

## TITLE 12 – FRANCHISES AND EASEMENTS

### CHAPTER 12-1 – MDU

#### CHAPTER 12-2.1 – CABLE COMMUNICATIONS

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### 12-1-1 Section I

For convenience, herein, said municipal corporation is designated and referred to as “Municipality” and Montana-Dakota Utilities Co. is designated and referred to as “Grantee”. Any reference to either includes their respective successors and assigns.

### 12-1-2 Section II

There is hereby granted to Montana-Dakota Utilities Co., a corporation, Grantee, its successors and assigns, subject to the limitations herein stated, the right and franchise to occupy and use the streets, alleys, and public grounds of the municipality as now, or hereafter constituted, for the purpose of constructing, maintaining, and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for all public and private uses.

### 12-1-3 Section III

Grantee shall maintain an efficient distribution system for furnishing electric energy for public and private use during twenty-four (24) hours of each day.

### 12-1-4 Section VI

This franchise shall not be exclusive and shall not be construed to prevent the Municipality from granting to any other party the right to use the streets, alleys and public grounds of the Municipality for like purpose.

### 12-1-5 Section V

The Municipality reserves the right it may have, under its police power, or otherwise, to control or regulate the use of said streets, alleys and public grounds by Grantee.

### 12-1-6 Section VI

Grantee shall indemnify and save and hold the Municipality harmless from any loss or damage due to the construction, installation, and maintenance of the distribution system, and its use of the streets, alleys and public grounds of the Municipality.

### 12-1-7 Section VII

Grantee shall have the right to assign this franchise to any part, or corporation, but all obligations of the grantee hereunder shall be binding upon its successors and assigns.

### 12-1-8 Section VIII

Within thirty (30) days after passage and final approval of this Ordinance, Grantee shall file with the Clerk or Finance Officer of the Municipality, its written acceptance of this franchise.

## **12-1-9 Section IX**

The franchise shall continue and remain in full force and effect for a period of twenty (20) years from the date of its final passage by the governing body of the Municipality.

## **CHAPTER 12-2 – MOBRIDGE CABLE TV**

Repealed. (2005ORD815) (1998ORD746) (1972ORD485)

## **CHAPTER 12-2.1 CABLE COMMUNICATIONS**

### **12-2.1-1. SHORT TITLE AND DEFINITIONS**

**Short Title.** This Franchise Ordinance shall be known and cited as the Cable Communications Ordinance.

**Definitions.** For the purposes of this Franchise, 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.

**"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) (1993).

**"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(l)(2) (1993) and 47 C.F.R. 76.901(b) (1993).

**"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.

**"Cable System" or "System"** means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes Video Programming and which is provided to multiple Subscribers within a community, but such term does not include:

a facility that serves only to retransmit the television signals of one or more television broadcast stations;

a facility that serves Subscribers without using any public right-of-way;

a facility of a common carrier which is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201 et seq., except that such facility shall be considered a Cable System (other than for purposes of 47 U.S.C. § 541 (c) to the extent such facility is used in the transmission of Video Programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand services;

an open video system that complies with 47 U.S.C. § 653; or

any facilities of any electric utility used solely for operating its electric utility systems.

"City" means City of Mobridge, a municipal corporation, in the State of South Dakota, acting by and through its City Council.

"City Council" means the Mobridge, South Dakota City Council.

"Drop" means the cable that connects the ground block on the Subscriber's residence to the nearest feeder cable of the System.

"FCC" means the Federal Communications Commission and any legally appointed, designated or elected agent or successor.

"Franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to 47 U.S.C. § 546) 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.

"Grantee" is Midcontinent Communications, G.P., its agents and employees, lawful successors, transferees or assignees.

"Installation" means the connection of the System from feeder cable to the point of connection, including Standard Installations and custom installations.

(l) "Lockout Device" means an optional mechanical or electrical accessory to a Subscriber's terminal which inhibits the viewing of a certain program, certain channel, or certain channels provided by way of the Cable Communication System.

