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CHAPTER FOURTEEN FRANCHISE

ARTICLE 1 – Grant of Franchises

14.0101 Power to Grant

The City Council may grant to any person, firm, partnership, association, corporation, company or organization of any kind a franchise or special right or privilege to operate or do business in the City, but such franchise shall be subject to the provisions of this article. (Source: North Dakota Century Code Section 40-05-01- (57))

14.0102 Compliance with Applicable Laws and Ordinances

The grantee of any franchise during the life of the franchise shall be subject to all lawful exercise of the police power of the City, and to such reasonable regulation, as the City Council shall provide by resolution or ordinance.

14.0103 Indemnification

The grantee of any franchise shall indemnify and save the City and its agents and employees harmless from all and any claims for personal injury or property damages and any other claims, costs, including attorney's fees, expenses of investigation and litigation of claims and suits thereon which may result from the activities of the grantee of the franchise in the City.

14.0104 Insurance

Any grantee of a franchise shall carry and keep in force a public liability policy of insurance, insuring the grantee of the franchise and the City against any and all liability, of not less than two hundred fifty thousand dollars (\$250,000.00) for any one person, property damage, personal injury, or death, and five hundred thousand dollars (\$500,000.00) for any one accident resulting in property damage, personal injury, or death. The City Council may demand proof of such insurance coverage in an insurance company licensed to do business in the State of North Dakota. (Source: North Dakota Century Code Section 32-12.1-03)

ARTICLE 2 – Penalty

Any person who is convicted of violating or failing to comply with any of the provisions of this Chapter may be punished by a fine of not more than \$1000.00 or by imprisonment not to exceed 30 days or both.

It shall be the Municipal Judge's decision to use the sentencing defined in Article 5 of Chapter 13 of the Revised Ordinances of the City of Cando.

Article 3 – Authorizing the Grant of Cable Communications Franchise

14.0301 SHORT TITLE AND DEFINITIONS

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

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

(a) **"Basic Cable Service"** means any service tier which includes the lawful retransmission of local television broadcast signals and any public, educational, and governmental access

programming required by the franchise to be carried on the basic tier. Basic Cable Service as defined herein shall not be inconsistent with 47 U.S.C. §543(b)(7).

(b) "Cable Programming Service" means any Video Programming provided over a Cable System, regardless of service tier other than:

Video Programming carried on the Basic Service Tier;

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

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

consists of commonly-identified Video Programming; and

is not bundled with any regulated tier of service.

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

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

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

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

(f) "Franchise" means an initial authorization, or renewal thereof issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a Cable System or other MVPD facility.

(g) "Franchise Area" means the area within the legal boundaries of the Grantor.

(h) "Grantee" is the Person which is granted a Franchise in City pursuant to this Ordinance, its agents and employees, lawful successors, transferees or assignees.

(i) "Grantor" is the City of Cando.

(j) "Gross Revenue" means only that monthly revenue net of bad debt received from Basic Cable Service and Premium Pay Services such as HBO. The Term "Gross Revenues" shall not include any other revenue billed or received by the Grantee including, franchise fees, late fees, any fees itemized and passed through as a result of franchise imposed requirements, 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) "Multichannel Video Program Distributor" or "MVPD" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, an OVS provider, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

- (l) “Open Video Services” or “OVS” means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.
- (m) “Pay Television” means the delivery over the System of pay-per-channel or pay-per-program audio-visual signals to Subscribers for a fee or charge, in addition to the charge for Basic Cable Service or Cable Programming Services.
- (n) “Person” is any person, firm, partnership, association, corporation, company, or other legal entity.
- (o) “Standard Installation” means any residential installation which can be completed using a drop of one hundred fifty (150) feet or less.
- (p) “Street” means the surface of, and the space above and below, any public street, road, highway, freeway, lane, alley, path, court, sidewalk, parkway, or drive, or any easement or right-of-way now or hereafter held by Grantor.
- (q) “Subscriber” means any Person who lawfully receives Cable Service.
- (r) “Video Programming” means programming provided by, or generally considered comparable to programming provided by a television broadcast station.

