

ORDINANCE #1396

AN ORDINANCE GRANTING TO MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA GENERAL PARTNERSHIP, THE NON-EXCLUSIVE RIGHT TO ERECT, MAINTAIN AND OPERATE IN, UNDER, OVER, ALONG AND ACROSS THE PRESENT AND FUTURE STREETS, LANES, AVENUES, SIDEWALKS, ALLEYS, BRIDGES, HIGHWAYS, EASEMENTS DEDICATED FOR COMPATIBLE USES AND OTHER PUBLIC PLACES IN THE CITY OF DEADWOOD, SOUTH DAKOTA AND THE SUBSEQUENT ADDITIONS THERETO, TOWERS, POLES, LINES, CABLES, WIRES, MANHOLES, AND ALL OTHER FIXTURES AND EQUIPMENT NECESSARY FOR THE MAINTENANCE AND OPERATION IN THE CITY OF A CABLE TELEVISION SYSTEM, FOR THE PURPOSE OR TRANSMISSION AND DISTRIBUTION OF AUDIO, VISUAL, ELECTRONIC AND ELECTRICAL SIGNALS, AND OTHER ELECTRONIC IMPULSES IN ORDER TO FURNISH TELEVISION AND RADIO PROGRAMS AND VARIOUS OTHER COMMUNICATION SERVICES TO THE PUBLIC, FOR A PERIOD OF TEN (10) YEARS REGULATING THE SAME, AND PROVIDING FOR COMPENSATION TO THE CITY.

BE IT ORDAINED by the City Commission of the City of Deadwood that, pursuant to SDCL Ch. 9-19, the Deadwood Ordinances be modified to read as follows,

SECTION I - TITLE

This Ordinance shall be known and may be cited as the "Midcontinent Cable Television Ordinance" and is sometimes referred to as the "franchise"

SECTION II - DEFINITIONS

For the purpose of this Ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

1. "Basic Cable Service" means the service tier which includes the retransmission of local television broadcast signals and public, educational, and governmental access channels.
2. "Cable Act" means the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, (codified at 47 U.S.C. §§521-611 ([1982 & Supp. V. 1987])), as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, and the *Telecommunications Act of 1996*, Pub. L. No. 104-104 (1996) as it may, from time to time, be amended.

3. "Cable service or services" means (A) the one-way transmission to subscribers of (i) video programming or (ii) other programming service; and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. Cable service as defined herein shall not be inconsistent with the definition set forth in 47 U.S.C. § 522(6).

4. "Cable system or system" means any facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed or used to provide cable services which includes video programming, and which is provided to multiple subscribers within the City, but such term does not include:

1. A facility that serves subscribers without using any right-of-ways;

2. A facility of a common carrier which is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201-226, 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; or

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

5. "City" or "Grantor" is the City of Deadwood, South Dakota.

6. "Commission" is the City Commission of Deadwood, South Dakota.

7. "Facility" or "facilities" means Grantee's wires, cables, towers, poles, communication attachments, fibers, equipment facilities, wireless communications facilities, and other component parts utilized to provide cable service and/or video programming to be installed or located in, along, over, upon, under, or through the right-of-ways by Grantee.

8. "FCC" shall mean Federal Communications Commission.

9. "Gross revenue" means any and all revenue in whatever form from any source received by Grantee or an affiliate of Grantee that would otherwise be subject to the payment of franchise fees pursuant to the provisions of 47 U.S.C. §542 derived from the operation of the cable system to provide cable service within the City. Gross revenues shall include, but are not limited to, all revenue received from basic and expanded basic, pay cable, digital services, high definition services, digital video recorder, video on-demand, and converter rentals. The term does not include any taxes or fees on cable services furnished by Grantee and imposed directly upon any subscriber, nonsubscriber, or user by federal, state, or local law and collected by grantee on behalf of such governmental unit, or amounts collected from subscribers for public, educational, and/or governmental access.

1. Gross revenues does not include any revenue which cannot be collected by Grantee and are identified as bad debt; provided, that if revenue previously representing bad debt is collected, this revenue shall be included in gross revenues for the collection period.

2. The term does not include revenue received from advertising, home shopping service commissions, leased access and service charges, including, but not limited to, installation, disconnection, repair, or other similar service charges.

3. It is understood that over the term of a franchise, Grantee may provide new services that are classified as cable services under a franchise and federal law. The parties anticipate and agree that such services shall be subject to franchise fees under this chapter and a franchise without any further amendment or other action by the parties hereto.

THIS NEW DEFINITION OF “GROSS REVENUE SHALL BE EFFECTIVE ON THE FIRST DAY OF THE MONTH FOLLOWING NINETY (90) DAYS AFTER THE EFFECTIVE DATE OF THE FRANCHISE.

10. "Person" is any person, firm, partnership, association, corporation or organization of any kind and any other legally recognized entity.

11. "Grantee" is Midcontinent Communications (“Midcontinent”) or anyone who succeeds Midcontinent in accordance with the revisions of this Ordinance.

12. “Right-of-way” or “right-of-ways” means the surface of and the space above and below any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive, or any public easement or right-of-ways now or hereafter held by the City which shall, within its proper use and meaning, entitle Grantee to the use thereof for the purpose of installing or transmitting over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to a system.

