

ORDINANCE 21-5756

AN ORDINANCE OF THE CITY OF BILLINGS, PROVIDING THAT THE BILLINGS, MONTANA CITY CODE BE AMENDED BY ADDING A NEW ARTICLE 7-1800, SECTIONS 7-1801 THROUGH 7-1809, ESTABLISHING A NONEXCLUSIVE CABLE SYSTEM FRANCHISE AGREEMENT INCLUDING ALL TERMS AND CONDITIONS WITH TDS METROCOM, LLC

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BILLINGS THAT:

Section 1. That the Billings, Montana, City Code be amended by adding a new Article 7-1800, to read as follows:

ARTICLE 7-1800. CABLE SYSTEM FRANCHISE

Sec. 7-1801. Definition of terms.

For the purpose of this Article, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. Any word or phrase not defined in this Section shall have the same meaning as in 47 U.S.C § 521 et seq. ("Cable Act") and associated Federal Communications Commission ("FCC") rules and regulations. Otherwise, words shall have their ordinary meaning.

- A. "Basic Cable Service" means the most highly penetrated, separately-priced Service Tier that is available without the purchase of any other Service Tier and which includes the retransmission of local broadcast signals.
- B. "Cable Act" means Title VI of the Communications Act of 1934, as amended.
- C. "Cable Ordinance" means the Model Cable System Franchise set forth in Article 7-1600, Billings, Montana City Code.
- D. "Cable Service" shall mean (1) the one-way transmission to Subscribers of (a) video programming, or (b) other programming service, and (2) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- E. "Cable System" shall mean 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 the Service Area, 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;
- (5) any facilities of any electric utility used solely for operating its electric utility systems.

The term "Cable System" includes wires, cables, conductors, ducts, poles, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary to the operation of the Cable System.

- F. "Drop" means the cable that connects the ground block on the Subscriber's residence to the nearest feeder cable of the Cable System.
- G. "FCC" means the Federal Communications Commission, or successor governmental entity thereto.
- H. "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 the Grantor, 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.
- I. "GAAP" means Generally Accepted Accounting Principles.
- J. "Grantor" means the City of Billings, Montana or any lawful successor or assign.
- K. "Grantee" means TDS Metrocom, LLC, or the lawful successor, transferee, or assignee thereof.
- L. "Gross Revenues" means all amounts derived by the Grantee and/or affiliate from the operation of the Grantee's Cable System to provide Cable Services within the Service Area.
- (1) "Gross Revenues" include, by way of illustration and not limitation:

- (i) Fees for Cable Services, regardless of whether such Cable Services are provided to residential or commercial Subscribers, including revenues derived from the provision of Cable Services (including but not limited to pay or premium Cable Services, digital Cable Services, pay-per-view, pay-per-event, audio channels and video-on-demand Cable Services);
 - (ii) Installation, disconnection, reconnection, downgrade, upgrade, maintenance, repair, or similar charges associated with Subscriber Cable Service;
 - (iii) Fees paid to the Grantee for channels designated for commercial/leased access use, which shall be allocated on a pro rata basis using total Cable Service Subscribers with the Service Area;
 - (iv) Converter, remote control, and other Cable Service equipment rentals, leases, or sales (but not revenues from equipment used exclusively for the provision of services that are not Cable Service);
 - (v) Advertising Revenues as defined herein;
 - (vi) Fees including, but not limited to: a) late fees, convenience fees and administrative fees which shall be allocated in accordance with GAAP; and 2) Franchise fees;
 - (vii) Commission from home shopping channels and other Cable Service revenue sharing arrangements which shall be allocated on a pro rata basis using total Cable Services Subscribers within the Service Area;
 - (viii) "Advertising Revenue" shall mean amounts derived from sales of advertising on any Cable Service made available the Grantee's Cable System Subscribers within the Service Area and shall be allocated on a pro rata basis using total Cable Service Subscribers reached by the advertising.
- (2) "Gross Revenues" shall not include:
- (i) actual Cable Services bad debt write-offs, except any portion which is subsequently collected which shall be allocated on a pro rata basis using Cable Services revenue as a percentage of total subscriber revenues within the Service Area; and

- (ii) any taxes and/or fees of general applicability imposed upon Grantee or Subscribers by any municipality, state or other governmental unit and required to be collected by Grantee and remitted to the taxing entity, provided that Franchise Fees, Public, Educational and Governmental (PEG) Fees and the FCC regulatory fee shall not be regarded as such a tax or fee;
- (iii) launch fees and marketing co-op fees to the extent consistent with GAAP; and,
- (iv) unaffiliated third party advertising sales agency fees which are reflected as a deduction from revenues to the extent consistent with GAAP.