14.0302 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 MVPD facility or to provide Cable Service, Video Programming or other MVPD services, including OVS, in the Grantor without a Franchise authorizing the same, unless applicable federal or State law prohibits the Grantor’s enforcement of such a requirement.
- 2.) Grant of Franchise. Any Franchise that is granted in City shall be subject to the terms and conditions contained herein.
- 3.) Grant of Nonexclusive Authority.
- (a) A Grantee shall have the right and privilege to construct, erect, operate, and maintain, in, upon, along, across, above, over and under the Streets, public ways and public places now laid out or dedicated and all extensions thereof, and additions thereto in Franchise Area, poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in Franchise Area of a Cable System.
- (b) A Franchise shall be nonexclusive, and Grantor reserves the right to grant a similar use of said Streets to any MVPD at any time, provided, however, that all Franchises shall contain the same terms and conditions as this Franchise in order that one MVPD is not granted a competitive advantage over another. In the event a MVPD commences operation without a Franchise or is granted a Franchise to operate by the Grantor, the terms and conditions of which do not comply with this Ordinance, other Grantees shall have the right either (i) to opt in to the competitor’s Franchise by providing ten (10) days prior written notice to the Grantor; or (ii) to petition the Grantor for modifications to its Franchise, in which case the Grantor shall work in good faith with the affected Grantee(s) to review and adopt modifications which the Grantee(s) deem necessary, review and approval by Grantor shall not be unreasonably denied.
- (c) Before granting an additional franchise, the Grantor shall give written notice to all Grantees of any new application, identifying the applicant for such additional Franchise and

providing at least thirty (30) days prior notice of the date, time, and place at which the Grantor shall consider and/or determine whether such additional Franchise should be granted.

(d) Every Franchise shall apply to the entire service area of the Grantor, as it exists now or may later be configured.

(e) In the event Grantor grants one or more additional Franchises or one or more non-franchised MVPD's commence providing Cable Service in the Grantor, a Grantee shall have the right to terminate or reduce the term of this Franchise in its sole discretion.

(f) Neither City nor Grantee(s) may unilaterally alter the material rights and obligations set forth in this Franchise. In the event of a conflict between any other ordinance and this Franchise, the Franchise shall control.

4.) Franchise Term. A Franchise shall be in effect for a period of up to thirteen (13) years from the effective date of the agreement, unless renewed, revoked, or terminated sooner as herein provided.

5.) Territorial Area Involved. A Franchise shall be granted for the corporate boundaries of Grantor, as it exists from time to time. In the event of annexation by Grantor, or as development occurs, any new territory shall become part of the area covered, provided, however, that Grantee(s) shall not be required to extend service beyond its present System boundaries unless there is a minimum of twenty-five (25) homes per cable mile as measured from the last fiber node or terminating amplifier

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

14.0303 APPLICATION FOR NEW FRANCHISE

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

(a.) Applicant name and business address of Applicant.

(b.) A statement as to the proposed Franchise Area, and whether Applicant holds an existing authorization to access the Rights-of-Way in the City and a map of the areas where such authorization exists if for an area other than the entire City.

(c.) Resume of prior history of Applicant, including the legal, technical, and financial expertise of Applicant in the Cable Service field.

(d.) List of officers, directors, and managing employees of Applicant and resumes of each.

(e.) A proposed construction and schedule to provide Cable Service or Video Programming to Subscribers.

(f.) A certificate of insurance consistent with the requirements of this Ordinance.

(g.) A description of the Cable System the Applicant intends to build, including its capacity, the types of equipment proposed for use and the Cable Services or Video Programming which will be offered.

(h.) A description of the financial qualifications of the Applicant to construct and operate the System including a balance sheet, income statement sources and uses of funds statement and pro forma projections for at least three (3) years of operation subsequent to System completion.

- (i.) A proposed plan for Public, Educational, and Government Access Channels, including funding, facilities, and equipment and capacity on the System to be dedicated for educational and governmental use.
- 2.) The Initial Franchise Application may be evaluated according to the following criteria, and approved within one-hundred eighty (180) days after City deems the Application is complete. In the event Applicant is already authorized to occupy the Rights-of-Way, the time for review and approval will be ninety (90) days.
 - (a.) The evidence of legal, technical and financial ability required in the Applicant's proposal will be such as to assure the ability to complete the entire System within a reasonable time from the date the Franchise is granted. The City will also consider the Applicant's ability to operate the System and provide the necessary Cable Services or Video Programming in compliance with the terms of this Ordinance.
 - (b.) The City Administrator or designee shall prepare a report and make his or her recommendations respecting such application to the City Council
 - (c.) A public hearing shall be set prior to any grant of a Franchise, at a time and date approved by the City Council. Within thirty (30) days after the close of the hearing, the City Council shall make a decision based upon the evidence received at the hearing as to whether or not the Franchise(s) should be granted, and, if granted subject to what conditions.
 - (d.) The City may consider any additional information that it deems applicable.