13. “Service area” means the present municipal boundaries of the City, and shall include any additions thereto by annexation or other legal means.

14. “Subscribers” are those persons to receive cable television reception services furnished under this ordinance by Grantee.

SECTION III - GRANT OF NON-EXCLUSIVE AUTHORITY

There is hereby granted by the City to the Grantee, and to its successors, assigns or designees, the non-exclusive franchise and right to erect, maintain, and, construct facilities and to operate a cable system in the City for the purposes of offering cable service. The Grantee may utilize the right-of-ways within the City for the operation of a cable system providing cable service, subject to the requirements of this ordinance and all other applicable codes, laws, and regulations, both state and federal. This franchise shall be for a period of ten (10) years, commencing from and after the effective date of this Ordinance.

As a condition of use of the right-of-ways, every Grantee, at its sole cost and expense shall indemnify and hold harmless City for all damages and penalties as a result of the exercise of this franchise as described in XXIII of this Ordinance.

SECTION IV - COMPLIANCE WITH APPLICABLE LAWS AND ORDINANCES

1. The Grantee shall, during the term hereof, except in those areas which have been preempted by the Acts, Laws and regulations of the Government of the United States, be subject to all lawful exercise of the regulating and police powers of the City.
2. Grantee shall not, as to rates and charges, make or grant any preference or advantage to any person, nor subject any person to any prejudice or disadvantage. This section shall not be construed to prohibit promotional or bulk discounts, or discounts that may be made available to seniors or the economically disadvantaged.
3. Grantee agrees to comply with the provisions of the Communications Act of 1934, § 631(a), (a)(1)(A-E), as amended, 47 U.S.C.A. § 551(a), (a)(1)(A-E).

SECTION V - TERRITORIAL AREA INVOLVED

1. This Ordinance relates to the present territorial limits of the City and to any area annexed thereto during the term of this Ordinance. (“Service Area”)
2. Grantee may, but shall not be required to, serve areas or individual homes adjoining, but outside the City limits and that may be served from its existing facilities. Grantee may negotiate directly with such customers the amount to be charged for the bringing of the service to the customer.
3. Services provided by the Grantee under this franchise shall be made available to all points within the Service Area during the term of this franchise under the following conditions:

- a. Whenever the Grantee shall receive a request for service from at least 30 residences within 1,320 cable-bearing strand feet (one-quarter mile) of its trunk or distribution cable, it shall extend the Cable System to such Subscribers at no cost to said Subscribers for the extension, other than the usual connection fees for all Subscribers, provided that such Cable System extension is technically feasible and provided such an extension will not adversely affect the operation, financial condition, or market development of the Cable System or as provided for under subsection B, below.
- b. No Subscriber shall be refused service arbitrarily. However, for unusual circumstances, such as Subscriber's request to locate his cable drop underground in an area where other installations is done in an aerial manner or a distance of greater than 200 feet from the distribution cable to the connection of service to Subscriber, or a density of less than 30 residences per 1,320 cable-bearing strand feet (one-quarter mile) of trunk or distribution cable, service may be made available on the basis of a capital contribution in aid of construction, including cost of materials, labor, and access to easements. For the purpose of determining the amount of capital contribution in aid of construction to be borne by the Grantee and Subscribers in an 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 30 residences. Subscribers who request service hereunder may bear the remainder of the construction and other cost on a pro rata basis. The Grantee may require that the payment of the capital contribution in aid of construction to be borne by such potential Subscribers be paid in advance.

SECTION VI - TECHNICAL STANDARDS

Grantee shall be governed by technical standards established by the FCC and is responsible for ensuring that its system is designed, installed, and operated in a manner that fully complies with applicable FCC rules including Subpart K of Part 76 of Chapter I of Title 47 of the Code of Federal Regulations as revised or amended from time to time.

SECTION VII - OPERATION AND MAINTENANCE OF SYSTEM

1. Grantee shall render efficient service, make repairs promptly and interrupt service only for good cause and for the shortest possible time. Such interruptions, insofar as possible, shall be preceded by notice and shall occur during minimal use of the system.
2. All service requests and complaints should be responded to within twenty-four (24) hours of receipt.

SECTION VIII - SAFETY REQUIREMENTS

The Grantee shall, at all times, employ ordinary care and shall use and maintain commonly accepted methods and devices for preventing failures and accidents which are likely to cause damages, injuries or nuisances to the public.

SECTION IX – BUILD-OUT - NEW DEVELOPMENTS

The City shall agree to amend this franchise, upon application of the Grantee, when necessary to enable the Grantee to take advantage of any developments in the field of transmission of television and radio signals which will afford it an opportunity to more effectively, efficiently or economically serve its subscribers. Provided, however, that this section shall not be construed to require the City to make any amendment or to prohibit it from unilaterally changing its policy stated herein.