(3) To the extent revenues are received by Grantee, or any affiliate of Grantee, for the provision of a discounted bundle of services which includes Cable Services and non-Cable Services, Grantee shall calculate revenues to be included in Gross Revenues using a methodology that allocates revenue on a *pro rata* basis when comparing the bundled service price and its components to the sum of the published undiscounted rates for the components. This calculation shall be applied to every bundled service package containing Cable Service from which the Grantee derives revenues in the Service Area and shall be modified whenever a rate change occurs on any part of the bundled services. The Grantor reserves the right to review and to challenge the Grantee's calculations.

- M. "Person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.
- N. "Public Way" shall mean the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, parkway, way, lane, public way, drive, circle, or other public right-of-way, including, but not limited to, public utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses held by the Grantor in the Service Area and which by their nature entitle the Grantor and the Grantee to the use thereof for the purpose of installing, operating, repairing, and maintaining a Cable System.
- O. "Service Area" means the present boundaries of the Grantor, and shall include any additions thereto by annexation or other legal means.
- P. "Service Tier" means a specific set of Cable Services which are made available as a group for purchase by Subscribers at a separate rate for the group.
- Q. "Standard Installation" is defined as any service installation that can be completed using a Drop of one hundred twenty five (125) feet or less.

- R. "Subscriber" means any Person who lawfully receives Cable Service of the Cable System and does not further retransmit it.
- S. "Video Programming" means any programming provided by, or generally considered comparable to programming provided by a television broadcast station.

Sec. 7-1802. Grant of franchise.

- (a) *Grant.* The Grantor hereby grants to the Grantee a nonexclusive Franchise which authorizes the Grantee to construct, maintain, extend and operate a Cable System to provide Cable Services in, along, among, upon, across, above, over, under, or in any manner connected with Public Ways within the Service Area, and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, or retain in, on, over, under, upon, across, or along any Public Way a Cable System for the purpose of providing Cable Service. The Cable System shall be a Fiber-to-the-Premise (FTTP) network capable of delivering high-quality digital video signals meeting or exceeding FCC technical quality standards.
- (b) *Other Ordinances.* This Franchise is subject to the laws and regulations of the Grantor as now existing or as may hereafter be adopted. Provided that, neither party may unilaterally alter the express material rights and obligations set forth in this Franchise. In the event of a conflict between the express material rights of Grantee set forth in this Franchise and any ordinance adopted after the date hereof and this Franchise, the Franchise shall control, provided however that the Grantee agrees that it is subject to the lawful exercise of the police power of the Grantor. Provided further, the right to use the Public Ways is subject to the continuing regulation by the Grantor, the grant of this Franchise is not in lieu of any permits or zoning approvals that may be required, or fees associated with the same; and the grant of the Franchise does not give Grantee the right to maintain its facilities at any particular location in the Public Ways, and instead the Grantee shall have the duty to relocate or remove the same from time to time, as provided in this Franchise or under laws or regulations now existing or hereafter adopted.
- (c) *Public Hearing.* Before issuing any other Franchise or other authorization to provide multichannel video programming services, the Grantor shall conduct a public hearing to determine whether an applicant's proposal for such Franchise or other authorization meets the future cable-related needs and interests of the community and any impact on the existing provision of Cable Service, except where such a hearing would be inconsistent with applicable laws and regulations. Grantee shall be notified of that hearing, and shall be given an opportunity to appear at the hearing and address issues relevant to the issuance of the Franchise or other authorization, except that nothing in this paragraph requires the Grantor to take any action

that would result in a violation of applicable laws and regulations, or that prevent it from acting prior the expiration of any deadline.

