

Township of Avon Ordinance 06-05-19

AN ORDINANCE GRANTING A FRANCHISE TO MIDCONTINENT COMMUNICATIONS TO MAINTAIN A CABLE COMMUNICATIONS SYSTEM IN THE TOWNSHIP OF AVON, MINNESOTA; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE; PROVIDING FOR REGULATION AND USE OF THE SYSTEM; AND PRESCRIBING PENALTIES FOR THE VIOLATION OF ITS PROVISIONS

The Township Board of Avon Township ("Franchising Authority") ordains:

FINDINGS

In the review of the application of Midcontinent Communications, ("Grantee"), and as a result of a public hearing, the Franchising Authority makes the following findings:

- 1.) The Grantee's technical ability, financial condition, legal qualifications, and character were considered and approved in a full public proceeding after due notice and a reasonable opportunity to be heard;
- 2.) Grantee's plans for operating the System were considered and found adequate and feasible in a full public proceeding after due notice and a reasonable opportunity to be heard; and
- 3.) The Franchise granted to Grantee complies with the existing applicable Minnesota Statutes, federal laws, and regulations.

SECTION 1.

SHORT TITLE AND DEFINITIONS

- 1.) Short Title. This Cable Communications Ordinance is an extension of a previously granted cable franchise and shall be known and cited as the Franchise.
- 2.) 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.
 - (a) "Basic Cable Service" means any service tier which includes the lawful retransmission of local television broadcast signals and any public, educational, and governmental access programming required by the Franchise to be carried on the basic tier. Basic Cable Service as defined herein shall not be inconsistent with 47 U.S.C. §543(b)(7).

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

- (1) Video Programming carried on the Basic Service Tier;
- (2) Video Programming offered on a pay-per-channel or pay-per-program basis; or
- (3) 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:
 - a. consists of commonly-identified Video Programming; and
 - b. is not bundled with any regulated tier of service.

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

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

(d) "Cable System" or "System" 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:

- (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations;
- (2) a facility that serves Subscribers without using any public right-of-way;
- (3) 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;
- (4) an open video system that complies with 47 U.S.C. §653; or

- (5) any facilities of any electric utility used solely for operating its electric utility systems.
- (e) "Drop" means the cable that connects the ground block on the Subscriber's residence to the nearest feeder cable of the System.
- (f) "FCC" means the Federal Communications Commission and any legally appointed, designated or elected agent or successor.
- (g) "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 or an MVPD System.
- (h) "Franchising Authority" means the Township of Avon, Minnesota, or the lawful successor, transferee, or assignee thereof.
- (i) "Grantee" is Midcontinent Communications, its agents and employees, lawful successors, transferees or assignees.
- (j) "Gross Revenue" means all revenue received from Subscribers for Basic Cable Service, Cable Programming Service, and Pay Television directly by the Grantee from the operation of its System within municipal boundaries of the Franchising Authority. The term "Gross Revenues" shall not include Installation fees, disconnection fees, upgrade and downgrade of service fees, fees for telecommunications services, if any, fees for the sale, leasing, or servicing of equipment, network capacity and facilities rent for the provision of non-cable services (voice or data services), investment income, franchise fees, advertising revenues, late fees, any fees itemized and passed through as a result of franchise imposed requirements, tower rent, or any taxes or fees on services furnished by Grantee imposed directly on any Subscriber or user by any municipality, state, or other governmental unit and collected by Grantee for such governmental unit.
- (k) "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 System.
- (m) "Multichannel Video Program Distributor" or "MVPD" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, an Open Video Services provider, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

- (n) “Open Video Services or OVS” means any video programming Services provided to any person by a Person 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.
- (o) “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.
- (p) “Person” is any person, firm, partnership, association, corporation, company, or other legal entity.
- (q) “Standard Installation” means any residential installation which can be completed using a Drop of one hundred twenty five (125) feet or less.
- (r) “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 Franchising Authority.
- (s) “Subscriber” means any Person who lawfully receives Cable Service.
- (t) “Video Programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

SECTION 2.

GRANT OF AUTHORITY AND GENERAL PROVISIONS

- 1.) Franchise Required. It shall be unlawful for any Person to construct, operate or maintain a Cable System or an MVPD System to provide Cable Service or Video Programming, including OVS, in the Franchising Authority without a Franchise in the form of this Franchise authorizing the same, unless applicable federal or State law prohibits the Franchising Authority’s enforcement of such a requirement.
- 2.) Grant of Franchise. This Franchise is granted pursuant to the terms and conditions contained herein.
- 3.) Grant of Nonexclusive Authority.
 - (a) 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 Franchising Authority, poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in Franchising Authority of a Cable System as herein defined.

