

ORDINANCE NO. ___747___

AN ORDINANCE

WHEREAS, under Wyoming Statutes Section 15-1-103(a)(xxxiii), a city may grant franchises for such terms as the governing body deems property to any utility company, provided no franchise may be entered into with any person in which that person is given an exclusive right for an purpose whatsoever and,

WHEREAS, this franchise agreement (Agreement) is entered into by and between the following parties: the Town of Mills, Wyoming, a Wyoming municipal corporation, 704 Fourth Street, Mills, Wyoming 82604 (“Town”) and Mountain West Telephone, 123 West 1st Street, Suite C-95, Casper, Wyoming 82601 (“Franchisee”). Throughout this document, the Town and Franchisee may be individually referred to as a “party” or collectively referred to as the “parties;” and,

WHEREAS, on _____, the parties have negotiated this mutually acceptable Agreement for this franchise.

NOW, THEREFORE, BE IT ORGAINED BY THE GOVERNING BODY OF THE TOWN OF MILLS, WYOMING:

SECTION 1. DEFINITIONS AND TERMS

- A. “Commission” means the Wyoming Public Service Commission or its successor.
- B. “Customer” means a person, business or other entity that purchases a service from the Franchisee and receives all or part of the service within the Town boundary.
- C. “Gross Revenue” means all revenue, cash or otherwise, of the Franchisee for the provision of local telecommunication services to any location inside the Town limits, without regard to where the service is billed or paid. Gross Revenues shall not include:
 - 1. any sales, excise or other taxes which are imposed directly on any telecommunications service subscriber by any governmental unit or agency and which are collected by the Franchisee on behalf of such governmental unit or agency.
 - 2. Proceeds from the sale of bonds, mortgages, or other evidence of indebtedness, securities or stocks.
 - 3. Sales at wholesale by Franchisee to another utility when the utility purchasing such services is not the ultimate consumer, is itself a franchisee of the Town, and is paying a franchise fee to the Town on the revenue derived from the use of Franchisee’s telecommunication system.
 - 4. Any revenues reported by the Franchisee but which in fact constitute bad debt; except that “Gross Revenues” shall include all recoveries of such bad debt, by the Franchisee directly or by any person on the Franchisee’s behalf. Provided that, in order to take advantage of this Section, the Franchisee must maintain books and records in a form so that bad debt and recoveries can easily and fully identified.
 - 5. Installation, setup, consulting, lease, and rental charges.
 - 6. Sale of hardware or equipment.
- D. “Local loop” means the “last mile” facilities (either wired facilities or the wireless equivalent) utilized for the transmission between a central office and the end user premises in a telephone

network, a node and the end user premises in a cable network, or the analogous portion of the facilities of other providers of the telephone service or broadband connections.

- E. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.
- F. "Local telecommunication services" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used but including only that portion of the service that includes transmission between the Customer Premises and the Franchisee's designated Point-of-Presence.

SECTION 2. PURPOSE.

The Town hereby grants to Franchisee, a corporation authorized to do business in the State of Wyoming, its successors and assigns, a nonexclusive right to construct, maintain and operate a telecommunications service system. The telecommunications system may be placed in, under, upon, over, across and along the streets, alleys, bridges and public places for the furnishing, transmission, distribution and sale of telecommunications services for the benefit of the inhabitants of the Town, and persons and corporations within and beyond the limits of the Town, subject to the terms and conditions of this Agreement and to making of payments hereinafter specified.

SECTION 3. USE OF STREETS AND PUBLIC GROUNDS/RESTORATION OF PUBLIC RIGHTS-OF-WAY.