- (d) *Competitive Equity.* In the event that the Grantor issues, or has issued, a Franchise or other authorization to any other entity to provide multichannel video programming services in the City comparable to the Cable Service provided by Franchisee, the Grantor agrees to engage in good faith discussions with Grantee regarding any modifications to this Franchise proposed by Grantee to ensure that the terms and conditions imposed on Grantee by this Agreement will be neither less favorable nor more burdensome than those governing any other such entity or otherwise give such other entity an unfair competitive advantage over Grantee.
- (e) *Term.* The Franchise granted hereunder shall be for an initial term of ten (10) years commencing on the effective date of the Franchise as set forth in Section 2, unless otherwise lawfully terminated in accordance with the terms of this Franchise.
- (f) *Renewal.* This Franchise will be automatically extended for an additional term of five (5) years, unless either party notifies the other in writing of its desire to not exercise this automatic extension at least three (3) years before the expiration of this Franchise. If such a notice is given, the parties will then proceed under the federal Cable Act renewal procedures.

Sec. 7-1803. Standards of Service.

- (a) *General.* This Section sets forth minimum standards for service. All acts a Grantee is required to perform are at its expense, and at no expense to the Grantor except as otherwise stated herein.
- (b) *Conditions of occupancy.* The Cable System installed by the Grantee pursuant to the terms hereof shall be located so as to cause a minimum of interference with the proper use of Public Ways and with the rights and reasonable convenience of property owners who own property that adjoins any of such Public Ways.
- (c) *Restoration of public ways.* If during the course of the Grantee's construction, operation, or maintenance of the Cable System there occurs a disturbance of any Public Way by the Grantee, Grantee shall replace and restore such Public Way to a condition better than, or equal to, the condition of the Public Way existing immediately prior to such disturbance.
- (d) *Relocation for the Grantor.* Upon its receipt of reasonable advance written notice, to be not less than ten (10) business days, the Grantee at its expense shall protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way, any property of the Grantee when required by the Grantor or any government entity by reason of traffic

conditions, public safety, street abandonment, freeway and street construction, change or establishment of street grade, installation of sewers, drains, gas or water pipes, or any other type of public structures or improvements. The Grantee shall in all cases have the right of abandonment of its property, provided that, if property is abandoned, Grantee upon request must provide Grantor title to the property, free and clear of encumbrances.

- (e) *Relocation for a third party.* The Grantee shall, on the request of any Person holding a lawful permit issued by the Grantor, protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way as necessary any property of the Grantee, provided: (A) the expense of such is paid by said Person benefiting from the relocation, including, if required by the Grantee, making such payment in advance; and (B) the Grantee is given reasonable advance written notice to prepare for such changes. For purposes of this subsection, "reasonable advance written notice" shall be no less than ten (10) business days in the event of a temporary relocation, and as promptly as possible for a permanent relocation, considering the work to be performed in connection with that relocation.
- (f) *Relocation for a Person Authorized to Place Facilities in Rights of Way.* Grantee shall promptly protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way as necessary any property of the Grantee as required to enable another person authorized to place facilities in the rights of way (other than a person described in Sections 7-1803(d)-(e) to construct, modify, repair or maintain such facilities, with the cost therefore to be borne in accordance with applicable law. If applicable law requires such other person to pay for the cost of relocation, Grantee may require such payment in advance.
- (g) *Trimming of Trees and Shrubbery.* The Grantee shall have the authority to trim trees or other natural growth in order to access and maintain the Cable System, subject to the supervision of the Grantor. Nothing in this section relieves Grantee of any liability it may have to persons for damage caused to public or private property.
- (h) *Safety Requirements.* Construction, operation, repair, and maintenance of the Cable System shall be performed in an orderly and workmanlike manner. All such work shall be performed in substantial accordance with applicable federal, state, and local regulations and the National Electric Safety Code and the National Electrical Code. The Cable System shall not endanger or unreasonably interfere with the safety of Persons or property in the Service Area.