(m) 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.

(n) "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.

(o) "Person" is any person, firm, partnership, association, corporation, company, or other legal entity.

(p) "Standard Installation" means any residential installation which can be completed using a Drop of one hundred fifty (150) feet or less.

(q) "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 City.

(r) "Subscriber" means any Person who lawfully receives Cable Television Service.

(s) "Video Programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station. (2005ORD815)

## 12-2.1-2 GRANT OF AUTHORITY AND GENERAL PROVISIONS

**Franchise Required.** It shall be unlawful for any Person to construct, operate or maintain a Cable Communications System or Open Video System or other multichannel video service in City unless such Person or the Person for whom such action is being taken shall have first obtained and shall currently hold a valid Franchise Ordinance. It shall also be unlawful for any Person to provide OVS Service or Cable Service in City unless such Person shall have first obtained and shall currently hold a valid Franchise.

**Grant of Franchise.** This Franchise is granted pursuant to the terms and conditions contained herein.

### **Grant of Nonexclusive Authority.**

The Grantee shall have the right and privilege to construct, erect, operate, and maintain, in, upon, along, across, above, over and under the Streets, alleys, public ways and public places now laid out or dedicated and all extensions thereof, and additions thereto in City, poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures

necessary for the maintenance and operation in City of a Cable Communications System as herein defined.

This Franchise shall be nonexclusive, and City reserves the right to grant a similar use of said Streets, alleys, public ways and places, to any Person at any time during the period of this Franchise, provided, however, that any additional Cable Franchise grants shall be under the same substantive terms and conditions as this Franchise.

Grantee shall have the authority to use City easements, public rights-of-way, Streets and other conduits for the distribution of Grantee's System. The City shall require all developers of future subdivisions to allow and accommodate the construction of the System as part of any provisions for utilities to serve such subdivisions.

Franchise Term.

(a) This Franchise shall be in effect for a period of fifteen (15) years from the date of acceptance by Grantee ("Effective Date"), unless renewed, revoked or terminated sooner as herein provided. City may conduct a review of Grantee's performance at the fifth and tenth anniversary of the Effective Date.

Previous Franchises. Upon acceptance by Grantee as required by Section 12 herein, this Franchise shall supersede and replace any previous Ordinance or Agreement granting a Franchise to Grantee to own, operate and maintain a Cable Communications System within City. Ordinance No. 681 is hereby expressly repealed.

Rules of Grantee. The Grantee shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable said Grantee to exercise its rights and perform its obligation under this Franchise.

Territorial Area Involved. This Franchise is granted for the corporate boundaries of City, as it exists from time to time. In the event of annexation by City, or as development occurs, any new territory shall become part of the area covered, provided, however, that Grantee shall not be required to extend service beyond its present System boundaries unless there is a minimum of ten (10) homes per quarter cable mile as measured from the last fiber node or terminating amplifier. Access to Cable Service shall not be denied to any group of potential residential cable Subscribers because of the income of the residents of the area in which such group resides. Grantee shall be given a reasonable period of time to construct and activate cable plant to service annexed or newly developed areas.

Written Notice. All notices, reports, or demands required to be given in writing under this Franchise shall be deemed to be given when delivered personally to any officer of Grantee or City's Administrator of this Franchise or forty-eight (48) hours after it is deposited in the United States mail in a sealed envelope, with registered or certified mail postage prepaid thereon, addressed to the party to whom notice is being given, as follows:

If to City:                      City of Mobridge  
   114 1st Ave. E.  
   Mobridge, South Dakota 57601-2692  
   Attn: City Administrator

If to Grantee:                    Midcontinent  
   Communications, G.P.  
   5001 W. 41st Street  
   Sioux Falls, SD 57106-1424  
   Attn: W. Tom Simmons

Such addresses may be changed by either party upon notice to the other party given as provided in this Section.