3.1 GENERAL CONDITIONS ON USE.

- A. The Franchisee may not endanger nor unreasonable interfere with the lives or property of persons; unreasonably interfere with property of the Town or any public utility; or unnecessarily hinder or obstruct use of the Public Ways. The Franchisee does not establish priority for use of Public Ways over holders of other permits or franchises; it grants no vested interest in occupying any particular position in the Public Ways. The Town shall control distribution of space in the Public Ways, but may not exercise that authority unreasonably. No location of any pole, utility box, or wire-holding structure shall give rise to a vested interest in Town property or Public Ways and such poles or structures shall be removed or modified by the Franchisee whenever the Town reasonable determines that the public interest will be enhanced thereby.
- B. The telecommunications system shall be installed in Public Ways and other places within the limits of the Town, subject to the inspection of and in close cooperation and coordination with the Town Manager or his/her designee. All cable placed under streets, roads and other Public Ways crossed by vehicular traffic shall be placed in conduit.
- C. Without obtaining the prior written approval of the Town, the Franchisee shall not install or erect its telecommunications system in or on public property, rights-of-way- or in any privately-owned area within the Town that has not yet become a Public Way, even if it is designated or delineated as a proposed Public Way on any subdivision plat submitted for approval by the Town, except insofar as the telecommunications system may be installed or erected on public utility facilities then existing.
- D. The Franchisee shall expeditiously carry out all of its operations during the course of any construction, repairs or maintenance operations on Public Ways of the Town.
- E. If the Franchisee performs any excavation or other construction in any portion of any Public Way, Franchisee shall take all reasonable precautions to protect the public using such Public Ways from harm including erecting proper barriers and warning facilities.

All barriers and related signs shall conform to the Manual on Uniform Traffic Control Devices, latest edition. Paved streets shall be bored or drilled when they are crossed beneath the ground by Franchisee's telecommunications system so that the Town's paved streets will not be unnecessarily damaged. The Town Manager or his/her designee, in his/her sole discretion, may allow other construction methods when he/she finds that drilling or boring is unreasonable and will not provide a sufficient public benefit for the cost. All excavation shall be performed to create the least inconvenience to the public, and in accordance with permits and manuals issued by the Town. The Town shall have the right, but not the responsibility to supervise all excavation.

- F. Franchisee shall bury or suspend each of its service lines from its main trunk lines to individual customers. In no event shall it allow its cable to lie upon the ground except as may be necessary during the actual construction or repair to the service line, and in no event shall it be allowed to remain upon the ground for more than sixty (60) calendar days, provided that Franchisee is not required to bury its cable between October 15 and April 15 where the weather prevents it. Subject to the foregoing, in the event the Franchisee fails to bury any cable within sixty (60) calendar days, then the Town shall give the Franchisee a written objection to the delay. If Franchisee fails to perform the work within ten (10) business days after receipt of the notice, the Town may have the cable buried. The Franchisee shall compensate the Town for the expenses incurred in the connection with this work.

3.2 NO HINDRANCE TO PUBLIC WORKS AND IMPROVEMENTS.

- A. Franchisee shall, at its sole cost and expense, install, construct, operate, and maintain its telecommunications system so that it does not interfere with or hinder the Town's installation, construction, maintenance, or operation of any public works, public improvements, or other publicly-owned facilities or systems. Whether the Franchisee's installation, construction, operation, or maintenance of its telecommunications system is an interference or hindrance is at the reasonable discretion of the Town Manager or his/her designee.
- B. The Franchisee shall protect, support, temporarily disconnect, relocate, or remove its telecommunications system as requested by the Town for reasons of traffic conditions, public health and safety, and protection of property, construction, repair, maintenance or relocation of any Public Way, grade change, or construction, relocation, installation or maintenance of any public works, public improvements, or other publicly-owned facilities or systems. If, after fifteen (15) business days from the deadline provided in the written notice, Franchisee fails to remove or relocate its telecommunications system as required by the Town, the Town may remove or relocate the Franchisee's telecommunications system, and Franchisee shall compensate the Town for all expenses incurred thereby.
- C. Franchisee, at all times, will keep a map in the office of Franchisee and in the Town Engineer's Office of the Town showing the size and approximate location of its cables and other supporting infrastructure laid in said telecommunications system in the Town. The map will be replaced each year, upon request by the Town, with a revised map showing the new construction for the previous calendar year. The Franchisee shall provide the Town annually GIS Data on a DVD or other acceptable electronic storage form with files in ArcView format, or other technology agreed upon by the Town and Franchisee, at no cost to the Town. Except for information that is protected under the Wyoming Public Records Act, Wyoming Statute Sections 16-4-201 *et seq.*, upon request by Franchisee the Town shall provide Franchisee annually a Municipality GIS Data DVD with electronic files in ArcView format, or other technology agreed upon by the Town and Franchisee, at no cost to Franchisee. The electronic files provided Franchisee by the Town shall include (if and to the extent available) the following features and attributes:

Parcels, Structures, Boundaries, Utilities, Transportation, Natural Features, Community Development Planning, Hazards, Parks & Recreation, Public Safety, Topography and Imagery.

3.3 AERIAL AND UNDERGROUND CONSTRUCTION.

With regard to all areas of new construction or line extension, where the distribution facilities of public utilities providing telephone communications and electric services are located underground, the Franchisee likewise shall locate its telecommunications system underground. Nothing contained in this Section shall require the Franchisee to construct, operate, and maintain underground any ground-mounted appurtenances such as Subscriber taps, line extenders, system passive devices (splitters, directional couplers), amplifiers, power supplies, pedestals, or other related equipment. For purposes of this Section, "undergrounding" shall include a partial underground system. Amplifiers on the telecommunications system must be underground wherever feasible, but may be in appropriate housings upon the surface of the ground when it is commercially impractical to place them underground.

3.4 CONSTRUCTION STANDARDS.

The construction, installation, operation, and maintenance of the telecommunications system shall be performed in an orderly and workmanlike manner. In addition to requirements of local law and conditions established by the utilities whose facilities are used by the telecommunications system, all such work shall be performed in accordance with best engineering practices, in accordance with at least the following safety, construction, and technical specifications and codes and standards, as they may now exist or be amended or adopted hereafter:

- A. National Electrical Code;
- B. National Electrical Safety Code (NESC);
- C. Obstruction Marking and Lighting, AC 70/7460; Federal Aviation Administration;
- D. All Federal, State, and Municipal Construction Requirements, including FCC Rules and Regulations; and,
- E. Local building and zoning codes, and all land use restrictions and local safety codes.

The Town may to the extent consistent with its policing powers from time to time adopt additional standards of general applicability as appropriate to assure work is performed in a safe and workmanlike manner.

3.5 SUBCONTRACTORS.

All contractors or subcontractors shall be properly licensed, and each contractor or subcontractor shall have the same obligations with respect to its work as Franchisee would have under this Franchise and applicable laws if the work were performed by Franchisee. Franchisee shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent with the Franchise and applicable law, and the all contractors and subcontractors are familiar with their responsibilities.

3.6 POLES.

The Town may, upon reasonable notice to the Franchisee and without contact charges or rental therefor, attach its fire alarm, police signal wires, traffic control systems, signs, or communication systems for the Town's own use, to the poles of Franchisee, but at its own risk and expense and only in accordance with the National Electric Safety Code (NESC) and accepted electric utility industry standards. If there is not sufficient space available thereon for said purposes, Franchisee's structures may be changed, altered, or rearranged at the Town's expense so as to provide proper clearance for such wires or appurtenant facilities. Such facilities shall be subject to interference by

Franchisee only when to the extent necessary for the proper construction, maintenance, operation or repair of Franchisee's facilities.

SECTION 4. SYSTEM SERVICES.

4.1 CITY INTERNET CONNECTION.

Telecommunication services will be offered to the Town to support its general government operations.

- A. **MONTHLY CHARGE.** Town will have the option to purchase telecommunication services from Franchisee at a rate of 0.75 per month for each megabit per second (Mb) of download connectivity. Each purchased Mb of download connectivity will be matched with an equivalent amount of upload connectivity at no additional charge.
- B. **NONRECURRING CHARGES.** Town will not be charged for any connection, design, excavation, cable extension, or similar non-recurring fee that is associated with the installation of any new service connection, provided that the service connection is located within 300 feet of slack loop/splice point or other suitable connection point, and provided that the associated cable extension crosses no more than one street centerline. The cost to purchase or lease any on premises equipment beyond the demarcation point within the Town facilities that is required to receive the telecommunication services, and which is not normally included in the installation services shall be borne by the Town.