- (i) *Underground Construction.* In those areas of the Service Area where all of the distribution facilities of the incumbent local exchange carrier and distribution lines of public utilities providing electric services are underground, the Grantee likewise shall construct, operate, and maintain its Cable System underground.
- (j) *Initial Build-Out of Cable System; Required Extensions of the Cable System.* Grantor acknowledges that because Grantee is entering a market where potential Subscribers already have access to two or more terrestrial or satellite providers of multichannel video programming service, requiring Grantee to initially buildout all of the Service Area as a condition of receiving a cable franchise may be economically prohibitive and construed as a barrier to entry for competitive cable service in the Service Area. Accordingly, the parties agree to implement the following procedure for the initial construction and subsequent extension of the Grantee's Cable System within the Service Area.
 - (1) Within sixty (60) days following the effective date of this Franchise, the Grantor and Grantee shall establish a mutually agreeable construction start date that takes account such time as is reasonably necessary for Grantee to issue Requests for Proposals relating to the construction of the Cable System. No later than four (4) years from the agreed upon construction start date, Grantee's Cable System shall be capable of providing Cable Service to all of the Dwelling Units in the Initial Coverage Area, provided however that Grantee may request, and the Grantor shall not unreasonably withhold its approval of, extensions of this deadline based on construction delays caused or contributed to by unforeseen events outside Grantee's control.
 - (2) Within thirty (30) days following completion of the Initial Coverage Area construction required under paragraph (1), Grantee shall send written notification to Grantor of completion of Initial Coverage Area construction and Grantor may require grantee to expand its Cable System's coverage in accordance with the terms of this paragraph. No more than once a year, after receipt of a written request from Grantor, Grantee shall provide a report showing the current Penetration Level in Grantee's Service Area. If the Penetration Level is thirty-five percent (35%) or greater, the City may require Grantee to expand its Cable System to cover an additional seven percent (7%) of the Unserved Area by delivering written notice to Grantee. Upon receipt of such notice, Grantee shall have twenty-four (24) months to meet such expansion requirement. Grantee shall determine which portion of the Unserved Area it will serve to meet its obligation under this paragraph.
 - (3) Once Grantee has extended its Cable System to cover ninety-five percent (95%) of the Service Area in accordance with paragraph (2), the

Grantee shall make available Cable Service distributed over the Cable System when Dwelling Units can be served by extension of the cable system past Dwelling Units equivalent to a density of seven (7) Dwelling Units per one-quarter (1/4) mile of cable contiguous to the Cable System. Grantee may petition the Grantor for a waiver of this requirement, such waiver to be granted for good cause shown.

- (4) Extensions of the Cable System pursuant to paragraphs (2) and (3) shall be at the Grantee's cost.
- (5) In areas not meeting the requirements of seven (7) or more Dwelling Units per one-quarter (1/4) mile of cable contiguous to the Cable System, Grantee shall provide, upon request of any potential Subscribers desiring Cable Service from Grantee, an estimate of the costs required to extend the Cable System to such Subscribers. Grantee shall then extend the Cable System upon request and upon payment of any amount equal to the reasonable value of actual time and materials to be incurred by Grantee for such extension. If the Dwelling Unit is located within one hundred twenty-five (125) feet of Grantee's feeder cable, the installation cost for the Subscriber will be the Grantee's published rate for Standard Installations.
- (6) Definitions. For purposes of this Section 7-1803(j), the following terms shall have the meanings ascribed to them below:
 - (A) "Coverage Area" means any portion of the Service Area where Dwelling Units are passed by Grantee's Cable System activated plant.
 - (B) "Dwelling Units" means all residential single family or multi-family homes or units in the Service Area.
 - (C) "Initial Coverage Area" means an area comprised of seventy percent (70%) of the Dwelling Units in the Service Area.
 - (D) "Penetration Level" means the percentage obtained by dividing (x) the number of Grantee's Subscribers, by (y) the total number of Dwelling Units in Franchisee's Service Territory (e.g., $x/y =$ Penetration Level percentage).
 - (E) "Unserved Area" means any portion of the Service Area where the Dwelling Units are not in Grantee's Coverage Area.
- (k) *Emergency Use.* If the Grantee provides an Emergency Alert System ("EAS"), then the Grantor shall permit only appropriately trained and authorized Persons to operate the EAS equipment and shall take reasonable precautions to prevent any use of the Grantee's Cable System in any manner that results in inappropriate use thereof, or any loss or damage to the Cable System.

- (l) *Non-Discrimination.* All Grantee's rates and charges shall be publicly-available and be non-discriminatory as to all Persons and organizations of similar classes, under similar circumstances and conditions. Grantee shall provide a minimum of thirty (30) days' written notice to Grantor and each Subscriber before increasing any rates and charges. Grantee shall make its services available on a non-discriminatory basis, without regard to race, color, ethnic or national origin, religion, age, sex, sexual orientation, marital, military, or economic status, or physical or mental disability or geographic location within the Service Area. Nothing herein shall be construed to prohibit:
- (1) The temporary reduction or waiving of rates or charges in conjunction with promotional campaigns; or,
 - (2) The offering of reasonable discounts to senior citizens or economically disadvantaged citizens.