**Drops to Public Buildings.** Grantee shall provide Standard Installation of one (1) cable Drop, one (1) cable outlet, and monthly Basic Cable Service without charge to two (2) City-owned building chosen by the City and located in the City within one hundred fifty (150) feet of the System, excluding airports, nursing homes, hotels, residences of any kind, or other such public-use facilities. Grantee will also provide Standard Installation of one (1) cable Drop, one (1) cable outlet, and monthly Basic Cable Service without charge to all public and private elementary and secondary schools, excluding home schools, located in the City within one hundred fifty (150) feet of the System, upon request of the school system. No redistribution of the free Basic Cable Service provided pursuant to this Section shall be allowed. Additional Drops and/or outlets in any of the above locations will be provided by Grantee at the cost of Grantee's time and material. Alternatively, at the institution's request, said institution may add outlets at its own expense, as long as such installation meets Grantee's standards and provided that any fees for Cable Communications Services are paid. Nothing herein shall be construed as requiring Grantee to extend the System to serve additional institutions as may be designated by City. Grantee shall have one (1) year from the date of City Council designation of additional institution(s) to complete construction of the Drop and outlet. (2005ORD815)

### **12-2.1-3 CONSTRUCTION STANDARDS**

#### **1.) Construction Codes and Permits.**

Grantee shall obtain all required permits from City before commencing any construction upgrade or extension of the System, including the opening or disturbance of any Street, or private or public property within City.

The City shall impose no permit fees upon Grantee given that Grantee pays Franchise Fees pursuant to this Franchise.

The City shall have the right to inspect all construction or installation work performed pursuant to the provisions of the Franchise and to make such tests at its own expense as it shall find necessary to ensure compliance with the terms of the Franchise and applicable provisions of local, state and federal law.

**2.) Repair of Streets and Property.** Any and all Streets or public property or private property, which are disturbed or damaged during the construction, repair, replacement, relocation, operation, maintenance or reconstruction of the System shall be promptly and fully restored by Grantee, at its expense, to a condition as good as that prevailing prior to Grantee's work.

#### **3.) Conditions on Street Use.**

(a) If at any time during the period of this Franchise City shall elect to alter, or change the grade or location of any Street, alley or other public way, the Grantee shall, at its own expense, upon reasonable notice by City, remove and relocate its poles, wires, cables, conduits, manholes and other fixtures of the System, and in each instance comply with the standards and specifications of City. If City reimburses other occupants of the Street, Grantee shall be likewise reimbursed.

(b) The Grantee shall, on request of any Person holding a moving permit issued by City, 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, and the Grantee shall be given not less than ten (10) days advance notice to arrange for such temporary changes.

(c) The Grantee shall have the authority to trim any trees upon and overhanging the Streets, alleys, sidewalks, or public easements of City so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee.

Nothing contained in this Franchise shall relieve any Person from liability arising out of the failure to exercise reasonable care to avoid injuring Grantee's facilities.

**4.) Undergrounding of Cable.**

(a) In all areas of City where all other utility lines are placed underground, Grantee shall construct and install its cables, wires and other facilities underground.

(b) In any area of City 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.

**5.) Safety Requirements.** The Grantee shall at all times employ ordinary and reasonable care and shall install and maintain in use nothing less than commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injuries, or nuisances to the public. (2005ORD815)

**12-2.1-4 DESIGN PROVISIONS**

Operation and Maintenance of System. The Grantee shall render effective service, make repairs promptly, and interrupt service only for good cause and for the shortest time possible. Such interruption, to the extent feasible, shall be preceded by notice in accordance with Section 2.8 herein and shall occur during periods of minimum use of the System.

Technical Standards. The technical standards used in the operation of the System shall comply, at minimum, with the technical standards promulgated by the FCC relating to cable communications systems pursuant to the Federal Communications Commission's rules and regulations and found in Title 47, Section 76.601 to 76.617, as may be amended or modified from time to time.