With regards to build-outs for new developments;

- (a) Subject to the line extension provisions of SECTION V, Grantee shall extend cable service to all areas of the City with a density of 30 homes per mile at no cost for cable system extension other than the standard installation fees charged to all subscribers, and in accordance with its franchise and consistent with the rules and guidelines of the FCC.
- (b) In cases of new construction or property development where utilities are to be placed underground, the developer or property owner shall give all Grantees at least 14 days' written notice to Grantees of the construction or development, and of the particular date on which open trenching will be available for Grantee's installation of conduit and/or cable. Grantee shall provide specifications as needed for trenching.
- (c) Should the Grantee determine that line extension is economically unfeasible, the Grantee and the developer agree to negotiate in good faith toward an equitable agreement. If the Grantee and the developer arrive at impasse, disputes over the extension shall be mediated by the City Commission 30 days after receipt of written request by either party.

SECTION X - LIMITATIONS ON RIGHTS GRANTED

1. All facilities, including transmission and distribution structures, lines, and equipment, erected by the Grantee within the City shall be maintained and located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and to cause minimum interference with the rights and reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places, and said facilities, including poles or towers, shall be removed by Grantee whenever the City reasonably finds that the

same restricts or obstructs the operation or location of any future streets or public places in the City of Deadwood, South Dakota.

2. All facilities, including transmission and distribution structures, lines and equipment erected by the Grantee within the City shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or to interfere with any installations of the City or of a public utility serving the City, or to interfere with new improvements the City may deem proper to make.
3. In the maintenance and operation of Grantee's cable system in the City right-of-ways, and in the course of any new construction or addition to their facilities, Grantee shall proceed so as to cause the least possible inconvenience to the general public: any opening or obstruction in the streets or other public places made by Grantee in the course of its operations shall be guarded and protected at all times by the placement of adequate barriers, fences, or boarding's, the bounds of which, during periods of dusk and darkness, shall be clearly designated by warning indicators.
4. All work in any way necessitated by the business of Grantee which may involve the disturbing, damaging, opening, excavating, breaking up or tearing up of a portion of a City right-of-way, including street, sidewalk or other part of any City-owned or City-controlled property, shall at the option of the City be done by the City at the expense of Grantee. Prior to any excavation, opening, disturbing, breaking or tearing up of any right-of-way, Grantee shall notify the City and obtain any necessary permits and post any necessary bonds except where a bona fide emergency exists. Grantee agrees to retroactively apply for the proper permits in those instances where emergency excavation was conducted. In the event the City does not exercise its option, in case of disturbance, damaging, opening, excavating, breaking or tearing up of any City right-of-way, including street, sidewalk, alley, public way, or paved area, the Grantee shall at its own expense and in a manner approved by the City, replace and restore such right-of-way, street, sidewalk, alley, public walk, or paved area in as good as condition as before the work involving such disturbance was done. Grantee shall not be required to pay a fee for street openings.
5. If at any time during the period of this Ordinance the City shall lawfully elect to alter or change the grade of any street, sidewalk, alley, or other public way, the Grantee, upon reasonable notice by the City, shall remove, relay and relocate its facilities, including poles, wires, cables, underground conduits, manholes and other fixtures at its own expense.
6. All installations of facilities and other equipment shall be in accordance with good engineering practices, and of sufficient height to comply with all existing City regulations, ordinances and state laws so as not to interfere in any manner with the right of the public or individual property owner, and any equipment in a public way or public place shall not interfere with the usual travel on such public

way or usual use of such public place by the public and, during the construction, repair or removal thereof, shall not unduly obstruct or impede traffic.

7. The Grantee shall, on the request of (1) any person holding a building moving permit issued by the City, (2) any person holding a lawful over-size or over-height permit issued by the City or issued by an appropriate agency, (3) or any person who wishes to remove trees or structures from their property, shall temporarily raise or lower its wires to permit the moving of buildings or other oversized objects or to permit tree removal. The expense of such temporary or raising or lowering of wires shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance. In no event shall City pay such expense. The Grantee shall be given not less than fourteen (14) days advance notice to arrange for such temporary wire changes.
8. Subject to all provisions of Deadwood City Ordinance Ch. 12.40 “Trees and Landscaping Standards”, the Grantee shall have the authority to trim trees that are overhanging the streets, alleys, sidewalks and public ways and places of the City so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee, except that at the option of the City, such trimming may be done by it or under its supervision and direction at the expense of the Grantee, provided that Grantee has been first notified to perform such trimming and has unreasonably refused to do so. Trimming shall be done in accordance with any city requirements regarding such trimming.
9. In those areas within the City where a cable system offering cable service is currently placed underground, all facilities shall remain or be placed underground. In all sections of the City where the City designates an area where all presently above ground services are to be placed underground, the Grantee shall place its wires underground on the same time schedule and on the same conditions that are applicable to the providers of other above ground services in the designated areas and at no cost to the City.
10. The Grantee shall not allow its cable or other operations to interfere with television receptions of persons not served by the Grantee.
11. Grantee shall, at its expense, protect, support, temporarily disconnect, relocate on the same right-of-way or public place, or remove from the right-of-way or public place, any installation, facility, or property of Grantee when required by the City by reason of traffic conditions, public safety, street vacation, freeway and street construction, change or establishment of the street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks or any other types of structures or improvements by governmental agencies when acting in a governmental or proprietary capacity, or other structure of public improvement; provided, however, that Grantee shall in all cases have the privilege to abandon any property of Grantee in place as hereinafter provided.