(b) Grantee shall have the right to do direct selling (door to door) and this provision supersedes any applicable peddler or solicitor ordinance.

(b) This Franchise shall be nonexclusive, and Franchising Authority 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 Franchise shall include the same substantive terms and conditions as this Franchise.

4.) Franchise Term. This Franchise shall be in effect for a period of fifteen (15) years from the date of acceptance by Grantee, unless renewed, revoked, or terminated sooner as herein provided.

5.) Previous Franchises. Upon acceptance by Grantee as required by Section 9 herein, this Franchise shall supersede and replace any previous Ordinance or Agreement granting a Franchise to Grantee to own, operate and maintain a Cable System within Franchising Authority.

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

7.) Territorial Area Involved. This Franchise is granted for the corporate boundaries of Franchising Authority, as it exists from time to time. It shall be the responsibility of the Franchising Authority to notify Grantee of the annexation of new territories into the corporate boundaries. In the event of annexation by Franchising Authority, 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 forty (40) homes per 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.

8.) 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 Franchising Authority'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 Franchising Authority:

If to Grantee:

Nancy Vogel
Director of Revenue Assurance
Midcontinent Communications
3901 North Louise Avenue
Sioux Falls, SD 57107
Ph. (605) 357-5491

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

9.) 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 One (1) Franchising Authority owned building, and all public and private elementary and secondary schools, excluding home schools, located in the Franchising Authority 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 Services are paid. Nothing herein shall be construed as requiring Grantee to extend the System to serve additional institutions as may be designated by Franchising Authority. Grantee shall have one (1) year from the date of Franchising Authority designation of additional institution(s) to complete construction of the Drop and outlet.

10.) Public, Educational and Government (PEG) Access.

(a) Grantee shall offer to each of its Subscribers who receive all or any part of the Cable Services offered on the System, reception of one PEG Access Channel.

(b) Additional PEG Access Channel shall be made available in manner consistent with applicable law; provided, however, that Grantee shall determine the channel location of any additional PEG Channel(s).

(c) Upon written request of the Franchising Authority the Grantee shall operate and make readily available for the public equipment capable of performing good quality playback to perform playback of prerecorded programming and equipment to record programs at remote locations with battery operated portable equipment.

SECTION 3.

CONSTRUCTION STANDARDS

- 1.) Construction Codes and Permits.
 - (a) Grantee shall obtain all required permits from Franchising Authority before commencing any construction upgrade or extension of the System, including the opening or disturbance of any Street, or private or public property within Franchising Authority.
 - (b) The Franchising Authority shall impose no permit fees upon Grantee.
 - (c) The Franchising Authority 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, Franchising Authority 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 Franchising Authority, remove and relocate its poles, wires, cables, conduits, manholes and other fixtures of the System; provided, however, Township shall reimburse Grantee for any removal or relocation which will accommodate a MVPD or other public or private provider of Video Programming or telecommunications service. If Franchising Authority 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 Franchising Authority, 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, after advance notice to the Franchising Authority, to trim any trees upon and overhanging the Streets, alleys, sidewalks, or public easements of Franchising Authority so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee.

(d) 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 Franchising Authority 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 Franchising Authority 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.

SECTION 4.

SYSTEM PROVISIONS

1.) 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.

Technical Standards. The System shall comply, at minimum, with the technical standards promulgated by the FCC found in Title 47, Section 76.601 to 76.617, as may be amended or modified from time to time.

SECTION 5.

SERVICES PROVISIONS

1.) 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.

2.) 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.

SECTION 6.

OPERATION AND ADMINISTRATION PROVISIONS

1.) Indemnification of Franchising Authority.

(a) Grantee shall indemnify, defend, and hold harmless Franchising Authority, 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 covered by worker's compensation insurance.

(b) 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.

(c) In order for Franchising Authority to assert its rights to be indemnified, defended, and held harmless, Franchising Authority must with respect to each claim:

(1) Promptly notify Grantee in writing of any claim or legal proceeding which gives rise to such right;

(2) Afford Grantee the opportunity to participate in and fully control any compromise, settlement or other resolution or disposition of any claim or proceeding; and

(3) Fully cooperate with reasonable requests of Grantee, at Grantee's expense, in its participation in, and control, compromise, settlement or resolution or other disposition of such claim or proceeding subject to paragraph two (2) above.