For purposes of this paragraph, distance shall be calculated as the length of cable required to extend the connection from the nearest suitable connection point at the Town's facility to the nearest suitable connection point of the Franchisee's local loop infrastructure. For connections that are further than 300 feet distant or cross more than one street centerline from the Franchisee's local loop infrastructure, the Town shall pay non-recurring connection fees as they are normally calculated by the Franchisee for its customers minus the normally calculated value of a non-recurring connection fee for a facility that is exactly 300 feet distant from the Franchisee's existing local loop infrastructure which shall include the cost of crossing on street centerline.

- C. **CHANGES IN SERVICE.** The Town shall not pay any service cancellation charges. Town may opt to cancel, reduce, or enhance its connectivity to any existing Town facility. Any change that does not require additional excavation will be made no later than thirty (30) days after receipt of notice to proceed from Town to Franchisee. Any change that requires additional excavation will be made no later than ninety (90) days after receipt of notice to proceed from the Town, including any relevant permits to the Franchisee. If any service is canceled or reduced to less than 10 MB connection speed before the termination of this franchise agreement, within 36 months of the initial installation of service at that location, and has incurred less than \$5,500 in service charges for the telecommunications services provided by the Franchisee related to that installation, then the Town shall pay to the Franchisee the difference in total amount of non-recurring charges that were waived in paragraph "B" of this section and the total amount of charges incurred from services received associated with that installation.
- D. None of the provisions of this section shall be construed to withstand any contradictory unexpired and pre-existing contracts between the Town and the Franchisee.

SECTION 5. FIBER OPTIC INSTALLATION

Franchisee, as part of their operations, desires to expand Fiber Optic Network installation into the Town of Mills in anticipation of offering services to residents and business in Mills. As part of this agreement, Franchisee will offer a flat rate fee schedule for a Fiber Optic Network installation to connect

all existing Town of Mills facilities together. The rates below represent the costs for standard build out items. Additional sizes of cables and conduit can be requested at the current market rates. The parties agree and understand that the infrastructure installed under this agreement for this purposes will be provided as follows, although the parties also agree that franchisee has the right and expectation of using the same for providing services to residents and business in the Town of Mills.

A. PLACEMENT.

Trenching cable or conduit	10\$ per foot.
Boring cable or conduit	15\$ per foot.

B. MATERIALS.

12 Fiber Armored Cable	0.50\$ per foot.
1.25 Inch HDPE Duct	0.75\$ per foot.
Composite Hand Hold with Incidental traffic rated lid.	750\$ full installation.

C. SPLICING.

Fiber Splice or Termination Labor and Materials	30\$ per splice
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SECTION 6. TERM.

The right and authority herein granted shall continue for a period of either (8) years from and after the date of final passage of this Agreement, subject to the Town's right to renegotiate the franchise fee as described in Section 8.d. below.

SECTION 7. SERVICE.

Franchisee shall provide telecommunications service in accordance with the rules and regulations of the Commission and Franchisee's Wyoming Tariff as revised from time to time.

SECTION 8. FRANCHISE FEE AND PERMITTING.