Sec. 7-1804. Regulation by the Grantor

- (a) *Franchise Fee.* The Grantee shall pay to the Grantor an annual franchise fee of five percent (5%) of annual Gross Revenues (as defined in this Franchise) computed in accordance with Generally Accepted Accounting Principles.
- (1) Each annual payment shall be due forty-five (45) days following the end of the previous calendar year and shall be accompanied by a report prepared by a representative of Grantee showing the amount of the franchise fee due for each month covered by the annual payment. Upon written request, and subject to Section 7-1805(a), the Grantee shall provide such information as the Grantor may require to determine whether fees are being paid as required, attested to as accurate by an officer of the Grantee.
 - (2) *Limitation on Franchise Fee Actions.* The period of limitation for recovery of any franchise fee payable hereunder shall be three (3) years from the date on which payment by the Grantee is due.
 - (3) No acceptance of any payment by the Grantor shall be construed as a release or an accord and satisfaction of any claim the Grantor may have for further or additional sums payable as a franchise fee or for the performance of any other obligation of Grantee.
- (b) *Rates and Charges.* The Grantor may regulate rates and charges except to the extent preempted from doing so by federal or state law.
- (c) *Transfer of Franchise.* The Grantee's right, title, or interest in the Franchise shall not be sold, transferred, assigned, or otherwise encumbered, other

than to an entity controlling, controlled by, or under common control with the Grantee as of the Effective Date, without the prior consent of the Grantor, such consent not to be unreasonably withheld. A change of control of Grantee or entities controlling Grantee shall be treated as a transfer. No such consent shall be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Grantee in the Franchise or Cable System in order to secure indebtedness, provided that no such instrument permits any person to succeed to the ownership or control of the system without the approval of the Grantor. Without limiting the other provisions of this Franchise, Grantor and Grantee shall comply with any federal regulations governing transfer of cable systems. In deciding whether to grant or deny a request for transfer, the Grantor may consider any factors it may consider under applicable law, including the financial, technical and legal qualifications of the transferee.

Sec. 7-1805. Books and Records

- (a) The Grantee agrees that the Grantor, upon thirty (30) days written notice to the Grantee, may review and copy such of its books and records at a mutually agreed upon time and place, as is reasonably necessary to ensure compliance with the terms of this Franchise, or applicable law, or to carry out any of the Grantor's obligations under the same. Such notice shall reference the Section of the Franchise or applicable law giving rise to the request, so that the Grantee may organize the necessary books and records for easy access by the Grantor. The Grantee shall not be required to maintain any books and records for Franchise compliance purposes longer than three (3) years. Grantor agrees that it will not disclose information provided to it which is marked as confidential or proprietary, except as required to do so by Montana public records statutes or by court order. The Grantee shall not be required to provide Subscriber information in violation of Section 631 of the Cable Act and shall redact any such information.
 - (1) Upon request, Grantee shall provide the Grantor with maps of its system as built, in hard copy or, if the Grantor requests it, in an electronic format compatible with the Grantor's mapping systems.
 - (2) Grantor may require Grantee to produce reports reasonably necessary to ensure compliance with the terms of this Franchise, or applicable law, or to carry out any of the Grantor's obligations under the same.

Sec. 7-1806. Insurance and Indemnification

- (a) *Insurance Requirements.* The Grantee shall maintain in full force and effect, at its own cost and expense, during the term of the Franchise, Commercial General Liability Insurance in the amount of one million five hundred thousand dollars (\$1,500,000) combined single limit for bodily

injury and property damage. The Grantor shall be designated as an additional insured. Such insurance shall be noncancellable except upon thirty (30) days prior written notice to the Grantor. The Grantee shall provide a Certificate of Insurance showing evidence of the coverage required by this subsection.

- (b) *Indemnification.* Grantee shall indemnify, save harmless and defend the Grantor, its mayor and council, appointed boards and commissions, officers and employees, (collectively "Grantor and its agents") individually and collectively from all fines, liens, suits, claims, demands, actions, costs of litigation, attorneys' fees, judgments or liability of any kind ("Losses") (including but not limited to libel, slander, invasion of privacy, unauthorized use of any trademark, trade name or service mark, copyright infringement, injury, death or damage to person or property) arising out of or in any way connected with the installation, construction, operation, maintenance or condition of the Cable System. The Grantor shall give Grantee timely written notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the indemnity of this section, where Grantee is not a party thereto.