12. 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 system 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, canceled or have expired, Grantee shall, subject to the rights of the City to lawfully acquire or transfer the system, promptly remove all installations, facilities, wires, etc., and cable system from the City right-of-ways and public places other than any which the City may permit to be abandoned in place. In the event of such removal, Grantee shall promptly restore the right-of-ways, public place or other area from which said facility or property has been removed to a condition satisfactory to the City.
13. 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.

SECTION XI - OWNERSHIP AND REMOVAL OF FACILITIES

Notwithstanding anything to the contrary in Section X, upon termination of a franchise, Grantee or its successors and assigns shall retain ownership of the cable system and shall be entitled at its option and expense to remove the cable system from all right-of-ways, private property, or to abandon said cable system. Should Grantee elect to remove the cable system, it is obligated to restore all property to its prior condition. If Grantee fails to restore the property satisfactorily, the City may complete the work and Grantee shall reimburse the City within 90 days of receipt of an itemized bill for such work.

Except as otherwise agreed in writing at the time of installation, all facilities for cable services 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 at its sole cost and expenses and is obligated to restore all property to its prior condition. Grantee shall have the right, at any time, to disclaim any further ownership rights to the interior wiring and the subscriber. Once such a notice is given, the interior wiring and any equipment or fitting specified in the notice shall become the property of the subscriber without any payment obligations on the part of the subscriber. Provided, however, the Grantee shall have the right, when it is providing service to the premises, to use said interior wiring and specified equipment without charge. Upon termination of service to any subscriber, the Grantee shall, subject to Federal regulations, promptly remove all its above ground facilities and equipment from the premises of such subscriber upon his request, except the service drop pedestal.

SECTION XII - ASSIGNMENT OF ORDINANCE

The Grantee shall not assign rights obtained under this Ordinance to another person without prior approval of the City Commission, which approval shall not be unreasonably

withheld. This provision shall not apply to assignment of rights to a parent, subsidiary or affiliate of the Grantee.

SECTION XIII - DURATION AND RENEWAL OF ORDINANCE

The rights granted to the Grantee herein shall, except as provided in this Section, terminate ten (10) years from the effective date of this Ordinance which Ordinance shall be subject to renewal pursuant to the provisions of the Cable Act, as amended, applicable to new ordinances that are in the nature of a franchise. Pending final completion of renewal proceedings, the Ordinance shall remain in effect even if the original ten (10) year term has expired.

The City and grantee, by mutual consent, may enter into renewal negotiations at any time during the term of a franchise.

If this Ordinance is not renewed, or if it is revoked for cause by the City, the transfer of Grantee's system shall be governed by Section 627 of the Cable Communications Policy Act of 1984, as amended.

SECTION XIV - ERECTION, REMOVAL AND COMMON USE OF POLES

1. There is hereby granted to the extent that the City is authorized to so do, the right and authority to Grantee to lease, rent, or in any other manner obtain the use of towers, poles, lines, cables, and other equipment and facilities from the City and all other holders of public licenses and franchises within the corporate limits of the City, to use such towers, poles, lines, cables and other equipment and facilities, subject to all existing and future ordinances and regulations of the City.
 - a. Grantee, in consideration for this franchise, hereby acknowledges and agrees that City does not warrant the condition of any poles, facilities, equipment, or any other attachment to any poles, including anchors or guy-wires, or other pole supports, or the premises surrounding such poles as to its safety whatsoever, and Grantee hereby assumes all risk of any damage, injury, or loss of any nature whatsoever caused by or in connection with the use of said poles, facilities, and equipment on such poles, or the premises surrounding said poles, and Grantee agrees to indemnify, defend, and protect and hold City harmless in connection with Section XXIII of this Ordinance.
 - b. In the event that any pole of City to which Grantee desires to make an attachment of its facilities is inadequate to support Grantee's facilities, Grantee must cause the pole and current attachments thereto to be properly guyed and anchored. Whether a pole is inadequate to support Grantee's facilities must be determined by Grantee prior to attachment and it shall be Grantee's sole responsibility reinstall, guy, and/or anchor the pole to support all attachments and facilities on the pole. Grantee agrees to

indemnify and hold harmless City for any damage or injury resulting from Grantee's failure to adequately guy or anchor a pole as set forth in Section XXIII. Any guying, anchoring or strengthening of poles shall be at the expense of Grantee.

It is the stated intention of the City that all other holders of public licenses and franchises within the corporate limits of the City shall cooperate with Grantee to allow Grantee's joint usage of their poles and pole-line facilities whenever possible or wherever such usage does not interfere with the normal operation of said poles and pole-lines so that a number of new or additional poles constructed by Grantee within the City may be minimized. The annual rental for the use of City poles shall be set by the Commission by resolution and separate agreement.