- A. As consideration for all franchise rights and contractual privileges granted by the Town under this Agreement, Franchisee shall assess, effective the first billing cycle after this Agreement becomes effective, a five percent (5%) fee on the Franchisee's Gross Revenues. Franchisee shall pay to the Town in quarterly payments for each year of the Agreement's duration an amount equal to the franchise fee collected by Franchisee hereunder. Payment shall be made on or before June 1 for the period of January 1 through March 31 of said year, on or before September 1 for the period of April 1 through June 30 of said year, on or before December 1 for the period of July 1 through September 30 of said year, and on or before March 1 for the period of October 1 through December 31 of the preceding year.
- B. Such payment shall be in lieu of any and all other fees, charges, licenses, taxes or assessments which the Town may impose for the rights and privileges herein granted or for the telecommunications system, except that such payment shall not be in lieu of any required permit fees (which Franchisee shall pay before the commencement of the work on the telecommunications system covered by the permit fees). In the event the Town imposes any fee, charge, license, tax or assessment other than any required permit fees, the payment to be made in accordance with the provisions of this section shall be refunded in an amount equal to the annual burden of such fee, charge, license, tax or assessment imposed upon the Franchisee. Ad Valorem property taxes imposed generally upon all real and personal property within the Town shall not be

deemed to affect the obligation of the Franchisee under this section for property located within the Town's right of way.

- C. All permits required by the Mills Municipal Code or town regulations shall be acquired by the franchisee. All work performed by the franchisee shall be performed in strict accordance with such permits and ordinances.
- D. The Town reserves the right to renegotiate the franchise fee up to and no more than two times during the right (8)-year term of this Agreement.

SECTION 9. REPORTING.

- A. **REVENUE REPORTING.** Each franchise fee payment required by this Agreement shall be accompanied by a form, a sample of which is included in this agreement, satisfactory to the Town, that shall be delivered to the Town's Administrative Services Director and which shall report the gross revenue of the Franchise and the associated franchise fees collected. The report shall detail the amount of service provided by service type and the revenue collected by type of service provided. Service types shall include all wired and wireless telecommunications services and total services delivered to telecommunication customers within the Town. Any deductions from the franchise fee due shall be noted on the form.
- B. **EXCAVATION REPORTING.** So as to create a record of work completed, Franchisee shall produce a report detailing all excavations performed within the public rights-of-way for purposes of routine repair, replacement and maintenance of system components associated with the telecommunications system. The report will specify the date of the work, the location, a description of the work completed, the name of the Company's contractor or subcontractor(s) responsible for this work (if any), and contact information, including address and phone number, for any such contractor or subcontractor(s). Reports will be produced annually and will be due on the first business day of the second month after the completion of the calendar year.

9.1 **REQUIRED REPORT DETAILS FOR SERVICES WITHIN THE FRANCHISE AREA**

- A. Miles of fiber installed.
- B. Current number of customers, by service type and connection speed.

SECTION 10. RIGHT TO AUDIT.

The Town shall have the right to audit records to ensure compliance with the franchise fee section, including records regarding services delivered to telecommunication customers within the Town. The Town shall give reasonable written notice of its intent to audit. It is Franchisee's responsibility to collect and to make available to the Town, at Franchisee's local office, records of all services on which a franchise fee is required to be paid. If a Town review of payments shows that Franchisee has underpaid the franchise fee by: (i) three percent (3%) or less for the year, the Town shall bear the cost of the audit; (ii) more than three percent (3%) but less than or equal to seven percent (7%) for the year, the Town and Franchisee shall each bear an equal amount of the cost of the audit; or (iii) more than seven percent (7%) for the year, Franchisee shall bear the cost of the audit. Franchisee shall pay to the Town interest on any underpaid amounts at the rate of the Commission's annual interest rate payable on customer deposits.

SECTION 11. LIABILITY, INDEMNITY AND INSURANCE.

- A. Franchisee is required, and by the acceptance hereof, agrees to fully indemnify, defend, hold harmless, protect and save the Town, its council, manager, officers, employees and agents, harmless from and against all damage, lawful claims and demands, and from any and all loss, liability, cost or expense, necessarily incurred as a result thereof, arising out of any negligent act or omission of Franchisee in the construction, removal, maintenance, operation, replacement, inspection or repair of Franchisee's telecommunication system or in the use and operation thereof,

including but not limited to attorneys' fees and costs incurred, and Franchisee shall at all times comply with any lawful present or future ordinances, rules or regulations of the Town relating to the manner of occupation or use, or to the repair or improvement of said streets and property. The obligations under this paragraph shall not extend to any reckless conduct caused by the Town, its council, manager, officers, employees and agents.