Sec. 7-1807. Enforcement and Termination of Franchise

- (a) *Violation.* In the event that the Grantor believes that the Grantee has not complied with the terms of the Franchise, or applicable law, the Grantor may commence a proceeding in any court or agency of competent jurisdiction, and take such other actions as are permitted under this section, or other applicable law.
- (b) *Liquidated Damages.* Grantee and Grantor agree to the following liquidated damages for the following violations. Grantee and Grantor agree that the liquidated damages amounts are in 2021 dollars and, upon notice from Grantor, may be increased once every three (3) years by the increase in the U.S. city average of the consumer price index. Damages accrue in accordance with subsection (c); provided that, nothing herein prevents Grantee from raising a defense to the imposition of liquidated damages from the date of the violation based upon laches, waiver, statute of limitations, or any other similar defense.
 - (1) For transferring this Franchise without required approval: One thousand dollars (\$1,000.00) per day for each violation for each day the violation continues.
 - (2) For failure to comply with requirements for PEG use of the system for which damages to Grantor are not readily ascertainable: Two hundred fifty dollars (\$250.00) per day for each violation for each day the violation continues.

- (3) For violation of customer service standards: One hundred dollars (\$100.00) per violation, except that violations of customer service standards, such as telephone answering standards, where the operator's compliance is not measured in terms of its response to individual customers, one thousand five hundred dollars (\$1,500.00) a month for any period during which the Franchise fails to meet applicable performance standards, provided that, for purposes of this applying the telephone answering time standard, Grantee shall be deemed to have satisfied said standard whenever a Subscriber call is connected to an automated answering system within thirty (30) seconds after the call first rings and the Subscriber is transferred to a customer service representative within thirty (30) seconds after the Subscriber makes an automated or voice request to be so transferred; and
- (4) For all other material violations of this Franchise for which actual damages may not be ascertainable: Two hundred fifty dollars (\$250.00) per day for each violation for each day the violation continues.
- (c) *Procedures for Imposition of Liquidated Damages.* Grantor may impose liquidated damages in accordance with procedures in this section, provided that Grantee will not be liable for liquidated damages for violations of the customer service standards until ninety (90) days after it began serving its first Subscriber in the Service Area. Grantor shall provide Grantee written notice describing with reasonable specificity the alleged noncompliance, and provide Grantee with an opportunity to be heard at a public hearing, to show either that a violation has not occurred or that damages should not be imposed. The written notice shall be provided at least sixty (60) days prior to any hearing on the alleged noncompliance. Liquidated damages shall accrue from the date of the alleged violation.
- (d) *Nature of Liquidated Damages.* These sums are agreed upon as reasonable liquidated damages, developed in accordance with state law, and are not penalties.
- (e) *Revocation of Franchise.* The Grantor shall have the right to terminate, revoke or shorten the term of this Franchise for the reasons specified in the Cable Ordinance as of the effective date of this Franchise, pursuant to the procedures specified in the Cable Ordinance. Provided that, any amendments to the Cable Ordinance shall provide the same level of due process as is provided under the procedures provided for under the Cable Ordinance as the same existed on the effective date of this Franchise.
- (f) *Force Majeure.* Grantee shall not be deemed in default with provisions of this Franchise where performance was rendered impossible by war or riots,

civil disturbances, floods, natural catastrophes, or other events beyond Grantee's control, provided that Grantee takes immediate and diligent steps to comply as soon as possible under the circumstances with this Franchise without unduly endangering the health, safety and integrity of Grantee's employees or property, or the health, safety and integrity of the public, public rights-of-way, public property, or private property.

Sec. 7-1808. Public, Educational and Governmental Use

(a) *Definitions:*

(1) "Access, Public, Educational or Government, or PEG" refers to the availability of the System for Public, Education or Government ("PEG") use by various agencies, institutions, organizations, groups, and individuals, including the Grantor and its designated Access providers, to acquire, create, and distribute video and non-video communications not under Grantee's editorial control.

(2) "High definition" refers to television signals with a resolution of 1080i or 720p.