2. No poles or other wire-holding structures shall be erected by the Grantee without prior approval of the City with regard to location, 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 Commission or its designated representative determines that the public convenience would be enhanced thereby.
3. Grantee shall grant to the City, free of expense, joint use of any and all poles owned by it for any proper municipal purpose acceptable to Grantee, insofar as it may be done without interfering with the free use and enjoyment of Grantee's own wires and fixtures, and the City shall hold Grantee harmless from any and all actions, causes of actions and damages caused by the placing of the City's wires or appurtenances upon the poles of the Grantee. Proper regard shall be given to all existing safety rules covering construction and maintenance in effect at the time of construction. If, in accommodating the City's joint use of their poles, Grantee is required to change or replace poles or install new poles, the City shall compensate for such additional expense.
4. Where a public utility serving the City desired to make use of poles or other wire-holding structures of the Grantee but agreement therefore with the Grantee cannot be reached, the Commission may require the Grantee to permit such use for such consideration as is just and reasonable and upon such terms as the Commission determines the use would enhance the public convenience and would not unduly interfere with the Grantee's operations.

SECTION XV - RATES

1. Grantee shall at all times maintain on file with the City Finance Officer a schedule setting forth all rates and charges to be made to subscribers for cable services, including installation charges.

2. During the term hereof, and if required by the FCC, Grantee shall comply with the rate regulation rules of the Federal Communications Commission.
3. The monthly rate set forth in the schedule filed pursuant to subsection 1 above shall be payable in advance.
4. The Grantee shall not discriminate in rates between customers of the same category except to the extent permitted by the Cable Communications Policy Act of 1984, as amended, if applicable and Federal Communications Commission regulations.

SECTION XVI - PAYMENT TO THE CITY

Grantee shall pay to the City during the term of the rights granted hereunder, and so long as the Grantee operates said system in an amount of up to 5% of its annual Gross Revenue. The City shall impose the same franchise fee percentage and Gross Revenue definition on all Grantees.

The Grantee shall pay, as compensation to the City, the following sums: a sum equal to three percent (3%) of the annual total gross revenue of the cable system.

1. This franchise fee may be reviewed every two years by the City. In the event the franchise fee is increased, the City must give grantee a 180-day notice to implement the new fee. In accordance with the Cable Act, the 12-month period applicable under the franchise for the computation of the franchise fee shall be a calendar year.
2. The City may require Grantee to provide financial support permissible under the Cable Act, as a capital grant payable by each Grantee to the City for PEG capital requirements in the amount up to 1% of each grantee's gross revenue, as determined by the City no more frequently than once every two years. The capital grant shall be payable by each Grantee with the franchise fee payment as required by this chapter and shall be itemized and passed through to subscribers in the same manner. The City shall impose the same percentage fee on all Grantees or shall not impose the fee on any Grantee. The City shall provide all Grantees with 180 days' prior written notice for the implementation or modification of the capital grant.
3. The franchise fee and community grant payment shall be due monthly and payable within 30 days after the close of the preceding month. Each payment shall be accompanied by a brief report prepared by a representative of Grantee showing the basis for the computation. Payments shall be deposited to a City account electronically, unless otherwise agreed.
4. The community grant may be itemized and passed through to subscribers separate from and in the same manner as franchise fees. The City shall impose the same

community grant percentage fee on all Grantees or shall not impose the community grant percentage fee on any grantor;

5. The franchise fee obligation herein is a material requirement of a franchise and is considered payment by Grantee for use of rights-of-way.
6. Notwithstanding the annual gross revenue fee or tax payable hereunder, if the Grantee is legally obligated to collect or pay any sales tax or other taxes, the Grantee shall have the right to charge the subscribers an additional amount equal to such tax.

SECTION XVII - SERVICE TO SCHOOLS, CITY AND FIRE DEPARTMENT

The Grantee shall, subject to the line extension provisions of Section V, provide basic cable service at no cost to public and parochial elementary and secondary schools within the City and as amended from time to time, at one terminal junction for each school building in an area served by Grantee for educational purposes upon request of the school system and shall also furnish to the schools, without charge, basic service to all sets connected within such building to the terminal junction. Internal wiring and expenses for additional set-top boxes required for services beyond the first free service shall be the responsibility of the school.

Grantee shall, subject to the line extension provisions of Section V, also provide to the City without charge, at City owned buildings within an area served by Grantee and as amended from time to time, other than a hospital, nursing home, apartment or building at the airport, one junction terminal to said building and shall also furnish to the building, without charge, basic service to all sets connected within such building to the terminal junction.

The Grantee shall, subject to the line extension provisions of Section V, provide basic cable service at no cost to fire department buildings, library(ies), police station(s) within the City and as amended from time to time, one junction terminal to said building and shall also furnish to the building, without charge, basic service to all sets connected within such building to the terminal junction.

Exhibit A shall provide a listing of the current locations which may be served by Grantee under this Section.

SECTION XVIII – PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS CHANNELS

The Grantee shall allocate one channel to the City as a public, educational or governmental access channel. Until such time as the city files a written request with Grantee for full-time use of the channel, Grantee shall have the right to use that portion of

the channel capacity that is not being used by the City. Grantee shall have a reasonable period of time after notification to vacate its use of the channel.