2.) Insurance. As a part of the indemnification provided in Section 6.1, 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 Franchising Authority in its capacity as such. The policies of insurance shall be in the sum of not less than One Million Dollars (\$1,000,000) per occurrence, and One Million Dollars (\$1,000,000) for property damage per occurrence. The Franchising Authority shall be listed as an additional insured on all required policies.

3.) Franchise Fee.

- (a) Grantee will pay Franchising Authority an annual franchise fee in the amount of three (3) percent of Grantee's annual Gross Revenues.
- (b) The franchise fee shall be payable monthly. The payment shall be made within thirty (30) days of the end of each of Grantee's fiscal month, together with a brief report showing the basis for the computation.
- (c) Grantee shall reimburse the Franchising Authority for all publishing expenses incurred by the Franchising Authority in renewing the Franchise.

SECTION 7.

REVOCATION, ABANDONMENT, AND SALE OR TRANSFER

1.) Franchising Authority's Right to Revoke. In addition to all other rights which Franchising Authority has pursuant to law or equity, Franchising Authority reserves the right to revoke, terminate or cancel this Franchise, and all rights and privileges pertaining thereto, if after the hearing required by Section 7.2(b) herein, it is determined that Grantee has violated any material provision of this Franchise.

2.) Procedures for Revocation.

- (a) Franchising Authority 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, Franchising Authority 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 Franchising Authority Council prior to revocation, which public hearing shall follow the sixty (60) day notice provided in paragraph (a) above. Franchising Authority shall provide Grantee with written notice of its decision together with written findings of fact supplementing said decision.
- (c) After the public hearing and upon written determination by Franchising Authority to revoke the Franchise, Grantee may appeal said decision with an appropriate state or federal court or agency.
- (d) During the appeal period, the Franchise shall remain in full force and effect unless the term thereof sooner expires.
- (e) Upon satisfactory correction by Grantee of the violation upon which said notice was given, the initial notice shall become void.

3.) Removal Of Cable Equipment. Upon termination or forfeiture of this Franchise, Grantee shall remove all of its plants, structures, works, pipes, mains, conduits, cables, poles and wires related solely to the provision of cable services and refill at its own expense any excavation that shall be made by it and shall leave said streets, alleys, public ways and places, in as good condition as that existing prior to the Grantee's removal of equipment and appliances.

4.) Abandonment. The Grantee may not abandon any portion of the Cable System without written consent of the Franchising Authority, and no abandonment shall occur without compensating the Franchising Authority for damages resulting to it from such abandonment.

5.) Sale or Transfer of Franchise. No sale or transfer of this Franchise or sale or transfer of stock so as to create a new controlling interest under Minn. Stat. §238.083, shall be permitted without the approval of the Franchising Authority, which approval must 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 indebtedness.

SECTION 8.

MISCELLANEOUS PROVISIONS

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

2.) Amendment of Franchise Ordinance. Grantee and Franchising Authority may agree, from time to time, to amend this Franchise. Such written amendments may be made at any time if Franchising Authority 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. Franchising Authority shall act pursuant to local law pertaining to the ordinance amendment process.

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

SECTION 9.

PUBLICATION, EFFECTIVE DATE AND ACCEPTANCE

1.) Publication: Effective Date. This Franchise shall be published in accordance with applicable Minnesota law. The effective date of this Franchise shall be the date of acceptance by Grantee in accordance with the provisions of Section 9.2.

2.) Acceptance.

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

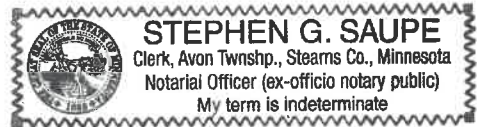
(a) Upon acceptance of this Franchise, Grantee shall be bound by all the terms and conditions contained herein.

(b) Grantee shall accept this Franchise in the following manner:

(1) This Franchise will be properly executed and acknowledged by Grantee and delivered to Franchising Authority.

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

Passed and adopted this 5th day of June, 2019.



ATTEST:

AVON TOWNSHIP, MINNESOTA

By: [Signature] Stephen G. Saupe

By: [Signature] William Hudson

Its: Clerk

Its: Supervisor Chair

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

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

Dated: _____

By: _____

Its: _____