Lockout Device. Upon the request of a Subscriber, Grantee shall provide by sale or lease a Lockout Device. (2005ORD815)

**12-2.1-5 SERVICES PROVISIONS**

Subscriber Inquiry and Complaint Procedures. Grantee shall have a publicly listed toll-free telephone number and be operated so as to receive Subscriber complaints and requests on a twenty-four (24) hour-a-day, seven (7) days-a-week basis.

Refund Policy. In the event a Subscriber established or terminates service and receives less than a full month's service, Grantee shall prorate the monthly rate on the basis of the number of days in the period for which service was rendered to the number of days in the billing. (2005ORD815)

**12-2.1-6 EDUCATIONAL AND GOVERNMENTAL ACCESS**

Educational and Government Access.

Grantee shall dedicate two (2) channels for Educational and Governmental use ("EG Access") to the City for public noncommercial, noncompetitive uses. Grantee shall have the right to use any portion of said channels that is not being used by the City.

All residential Subscribers who receive all or any part of the total services offered on the System shall be eligible to receive said access channel at no additional charge. (2005ORD815)

**12-2.1-7 OPERATION AND ADMINISTRATION PROVISIONS**

Indemnification of City.

City, its officers, boards, committees, commissions, elected officials, employees and agents shall not be liable for any loss or damage to any real or personal property of any Person, or for any injury to or death of any Person, arising out of or in connection with the construction,

operation, maintenance, repair or removal of, or other action or event with respect to the System.

Grantee shall indemnify, defend, and hold harmless City, its officers, boards, committees, commissions, 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 the Franchise, except claims because of EG programming or, the City's operation, administration, promotion or management of the EG access channel(s) or any use of Internet Services in public institutions.

Nothing in this Franchise relieves a Person from liability arising out of the failure to exercise reasonable care to avoid injuring the Grantee's facilities while performing work connected 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.

In order for City to assert its rights to be indemnified, defended, and held harmless, City must with respect to each claim:

Promptly notify Grantee in writing of any claim or legal proceeding which gives rise to such right; Afford Grantee the opportunity to participate in and fully control any compromise, settlement or other resolution or disposition of any claim or proceeding; and

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.

Insurance.

As a part of the indemnification provided in Section 7.1, but without limiting the foregoing, Grantee shall file with its acceptance of this Franchise, and at all times thereafter maintain in full force and effect at its sole expense, a comprehensive general liability insurance policy, including contractual liability coverage, in protection of City in its capacity as such. The policies of insurance shall be in the sum of not less than Five Hundred Thousand Dollars (\$500,000) for personal injury or death of any one Person, and One Million Dollars (\$1,000,000) 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.

The policy or policies of insurance shall be maintained by Grantee in full force and effect during the entire term of the Franchise. Each policy of insurance shall contain a statement on its face that the insurer will not cancel the policy or fail to renew the policy, whether for nonpayment of premium, or otherwise, and whether at the request of Grantee or for other reasons, except after thirty (30) days' advance written notice have been provided to City.

3.) Franchise Fee. Grantee shall pay to City a franchise fee of three percent (3%) of revenue for Basic Cable Service. The fee shall be payable monthly and shall be accompanied by a brief report showing the basis for the computation of the fee. (2005ORD815)

#### **12-2.1-8 REVOCATION, ABANDONMENT, AND SALE OR TRANSFER**

1.) City's Right to Revoke. In addition to all other rights which City has pursuant to law or equity, City reserves the right to revoke, terminate or cancel this Franchise, and all rights and privileges pertaining thereto, if after the hearing required by Section 8.2(b) herein, it is determined that Grantee has violated any material provision of this Franchise.

2.) Procedures for Revocation.

(a) City shall provide 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 correct the violation or to provide adequate assurance of performance in compliance with the

Franchise. Together with the notice required herein, City 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 City Council prior to revocation, which public hearing shall follow the sixty (60) day notice provided in paragraph (a) above. City shall provide Grantee with written notice of its decision together with written findings of fact supplementing said decision.