If City files a written request with Grantee for full-time use, and upon Grantee's vacating its use of the channel, then the Grantee shall have full use of this channel's capacity, but any portion not used by City may be used by Grantee. Grantee shall assist the City in obtaining the necessary licenses and frequency clearance to enable the City to use the PEG Channel. Grantee shall provide locations for program origination ("origination points"). No charges may be assessed by Grantee for channel time or playback of prerecorded programming on the specially designated PEG access channels. Each user of the PEG access channels shall be responsible for the programming content and pay their own costs of programming. Grantee shall not exercise editorial control over PEG Channel. Grantee will include PEG access channels on its program guide channels. Any content that may be required for such listing will be the responsibility of City, based on the reasonable requirements for the furnishing of such content to grantee. Grantee will provide City with installation, equipment, and only that digital cable radio service generally available to Subscribers without an additional fee, subject to Grantee's ability to lawfully do so pursuant to its contracts with the affected content providers, to be utilized as background music for PEG electronic message systems at no cost to the City.

SECTION XIX - EMERGENCY USE OF FACILITIES

In the case of any emergency or disaster, the Grantee shall, upon request of the Commission, make available its facilities to the City for emergency use during the emergency or disaster.

SECTION XX - MISCELLANEOUS

1. Grantee's legal, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, if any, have been approved by the Commission after consideration in a full public proceeding affording due process to all interested parties.
2. **Good Faith.** Grantee and the City shall act reasonably and in good faith, deal fairly, and cooperate with each other to enable performance of all obligations under this chapter and achievements of the expected benefits.
3. **Compliance with Law.** Compliance with federal, state, and local laws and changes require:
 - a. If any federal, state, or local law or regulation requires or permits Grantee or the City to perform any service or act or shall prohibit Grantee or the City from performing any service or act which may be in conflict with the terms of a franchise, then as soon as possible following knowledge thereof, City and Grantee shall notify the other of the point of conflict believed to exist between such law or regulation.

- b. If any section, sentence, clause, or phrase of this chapter or a franchise 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 chapter, or a franchise and the remainder shall remain in full force and effect.
4. **Nonwaiver of Obligation.** Grantee shall not be relieved of its obligation to comply with any of the provisions of this chapter or a franchise by reason of any failure of City to enforce prompt compliance.
 5. **Door-to-Door Sales & Peddlers.** Subject to Chapter 5.28 of the Deadwood City Ordinances, Grantee shall be allowed to utilize a door- to-door sales force to market its cable service within the City
 6. **Signage.** Subject to Chapter 15.32 of Deadwood City Ordinances, Grantee shall not place or cause to be placed any sort of signs, advertisements, or other extraneous markings, whether relating to Grantee or any other person or entity on grantee's facilities located in or on the right-of-ways, except minimal markings necessary to identify the cable system for service, repair, maintenance, or emergency purposes, or as required by applicable law or regulation.

SECTION XXI - MODIFICATION OF OBLIGATIONS

In addition to any other remedies provided by law or regulation, Grantee's obligations under this Ordinance may be modified, at its request, in accordance with Section 625 of Cable Communications

Policy Act of 1984 as it now exists, or as hereafter amended, replaced or superseded by other Act of Congress.

SECTION XXII – REMEDIES AVAILABLE TO CITY

If Grantee fails to perform in a timely manner any material obligation, as determined by the City, required herein, following notice from the City and an opportunity to cure such nonperformance, the City may remedy such violation in accordance with the following procedures:

- a. The City will first notify Grantee of the violation in writing by delivery of registered or certified mail, and demand correction within a reasonable time. Grantee shall have 30 days from receipt of the notice to: (a) respond to the City, contesting the assertion of noncompliance, which shall toll the running of any time frames hereunder until Grantee is afforded the public hearing required herein and a written determination of the City Commission has been issued, or (b) cure such default, or (c) in the event that, by the nature of default, such default cannot be cured within the 30-day period, initiate reasonable steps to remedy such default and notify the City of the steps being taken and

the projected date that they will be completed. If Grantee fails to correct the violation within the time prescribed or if Grantee fails to commence corrective action within the time prescribed and diligently remedy such violation thereafter, Grantee will then be given 30 days' prior written notice of a public hearing to be held before the City Commission. Said notice will specify the violations alleged to have occurred.

b. At the public hearing, the City Commission will hear and consider all relevant evidence, and thereafter render findings and its decision. Such public hearing shall be held at the next regularly scheduled meeting of the City which is scheduled at a time which is no less than five business days therefrom. The City shall notify Grantee in writing of the time and place of such meeting and provide Grantee with an opportunity to be heard.

c. In the event the City Commission finds that Grantee has corrected the violation or has diligently commenced correction of such violation after notice thereof from the City and is diligently proceeding to fully remedy such violation, or that no material violation has occurred, the proceedings will terminate, and no penalty or other sanction will be imposed.

d. Subject to applicable federal and state law, in the event the City Commission finds that a material violation exists and that Grantee has not corrected the same in a satisfactory manner or has not diligently commenced correction of such violation, the City Commission may establish a date, no earlier than 30 days following notification, by which grantee must comply with the obligation or the City may thereafter seek specific performance of any franchise provision, which reasonably lends itself to such remedy. In addition, the City Commission may impose reasonable damages and enforce imposition of such damages.