(b) *Provision of Channel Capacity for PEG Use.* At such time as Grantee first provides Cable Service to its first Subscriber in the Service Area, the Basic Cable Service provided by Grantee shall include two channels designated for PEG use. The PEG channels shall not be used for any purpose inconsistent with applicable law.

(c) *Management of Channel.* The Grantor shall designate who is responsible for managing the PEG channels provided under this Franchise.

(d) *Availability.* The PEG channels provided under this Franchise shall be viewable by any Subscriber without the need for obtaining any equipment other than the equipment required to receive High Definition broadcast channels; and shall be provided as part of Basic Cable Service.

(e) *Electronic Program Guide.* To the extent technically feasible, Grantee will identify the PEG channels on the same interactive, on-screen electronic program guide ("EPG") on which the Grantee lists other channels. If the entity that is responsible for managing a PEG channel wants the EPG to display specific program-related information (e.g., title, date, and time of program, closed captioning availability, etc.), it shall be the sole responsibility of such entity both to timely provide the information that it wishes to have displayed to the entity that is responsible for programming the EPG and to bear any expenses associated with arranging for such display.

- (f) *Format.* PEG links and channels must be designed so that there is no noticeable deterioration in signal quality or programming as received from the PEG programmer and should be of a quality equivalent to other local broadcast affiliate station channels carried on the Basic Cable Service. Grantee shall cablecast in High Definition format any PEG programming provided in high definition format. If, at any time during the term of this Franchise, Grantee carries fifty (50%) percent of all commercial channels on the Basic Cable Service in an advanced format other than High Definition, Grantee shall also carry the PEG channels in such format if so provided to Grantee and upon a schedule to be mutually agreed with the Grantor which may include carriage in more than one format for a transition period. Grantor will be responsible for the cost of upgrading its PEG facilities as needed to deliver the advanced format to Grantee; Grantee will be responsible for the cost of upgrading its facilities as needed to deliver the advanced format to Subscribers.
- (g) *Grantee's Responsibilities.* Grantee will provide and maintain a dedicated two-way activated fiber link between the Community Seven Television Playback Center at the Lincoln Center (the "Playback Center") and the Grantee's headend for cablecasting to Subscribers so that the transmission of any PEG channel emanating from the Playback Center can be monitored by Grantor. Grantee also will provide and maintain equipment to encode signals for transport from the Playback Center to the TDS headend. Grantee shall be responsible for ensuring that no material degradation occurs to signals emanating from said Playback Center during their transmission from Grantee's headend to Subscribers. The Grantee will provide and maintain dedicated activated fiber links between the Playback Center and the following locations so that each location may transmit signals without degradation to the Playback Center:
- (1) City Hall (Council Chambers/Municipal Court), located at 220 North 27th Street
 - (2) Either (but not both) the Stillwater Building at 316 North 26th Street, or the Miller Building at 301 North 29th Street, with the decision as to which one of these buildings Grantee is obligated to provide connections shall be made by Grantor and communicated to Grantee in writing at least thirty (30) days prior to the date on which Grantee commences downtown construction of the Cable System.

If Grantee makes changes to its Cable System that necessitate modifications to PEG facilities and equipment, including but not limited to the links, Grantee shall provide any additional facilities or equipment necessary to implement such modifications within thirty (30) days of the date that the System changes are made, so that PEG facilities and equipment may be used and operated as intended.