- B. Franchisee shall provide and maintain in full force and effect, at its own cost and expense, through the term of this Agreement, and any subsequent renewals, Comprehensive General Liability Insurance, from a provider having a minimum A.M. Best Company rating of "B++" VI, in the amount of not less than \$500,000 combined single limit for bodily injury, and property damage for the Town, its council, manager, officers, employees and agents. Said insurance shall designate the Town as an additional insured and loss payee, as applicable. Such insurance shall be noncancellable except upon thirty (30) days notice to the Town and upon Franchisee providing and maintaining in full force and effect replacement Comprehensive General Liability Insurance that complies with the requirements of this subsection. Franchisee shall furnish to the Town, upon execution of this Agreement and upon any replacement of its Comprehensive General Liability Insurance, a copy of a certificate of insurance to the Town's Risk Manager for said insurance. The insurance limit hereunder shall be revised upward in the event the statutory maximum applicable to local governments in Wyoming, as provided in the Wyoming Governmental Claims Act, is raised during the term of this Agreement or any subsequent renewals, upon thirty (30) days advance written notice to the Franchisee by the Town. The Franchisee shall have had notice of the pendency of any action against the Town arising out of such exercise by the Franchisee of said rights and privileges and be permitted at its own expense to appear and defend or assist in the defense of the same.

SECTION 12. GOVERNMENTAL CLAIMS ACT.

THE TOWN DOES NOT WAIVE ANY RIGHT OR RIGHTS IT MAY HAVE PURSUANT TO THE WYOMING GOVERNMENTAL CLAIMS ACT, W.S. § 1-39-101, ET SEQ., AND THE TOWN SPECIFICALLY RESERVES THE RIGHT TO ASSERT ANY AND ALL RIGHTS, IMMUNITIES, AND DEFENSES IT MAY HAVE PURSUANT TO THE WYOMING GOVERNMENTAL CLAIMS ACT.

SECTION 13. MISCELLANEOUS.

13.1 FEDERAL AND STATE LAW; GOOD FAITH DISCUSSION.

The Franchisee and the Town recognize that many aspects of the telecommunications industry are regulated by federal and state law, and that those regulations may ultimately result in fundamental changes in the way the Franchisee conducts its business and meets its service obligations. In recognition of the state of uncertainty respecting potential changes to the state and federal law, the Franchisee and the Town each agree on the request of the other during the term of this Agreement and any subsequent terms, to meet with the other and discuss in good faith whether it would be appropriate, in view of the developments of this kind referred to above dur the term of this Agreement, to amend this Agreement or enter into separate, mutually satisfactory arrangements to effect a proper accommodation of any such developments. By way of example and not as a limitation, the parties may amend this Agreement or substitute alternate terms to provide equivalent benefit to the Town, so as to achieve the same or similar intent.

13.2 SEVERABILITY.

If any section, subsection, sentence, clause or phrase of this Agreement is for any reason held illegal, invalid, or unconstitutional by the decision of any court of competent jurisdiction, or by any State or Federal regulatory authority having jurisdiction thereof, such decision shall not affect the validity of the remaining portion hereof.

13.3 ASSIGNMENT.

The Franchisee may not assign this Agreement or the rights granted hereunder, without first obtaining the written consent of the Town. The Town's consent to such an assignment shall not be unreasonably withheld, and this section shall not be construed to restrict or prevent the issuance of bonds, debentures, or other evidence of indebtedness, or the issue of additional stock, needed or useful for the purpose of financing the system or any portion thereof.

SECTION 14. EFFECTIVE DATE.

This Agreement shall be in full force and effect from and after its final passage and publication, pursuant to Wyoming Statute Section 15-1-116, but shall become null and void unless within sixty (60) days after such effective date the Franchisee shall file in the office of the Clerk the Franchisee's unqualified written acceptance of all the provisions thereof.