14.0304 CONSTRUCTION AND OPERATIONS STANDARDS

- 1.) Conditions on Street Use.
 - (a.) A Grantee shall obtain all required permits from Grantor before commencing any construction upgrade or extension of the System.
 - (b.) The Grantor shall impose no permit fees upon a Grantee.
 - (c.) If at any time during the period of this Franchise Grantor shall elect to alter, or change the grade or location of any Street, alley or other public way, a Grantee shall, at its own expense, upon reasonable notice by Grantor, remove and relocate its poles, wires, cables, conduits, manholes and other fixtures of the System. If Grantor reimburses other occupants of the Street, a Grantee shall be likewise reimbursed.
 - (d.) A Grantee shall, on request of any Person holding a moving permit issued by Grantor, temporarily move its wires or fixtures to permit the moving of buildings with the expense of such temporary removal to be paid by the Person requesting the same, and a Grantee shall be given not less than ten (10) days advance notice to arrange for such temporary changes.
 - (e.) A Grantee shall have the authority to trim any trees upon and overhanging the Streets, alleys, sidewalks, or public easements of Grantor so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee.
 - (f.) Nothing contained in this Ordinance shall relieve any Person from liability arising out of the failure to exercise reasonable care to avoid injuring Grantee's facilities.

(g) In areas where all other utility lines are placed underground, Grantee shall construct and install its cables, wires and other facilities underground. In any area where one or more public utilities are aerial, Grantee may construct and install its cables, wires and other facilities from the same pole with the consent of the owner of the pole.

(h) A Grantee shall at all times construct and operate its System in accordance with applicable FCC Technical specifications.

(i) In the event that the use of any part of the system is discontinued for any reason for a continuous period of twelve (12) months, or in the event such systems or property has been installed in any street or public place without complying with the requirements of this Ordinance, or the rights granted hereunder have been terminated, cancelled or have expired, Grantee shall, subject to the rights of the City to acquire the system as specified in Section 3.1.(j) herein, promptly remove from the streets, or public places all such property and poles of such system other than any which the City may permit to be abandoned in place. In the event of such removal, Grantee shall promptly restore the street or other area from which such property has been removed to a condition satisfactory to the City.

(j) 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.

(k) All cable and passive equipment for cable television reception service installed by Grantee at a subscriber's location shall remain the property of Grantee and Grantee shall have the right to remove said cable and equipment. Upon termination of service to any subscriber, the Grantee shall promptly remove all its above ground facilities and equipment from the premises of such subscriber upon his request.

(l) No poles or other wire-holding structures shall be erected by the Grantee without prior approval of the designated representative of the City Council with regard to locations, height, type or any other pertinent aspect, which approval shall not be unreasonably withheld. However, no locations of any pole or wire-holding structure of the Grantee shall be a vested interest and such poles or structures shall be removed or modified by the Grantee at its own expense whenever the City Council or its designated representative determines that the public convenience would be enhanced thereby.

(m) Where poles or other wire-holding structures already existing in use in serving the City are available for use by Grantee, but it does not make arrangements for such use, the City Council may require the Grantee to use such poles and structures if it determines that the public convenience would be enhanced thereby and the terms of the use available to the Grantee are just and reasonable.

(n) Where the City or a public utility serving the City desires to make use of poles or other wire-holding structures of the Grantee but agreement therefore with the Grantee cannot be reached, the City Council may require the Grantee to permit such use for such consideration as is just and reasonable and upon such terms as the Council determines the use would enhance the public convenience and would not unduly interfere with the Grantee's operations.

(o) Grantee shall at all times maintain on file with the City Auditor a schedule setting forth all rates and charges to be made to subscribers for basic cable service, including installation charges.

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

14.0305 SYSTEM PROVISIONS AND PUBLIC SERVICES

- 1.) Operation and Maintenance of System. A Grantee shall render effective service, make repairs promptly, and interrupt service only for good cause and for the shortest time possible.
- 2.) Service to Schools and City. A Grantee shall, subject to the line extension requirements of Section 2.5 herein, provide one (1) Drop and one (1) outlet of Basic Cable Service at no cost to public and parochial elementary and secondary schools in City, and one (1) City building to be mutually agreed upon by City and a Grantee.
- 3.) PEG Channel. 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. Grantee shall assist the City in obtaining the necessary licenses and frequency clearance to enable the City to use said channel.
- 4.) Emergency Use. In the case of any emergency or disaster, a Grantee shall, upon request of the City Council, make available its facilities to the City for emergency use. A Grantee shall comply with the mergandy alert requirements of federal law.
- 5.) Lockout Device. Upon the request of a Subscriber, Grantee shall provide by sale or lease a Lockout Device.