(h) *Other Capital Support for PEG.*

- (1) Grantee shall pay twenty-five cents (\$0.25) per Subscriber per month for capital support for PEG. Grantor may increase this fee to up to eighty-five cents (\$0.85) per subscriber per month and Grantee shall pay the increased fee beginning sixty (60) days after adoption of a resolution by the Grantor after at a public meeting, provided that such fee, as increased, is not greater than the PEG capital support fee required to be paid by any other Cable System serving the City. This charge for PEG capital support may be categorized, itemized and passed through to subscribers as a PEG fee on Subscriber's bills, at Grantee's option, as permitted by applicable law. Grantee shall remit the PEG capital support fee, separately itemized by month, to Grantor annually at the same time as Grantee remits the franchise fee payment due under Section 7-1804(a)(1).
 - (2) Grantee shall not be responsible for paying the PEG capital support fee with respect to gratis or bad debt accounts. Upon Grantee's written request and due as agreed upon by both parties, the Grantor shall provide the Grantee with documentation showing expenditures for PEG capital use of the previous fiscal years' PEG capital support fee and showing the budgeted use of the current year's PEG funding. In the event the Grantor cannot demonstrate that PEG capital funding was used or budgeted for PEG capital needs, Grantee's PEG funding obligations going forward shall be reduced by an equivalent amount.
- (i) *Channel Location.* Grantee agrees to use reasonable efforts to place the PEG channels on channel locations that are grouped with the local national network affiliated broadcast stations (e.g. ABC, CBS and NBC) in the Basic Cable Service. Grantee shall not change the channel position for the PEG channels without the Grantor's consent unless the change is required by federal law. The Grantor's consent will not be unreasonably withheld or delayed. Grantee shall pay reasonable, documented capital expenses associated with any change in the PEG channel positions, up to three thousand dollars (\$3,000.00) per change. Grantee shall give Subscribers advance notice, consistent with the federal customer service standards, of any change in the channel position of a PEG channel.
- (j) *No Charge for Use.* The facilities, equipment and channel capacity provided for PEG use shall be available at no charge from Grantee to users, to the Grantor or to any entity responsible for managing a PEG channel.
- (k) *Support not a franchise fee.* PEG capital support fee is not intended to represent part of the Franchise Fee and is intended to fall within one (1) or more of the exceptions in 47 U.S.C. § 542. So long as the PEG capital support fee is used by Grantor as permitted by applicable federal law, and

this Franchise, Grantee agrees that it will not offset or reduce its payment of past, present or future Franchise Fees required as a result of its obligation to remit the PEG capital support fee, unless otherwise mandated by applicable law.

Sec. 7-1809. Miscellaneous Provisions

- (a) *Actions of Parties.* In any action by the Grantor or the Grantee that is mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious, and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.
- (b) *Entire Agreement.* This Franchise constitutes the entire agreement between the Grantee and the Grantor. Amendments to this Franchise shall be mutually agreed to in writing by the parties.
- (c) *Governing Law.* This Agreement shall be governed by the laws of the State of Montana unless expressly preempted by federal law. Venue for any litigation shall be in Yellowstone County, Montana.
- (d) *Notice.* Unless expressly otherwise agreed between the parties, every notice or response required by this Franchise to be served upon the Grantor or the Grantee shall be in writing, and shall be deemed to have been duly given to the required party when placed in a properly sealed and correctly addressed envelope: a) upon receipt when hand delivered with receipt/acknowledgment, b) upon receipt when sent certified, registered mail, or c) within five (5) business days after having been posted in the regular mail.

The notices or responses to the Grantor shall be addressed as follows:

City of Billings
City Administrator
P.O. Box 1178
Billings, MT 59103

The notices or responses to the Grantee shall be addressed as follows:

TDS Metrocom, LLC
525 Junction Road
Madison, WI 53717
ATTN: Legal Department

The Grantor and the Grantee may designate such other address or addresses from time to time by giving notice to the other in the manner provided for in this subsection.

- (e) *Descriptive Headings.* The captions to Sections and subsections contained herein are *intended* solely to facilitate the reading thereof. Such captions shall not affect the meaning or interpretation of the text herein.
- (f) *Severability.* If any non-material Section, subsection, sentence, paragraph, term, or provision hereof is determined to be illegal, invalid, or unconstitutional, by any court of competent jurisdiction or by any state or federal regulatory authority having jurisdiction thereof, such determination shall have no effect on the validity of any other Section, subsection, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise.

Section 2. EFFECTIVE DATE. This ordinance shall be effective thirty (30) days after second reading and final adoption as provided by law.

Section 3. REPEALER. All resolutions, ordinances, and sections of the City Code inconsistent herewith are hereby repealed.

Section 4. SEVERABILITY. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provisions or application, and, to this end, the provisions of this ordinance are declared to be severable.

PASSED by the City Council on first reading this 12th day of April, 2021.

PASSED, ADOPTED and APPROVED on second reading this 26th day of April, 2021.



CITY OF BILLINGS:

BY: William A. Cole
William A. Cole, Mayor

Attest:

BY: Denise R. Bohlman
Denise R. Bohlman, City Clerk

ACCEPTED this 30th day of April, 2021, subject to applicable federal and state law.

TDS, Metrocom, LLC

By:

Name: Joel P. Dohmeier
Title: Dir. Gov't + Regulatory Affairs