In the case of a substantial default of a material provision of the franchise, the City Commission may also implement the franchise termination procedures in accordance with the following:

1. The City shall give written notice to Grantee of its intent to revoke a franchise on the basis of a pattern of noncompliance by Grantee, including one or more instances of substantial noncompliance with a material provision of the franchise. The notice shall set forth the exact nature of the noncompliance. Grantee shall have 90 days from such notice to object in writing and to state its reasons for such objection. In the event the City has not received a satisfactory response from Grantee, it may then seek termination of the franchise at a public meeting. City shall cause to be served upon Grantee, at least ten days prior to such public meeting, a written notice specifying the time and place of such meeting and stating its intent to request such termination.
2. At the designated meeting, the City shall give Grantee an opportunity to state its position on the matter, after which it shall determine whether or

not a franchise shall be revoked. Grantee may appeal such determination to an appropriate court.

Such appeal to the appropriate court must be taken within 60 days of the issuance of the determination of the City.

3. The City may, at its sole discretion, take any lawful action which it deems appropriate to enforce the City's rights under a franchise in lieu of revocation of a franchise.

e. In determining whether a violation is material, the City will take into consideration the reliability of the evidence of the violation, the nature of the violation, and the damage, if any, caused to the City or the City's residents thereby, whether the violation was chronic, and any justifying or mitigating circumstances, and such other matters as the City may deem appropriate. The parties hereby agree that it is not the City's intention to subject Grantee to penalties, fines, forfeitures, or revocation of a franchise for so-called "technical" breach(es) or violation(s) of a franchise or local cable ordinance, which shall include, but are not limited to, the following:

1. In instances or for matters where a violation or a breach by Grantee of a franchise or local cable ordinance was a good-faith error that resulted in no or minimal negative impact on the customers within the service area.
2. Where there existed circumstances reasonably beyond the control of Grantee and which precipitated a violation by Grantee of a franchise or local cable ordinance, or which were deemed to have prevented Grantee from complying with a term or condition of the franchise or local cable ordinance.

Should the City seek to revoke a franchise after following the procedures set forth above, the City shall give written notice to Grantee of its intent. The notice shall set forth the exact nature of the noncompliance. Grantee shall have 90 days from such notice to object in writing and to state its reasons for such objection. In the event the City has not received a satisfactory response from Grantee, it may then seek termination of a franchise at a public hearing. The City shall cause to be served upon Grantee, at least 30 days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke a franchise.

At the designated hearing, the City shall give Grantee an opportunity to state its position on the matter, after which it shall determine whether or not the franchise shall be revoked. Grantee may appeal such determination to an appropriate court. Such appeal to the appropriate court must be taken within 60 days of the issuance of the determination of the City.

Notwithstanding this Section, the City may, at its sole discretion, take any lawful action which it deems appropriate to enforce a franchise and the exercise of any of the

remedies as set forth herein shall not constitute an election of remedies or otherwise be considered a waiver by the City to take any lawful action or exercise any appropriate remedy it deems appropriate to enforce the terms and conditions of this chapter and a franchise.

SECTION XXIII - LIABILITY AND INDEMNIFICATION

- 1. Indemnify & Hold Harmless.** Grantee agrees, by acceptance of this franchise, that it shall indemnify and save free and harmless, and by the acceptance of a franchise, agrees to indemnify and save free and harmless the City, the City Commission, each member thereof, all officers, agents, employees, and members of boards and commissions of the City from and against any and all liability by reason of or arising out of any and all claims, demands, causes of action, or proceedings which may be asserted, prosecuted, or established against them or any of them, for injury to persons or tangible damage to property of whatever nature arising out of the use by Grantee of the right-of-ways, or of any other operations or activities of Grantee pursuant to this chapter and a franchise and the operation of a cable system, whether such damage shall be caused by negligence or otherwise (including but not limited to any liability for damages for defamation and damages by reason of or arising out of any failure by Grantee to secure consents from the owners, authorized distributors, or licensees of programs to be delivered by Grantee's cable system or vehicle operations) and irrespective of the amount of the liability insurance policies required hereunder, but excepting therefrom liability arising out of any claim, demand, cause of action, or proceeding resulting from the negligence or willful misconduct of the City, the City Commission, each member thereof, or officers, agents, employees, or members of boards and commissions of the City, or resulting from the negligence or willful misconduct of persons distributing programs via the PEG access channels over which persons and programming Grantee cannot legally and does not exercise control.
- 2. Defend at own cost.** Grantee, by the acceptance of a Franchise, agrees to defend at its own cost and expense the City, the City Commission, each member thereof, all officers, agents, employees, and members of boards and commissions of the City against any and all claims, demands, actions, or proceedings brought against them or any of them, in respect to the matters embraced by the indemnity set forth herein and regardless of a cross-indemnity claim that is or may be asserted by Grantee against the City.
- 3. Insurance requirement.** Concurrently, with the filing of the acceptance of award of a franchise, Grantee shall furnish to the City and at all times during the existence of franchise shall maintain in full force and effect, at its own cost and expense, a commercial general liability insurance policy and in a form reasonably satisfactory to the City. Said policy shall include, but shall not be limited to, personal injury, broad-form property damage, blanket contractual, completed operations, underground hazard, explosion and collapse hazard, independent

contractors, vaults, and products liability insurance. Said policy shall ensure Grantee, the City, the City Commission, each member thereof, all officers, agents, employees, and members of boards or commissions of the City against liability for all matters embraced herein with minimum combined single liability limit of two million dollars (\$2,000,000).