After the public hearing and upon written determination by City to revoke the Franchise, Grantee may appeal said decision with an appropriate state or federal court or agency.

During the appeal period, the Franchise shall remain in full force and effect unless the term thereof sooner expires.

Upon satisfactory correction by Grantee of the violation upon which said notice was given, the initial notice shall become void.

Abandonment of Service. Grantee may not abandon the System or any portion thereof without having first given three (3) months written notice to City.

4.) Sale or Transfer of Franchise. No sale or transfer of this Franchise shall take place without the written approval of the City, 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 Grantee. Said approval shall not be required where Grantee grants a security interest in its Franchise and assets to secure an indebtedness. (2005ORD815)

#### **12-2.1-9 PROTECTION OF INDIVIDUAL RIGHTS**

Discriminatory Practices Prohibited. Grantee shall not deny service, deny access, or otherwise discriminate against Subscribers or general citizens on the basis of race, color, religion, national origin, sex or age. Grantee shall comply at all times with all other applicable federal, state, and city laws, and all executive and administrative orders relating to nondiscrimination.

Subscriber Privacy. Grantee shall comply with the terms of 47 U.S.C. § 551 relating to the protection of Subscriber privacy. (2005ORD815)

#### **12-2.1-10 UNAUTHORIZED CONNECTIONS AND MODIFICATIONS**

1.) Unauthorized Connections or Modifications Prohibited. It shall be unlawful for any firm, Person, group, company, corporation, or governmental body or agency, without the express consent of the Grantee, to make or possess, or assist anybody in making or possessing, any connection, extension, or division, whether physically, acoustically, inductively, electronically or otherwise, with or to any segment of the System.

2.) Removal or Destruction Prohibited. It shall be unlawful for any firm, Person, group, company, corporation, or government body or agency to willfully interfere, tamper, remove, obstruct, or damage, or assist thereof, any part or segment of the System for any purpose whatsoever.

Penalty. Any firm, Person, group, company, corporation or government body or agency found guilty of violating this Section may be fined not less than Twenty Dollars (\$20.00) and the costs of the action nor more than Five Hundred Dollars (\$500.00) and the costs of the action for each and every subsequent offense. Each continuing day of the violation shall be considered a separate occurrence. (2005ORD815)

### **12-2.1-11 MISCELLANEOUS PROVISIONS**

Franchise Renewal. Any renewal of this Franchise shall be done in accordance with applicable federal, state and local laws and regulations.

Amendment of Franchise Ordinance. Grantee and City may agree, from time to time, to amend this Franchise. Such written amendments may be made at any time if City and Grantee agree that such an amendment will be in the public interest or if such an amendment is required due to changes in federal, state or local laws. City shall act pursuant to local law pertaining to the ordinance amendment process. (2005ORD815)

### **12-2.1-12 PUBLICATION, EFFECTIVE DATE AND ACCEPTANCE**

1.) Publication; Effective Date. This Franchise shall be published in accordance with applicable South Dakota law. The effective date of this Franchise shall be the date of acceptance by Grantee in accordance with the provisions of Section 12.2. The Grantee shall assume the cost of publication of this franchise as such publication is required by law and such is payable upon the Grantee's filing of acceptance of this Franchise.

2.) Acceptance.

Grantee shall accept this Franchise by executing same. Such acceptance by the Grantee shall be deemed the grant of this Franchise for all purposes.

Upon acceptance of this Franchise, Grantee shall be bound by all the terms and conditions contained herein.

Grantee shall accept this Franchise in the following manner:

This Franchise will be properly executed and acknowledged by Grantee and delivered to City.

With its acceptance, Grantee shall also deliver any insurance certificates required herein that have not previously been delivered. (2005ORD815)

### **12-2.1-13 ORDINANCE REPEALED**

All ordinances or parts of Ordinances in conflict with provisions of this Ordinance are hereby repealed. (2005ORD815)