14.0306 OPERATION AND ADMINISTRATION PROVISIONS

- 1.) Indemnification of Grantor.
 - (a) A Grantee shall indemnify, defend, and hold harmless Grantor, 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 a Franchise granted pursuant to this Ordinance, except claims covered by worker's compensation insurance or any claims arising from or related to Grantor's negligence. Nothing in this Ordinance relieves a Person from liability arising out of the failure to exercise reasonable care to avoid injuring the Grantee's facilities while performing work 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.
 - (b) In order for Grantor to assert its rights to be indemnified, defended, and held harmless, Grantor must with respect to each claim:
 - (1) Promptly notify a Grantee in writing of any claim or legal proceeding which gives rise to such right;
 - (2) Afford Grantee the opportunity to participate in and fully control any compromise, settlement or other resolution or disposition of any claim or proceeding; and
 - (3) Fully cooperate with reasonable requests of Grantee, at Grantee's expense, in its participation in, and control, compromise, settlement or resolution or other disposition of such claim or proceeding subject to paragraph two (2) above.
- 2.) Insurance. A Grantee shall maintain in full force and effect at its sole expense, a comprehensive general liability insurance policy, including contractual liability coverage, in protection of Grantor in its capacity as such. The policies of insurance shall be in the sum of not less than Three

Hundred Thousand Dollars (\$300,000) for personal injury or death of any one Person, and One Million Dollars (\$1,000,000) for personal injury or death of two or more Persons in any one occurrence, Three Hundred Thousand Dollars (\$300,000) for property damage to any one Person and One Million Dollars (\$1,000,000) for property damage resulting from any one act or occurrence.

3.) Franchise Fee.

(a) A Grantee will pay Grantor a monthly franchise fee in the amount of three (3%) percent of Grantee's Gross Revenues.

(b) The franchise fee shall be payable monthly, together with a brief report showing the basis for the computation.

(c) The period of limitation for recovery of any franchise fee payable hereunder shall be three (3) years from the date on which payment by Grantee is due.

14.0307 REVOCATION, ABANDONMENT, AND SALE OR TRANSFER

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

2.) Procedures for Revocation.

(a) Grantor shall provide a Grantee with written notice of a cause for revocation and the intent to revoke and shall allow Grantee sixty (60) days subsequent to receipt of the notice in which to substantially cure the violation or to provide adequate assurance of performance. Together with the notice required herein, Grantor shall provide Grantee with written findings of fact which are the basis of the revocation.

(b) Grantee shall be provided the right to a public hearing affording due process before the Grantor Council prior to revocation, which public hearing shall follow the sixty (60) day notice provided in paragraph (a) above. Grantor shall provide Grantee with written notice of its decision together with written findings of fact supplementing said decision.

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

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

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

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

14.0308 MISCELLANEOUS PROVISIONS

- 1.) Franchise Renewal. Any renewal of a Franchise shall be done in accordance with applicable federal law.
- 2.) Amendment of Franchise. A Grantee and Grantor may agree, from time to time, to amend a Franchise. Such written amendments may be made at any time.
- 3.) Marketing. A Grantee shall have the right to conduct direct selling in the Franchise Area, including door to door sales, notwithstanding any peddler or solicitor laws or regulations to the contrary.
- 4.) Severability. If any section, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, unenforceable or unconstitutional by a decision of any authority or court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance and the remainder shall remain in full force and effect.

14.0309 PUBLICATION, EFFECTIVE DATE

1.) Publication: Effective Date. If applicable, this Ordinance shall be published in accordance with law. The effective date of this Ordinance shall be _____.

Passed and adopted this ____ day of _____, 2010.

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

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

Passed and adopted this ____ day of _____, 2010.

CITY OF CANDO

By: _____
Its: _____

MIDCONTINENT COMMUNICATIONS

By: _____

Its: _____

Midcontinent Communications Investor, LLC
Managing Partner of Midcontinent
Communications

Date: _____