Subscriber bills, in addition to the price for Cable Service. Any payments by Grantee to City in support of PEG Access shall not be deemed "Franchise Fees" within the meaning of Section 622 of the Cable Act (47 U.S.C. §542).

3. Emergency Use. In the case of any emergency or disaster, a Grantee shall, upon request of the City Council, make available its facilities to the City for emergency use. A Grantee shall comply with the emergency alert requirements of federal law.

SECTION 6. OPERATION AND ADMINISTRATION PROVISIONS

1. Indemnification of Grantor.

- (a) A Grantee shall indemnify, defend, and hold harmless Grantor, its officers, boards, committees, councils, elected officials, employees and agents, from and against all liability, damages, and penalties which they may legally be required to pay as a result of the exercise of a Franchise granted pursuant to this Ordinance, except claims covered by worker's compensation insurance or

any claims arising from or related to Grantor's negligence. Nothing in this Ordinance relieves a Person from liability arising out of the failure to exercise reasonable care to avoid injuring the Grantee's facilities while performing work completed with grading, regarding, or changing the line of a Street or public place or with the construction or reconstruction of a sewer or water system.

- (b) In order for Grantor to assess its rights to be indemnified, defended, and held harmless, Grantor must with respect to each claim:
 - (1) Promptly notify a Grantee in writing of any claim or legal proceeding which gives rise to such right;
 - (2) Afford Grantee the opportunity to participate in and fully control any compromise, settlement or other resolution or disposition of any claim or proceeding; and
 - (3) Fully cooperate with reasonable requests of Grantee, at Grantee's expense, in its participation in, and control, compromise, settlement or resolution or other disposition of such claim or proceeding subject to paragraph two (2) above.

2. Insurance. A Grantee shall maintain in full force and effect at its sole expense, a comprehensive general liability insurance policy, including contractual liability coverage, in protection of Grantor in its capacity as such. The policies of insurance shall be in the sum of not less than One Million Dollars (\$1,000,000) for personal injury or death of any one Person, and Three Million Dollars (\$2,000,000) for personal injury or death of two or more Persons in any one occurrence, Five Hundred Thousand Dollars (\$500,000) for property damage to any one Person and One Million Dollars (\$1,000,000) for property damage resulting from any one act or occurrence.

3. Franchise Fee.

- (a) Grantee will pay Franchising Authority an annual franchise fee in the amount up to five percent (5%) maximum of Grantee's annual Gross Revenues. Any change in the franchise fee requires a minimum sixty (60) day notice to the Grantee. Grantor currently sets the franchise fee at three percent (3%).
- (b) The franchise fee shall be payable monthly. The payment shall be made within thirty (30) days of the end of each of Grantee's fiscal month, together with a brief report showing the basis for the computation.
- (c) The period of limitation for recovery of any franchise fee payable hereunder shall be three (3) years from the date on which payment by Grantee is due.

4. Compliance and monitoring. The Grantee shall make available for inspection by authorized representatives of the City, its books, accounts and financial records at reasonable times and upon reasonable advance notice for the purpose of verifying payments. Grantee shall not be required to maintain any books for longer than five years. Grantee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature. Grantee shall not be required to provide subscriber information in violation of applicable law regarding subscriber privacy.

SECTION 7. REVOCATION, ABANDONMENT, AND SALE OR TRANSFER

1. Grantor's Right to Revoke. Grantor reserves the right to revoke, terminate or cancel a Franchise, if after strictly following the procedures required by Section 7.2 herein, it is determined that a Grantee has violated any material provision of its Franchise or this Ordinance and has failed to substantially cure said violation.

2. Procedures for Revocation.

- (a) Grantor shall provide a Grantee with written notice of a cause for revocation and the intent to revoke and shall allow Grantee sixty (60) days subsequent to receipt of the notice in which to substantially cure the violation or to provide adequate assurance of performance. Together with the notice required herein, Grantor shall provide Grantee with written findings of fact which are the basis of the revocation.
- (b) Grantee shall be provided the right to a public hearing affording due process before the Grantor Council prior to revocation, which public hearing shall follow the sixty (60) day notice provided in paragraph (a) above. Grantor shall provide Grantee with written notice of its decision together with written findings of fact supplementing said decision.
- (c) After the public hearing and upon written determination by Grantor to revoke the Franchise, Grantee may appeal said decision with an appropriate state or federal court or agency.
- (d) During the appeal period, the Franchise shall remain in full force and effect unless the term thereof sooner expires.
- (e) Upon satisfactory correction by Grantee of the violation upon which said notice was given, the initial notice shall become void.

3. Sale or Transfer of Franchise. No sale or transfer of a Franchise shall take place without the written approval of the Grantor, which approval shall not be unreasonably withheld. All of the rights, privileges, obligations, duties, and liabilities created by this Franchise shall pass to and be binding upon the successor or assign of a Grantee. Said approval shall not be required where a Grantee grants a security interest in its Franchise and assets to secure indebtedness.

SECTION 8. MISCELLANEOUS PROVISIONS

1. Franchise Renewal. Any renewal of a Franchise shall be done in accordance with applicable federal law.

2. Amendment of Franchise. A Grantee and Grantor may agree to amend a Franchise. Such written amendments may be made at any time.

3. Marketing. A Grantee shall have the right to conduct direct selling in the Franchise Area, including door to door sales, notwithstanding any peddler or solicitor laws or regulations to the contrary.

4. Severability. If any section, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, unenforceable or unconstitutional by a decision of any authority or court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance and the remainder shall remain in full force and effect.

SECTION 9. PUBLICATION, EFFECTIVE DATE

1. Publication; Effective Date. This Ordinance shall be in full force and effect from and after its passage, approval, and publication, as required by law.

First Reading: 12/9/2019

Second Reading: 1/13/2020

ATTEST:

CITY OF WASHBURN, NORTH DAKOTA

By: _____

By: _____

Its _____

Its _____

ACCEPTED: This Franchise is accepted and we agree to be bound by its terms and conditions.

Dated: _____

MIDCONTINENT COMMUNICATIONS
By: Midcontinent Communications Investor, LLC
Its Managing Partner

By _____

Its: _____