4. **Workers' compensation insurance requirement.** Grantee will obtain and maintain workers' compensation insurance for all grantee's employees, and in case any work is sublet, Grantee will require any subcontractor similarly to provide workers' compensation insurance for all subcontractor's employees, in compliance with state laws, and to fully protect the City from any and all claims arising out of work-related occurrences. Grantee, by acceptance of a franchise, thereby agrees it indemnifies City for any damage resulting to it from failure of either Grantee or any subcontractor to obtain and maintain such insurance. Grantee will provide the City with a certificate of insurance indicating workers' compensation insurance prior to operations under a franchise and the commencement of any construction, system upgrade, reconstruction, or maintenance of a system. The City's approval or acceptance of certificates of insurance does not constitute City assumption of responsibility for the validity of any insurance policies nor does the City represent that the above coverage is adequate to protect any individual/group/business, its consultants' or subcontractors' interests, and assumes no liability, therefore.
5. **Auto liability requirement.** Grantee shall provide automobile liability insurance covering all grantee's owned, non-owned, and hired automobiles, trucks, and trailers. Such insurance shall provide coverage at least as broad as that found in the standard comprehensive automobile liability policy with limits of not less than two million (\$2,000,000) combined single limit each occurrence. This insurance coverage shall be increased/decreased annually to reflect changes in the Consumer Price Index.
6. **Additional insureds.** The policies of insurance shall contain an additional insured clause providing that City, the City Commission, each member thereof, all officers, agents, employees, and members of boards and commissions of the City shall be named as an additional insured under said policy. Each such policy required above shall provide that it is to be considered primary insurance in the event a demand is made on the City. Each policy required above shall contain a provision by the insurer to perform the covenant for defense set forth herein for the benefit of the additional insureds. This provision shall not apply to workers' compensation insurance.
7. **Cancellation of insurance.** Each of the above-listed policies of insurance shall contain a provision that a written notice of cancellation or reduction in coverage shall be delivered to the Mayor 30 days in advance of the effective date thereof. If such insurance is provided by a policy which also covers any other entity or person other than those above-named, then such policy shall contain the standard cross-liability enforcement. Grantee will not cancel or reduce said insurance

coverage without the City having been given 30 days' prior written notice thereof by Grantee.

8. **Certificate on file.** A certificate of insurance coverage shall be filed in the Finance office concurrently upon the acceptance of the award of this franchise and shall be updated annually if any changes to the policies occur. The grantee will provide the City with at least 30 days' written notice of an insurer's intent to cancel or not renew any of the insurance coverage. The grantee agrees to hold the City harmless from any liability, including additional premium due because of the grantee's failure to maintain the coverage limits required.
9. **Waiver of subrogation.** Any insurance policies procured by grantee shall provide that the insurance carrier waives all rights of subrogation against the City, except as they relate to gross negligence or willful misconduct on the part of the City and except as related to workers' compensation insurance.
10. **Liability to third parties.** Grantee shall be liable for the acts of its third parties (contractors and subcontractors) and ensure that before commencement of work regarding construction, operation, and maintenance of its cable system, any such third parties have provided insurance in compliance with this chapter.
11. **Survival of obligation.** Grantee's covenants and obligations under this Article XXIII shall survive the expiration or any termination of a franchise agreement for a period of two years.

SECTION XXIV – SEVERABILITY

If any Section, subsection, sentence, clause, phrase or portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, or is superseded or preempted by FCC regulation, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Dated this 18th day of March, 2024

CITY OF DEADWOOD

BY: _____
David Ruth Jr., Mayor

ATTEST:

BY: _____
Jessica McKeown, Finance Officer

(SEAL)

First Reading: March 4, 2024
Second Reading: March 18, 2024
Published: March 21, 2024
Effective: April 10, 2024

Published once at the approximate cost of _____.

EXHIBIT A

CITY LOCATIONS

Adams Museum, 54 Sherman Street;
Adam House, 22 Van Buren Street;
Broadway Parking Ramp, 630 Broadway Avenue;
Deadwood Parks Shop, 19 Seventy-Six Drive;
Deadwood City Hall, 102 Sherman Street;
Deadwood Public Library, 435 Williams Street;
Deadwood Fire Department, 73 Main Street;
Deadwood Welcome Center, 501 Main Street;
Days of '76 Museum, 18 Seventy-Six Drive;
Deadwood Recreation Center, 105 Sherman Street;
Deadwood Water & Street Department, 67 Dunlop Avenue;
HARCC, 150 Sherman Street; and
Trolley Barn, 62 Dunlap Avenue.