

**ORDINANCE NO. 90-18
CITY OF ELYSIAN, LE SUEUR COUNTY, MINNESOTA**

**AN ORDINANCE GRANTING A FRANCHISE TO MIDCONTINENT
COMMUNICATIONS TO MAINTAIN A CABLE COMMUNICATIONS SYSTEM IN
THE CITY OF ELYSIAN, 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 City Council of the City of Elysian, Minnesota ("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 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 City of Elysian, 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.

(c) 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.

(a) This Franchise shall be in effect for a period of ten (10) years from the date of acceptance by Grantee, unless renewed, revoked, or terminated sooner as herein provided.

(b) In the event Franchising Authority grants one or more additional Franchises or one or more non-franchised MVPD's commence providing Video Programming in the Franchising Authority, Grantee shall have the right to modify this Franchise as provided herein, terminate the Franchise or reduce the term of this Franchise in its sole discretion. All Franchises granted or renewed after the date of this Franchise shall have the same substantive terms and conditions as this Franchise in order that one MVPD not be granted a competitive advantage over another. Nothing in this provision shall be constructed in such a way as to limit the Franchising Authority's authority to enter into other Franchises.

(c) In the event a MVPD commences operation without a Franchise or is granted a Franchise or permit to operate by the Franchising Authority, the terms and conditions of which do not comply with this Franchise, Grantee shall notify the Franchising Authority whether it wishes to modify its Franchise (in addition to any rights it may have to modify its Franchise under state or federal law), terminate the Franchise or reduce the term of this Franchise in its sole discretion. The Franchising Authority and the Grantee shall work together in good faith to develop Franchise modifications which address any competitive inequity and the Franchising Authority shall adopt those modifications within ninety (90) days after receiving notice from Grantee. Failure to adopt the modifications shall allow Grantee to unilaterally opt into the competitor's Franchise or to otherwise reduce

or eliminate any obligations imposed by this Franchise which are not imposed on a competitor in its sole discretion. A MVPD is not an entity that provides direct broadcast satellite services for purposes of this Section. Notwithstanding any provisions of this Section to the contrary, if the Franchising Authority does not possess authority under applicable laws to require a Franchise from any Person, the provisions of this Section shall not apply.

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 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:

City Administrator-Lorri Kopischke
City of Elysian
110 West Main Street
Elysian, MN 56028
507-267-4708

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 the following locations: City Hall, Fire Hall, Public Works Building, Library, and the accredited School. Connecting cable Drops need only be completed if location requesting service is located within one hundred fifty (150) feet of the 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.) General Conditions.

(a) Grantee will keep in regular communication with residents concerning any construction, modification, restoration or alteration of the System, which may occur on their respective property. Except in instances of emergency repairs, Grantee will provide residents at least thirty-days (30) days' notice with regard to any construction, modification, restoration or alteration to the System which affects their property. Grantee will keep in regular communication with the City concerning projects located within the Corporate limits of the City. Grantee will cooperate with requests for information, requests for service, and request for restoration services. Grantee will notify the City's Administrator of any work to be completed in the City's corporate limits at least thirty (30) days before commencing work; unless an emergency situation arises, whereupon Grantee will then notify the City's Administrator of the same in a reasonable manner but in no event said notice shall not be longer than three (3) days' notice following completion of any work.

(b) All construction, modification, and restoration of premises work will be in a workmanlike manner and will be fully completed within twenty (20) days of substantial completion of the work, unless an extension is given by express written consent of the City. Grantee agrees that it will restore the premises to as good a condition as it existed prior to commencement of the project. This includes, but is not limited to, restoring soil areas disturbed with either sod or seed as requested by the City. Grantee additionally agrees that it will remove and replace any and all concrete or bituminous it removed, cut into, or disturbed as part of a project so that the area disturbed blends together and is compatible. Grantee agrees that in the event that any sidewalk material is removed, cut into, or disturbed in any manner, that the sidewalk will be fully restored by replacing the same with three (3) panels of sidewalk or ten (10) feet of the same, whichever is greater. Grantee agrees to warrant the restoration called for under this Franchise for a period of one (1) year following acceptance by the City. In the event that restoration work is deemed insufficient by the City, the City shall contact Grantee, advise Grantee of the same, and Grantee shall then have twenty (20) days to complete additional restoration work. In the event that restoration is not completed as contemplated by this Franchise, liquidated damages of one-hundred-dollars (\$100) per day shall accrue and continue for each additional day that restoration work has not been fulfilled pursuant to this Franchise and these liquidated damages shall be cumulative to the other rights and remedied the City may have under this Franchise.

2.) 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 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.

3.) 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.

4.) 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. If Franchising Authority reimburses other occupants of the Street, Grantee shall likewise be 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. Grantee shall have the option to require pre-payment from house moving company.

(c) The Grantee shall have the 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.

5.) 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.

6.) 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.

2.) 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 Five Hundred Thousand Dollars (\$500,000) for personal injury or death of any one Person, and One Million Dollars (\$1,000,000) for personal injury or death of two or more Persons in any one occurrence, Five Hundred Thousand Dollars (\$500,000) for property damage to any one Person and One Million Dollars (\$1,000,000) for property damage resulting from any one act or occurrence.

3.) Franchise Fee.

(a) Grantee will pay Franchising Authority an annual franchise fee in the amount of Five percent (5%) of Grantee's annual Gross Revenues. This fee shall begin Ninety (90) days following the effective date of this ordinance.

(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.

SECTION 7.

REVOCACTION, ABANDONMENT, AND SALE OR TRANSFER

4.) 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.

5.) 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.) 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 publication by Grantee in accordance with the provisions of Section 9.2. A summary of the ordinance may be published in lieu of publication of the entire ordinance.
- 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.
 - (b) Upon acceptance of this Franchise, Grantee shall be bound by all the terms and conditions contained herein.
 - (c) 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 12th day of March, 2018.

ATTEST:

CITY OF ELYSIAN

By: _____

By: _____

Its: _____

Its: _____

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: _____