

CHAPTER 113

CABLE TELEVISION FRANCHISE

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113.01 TERMS. For the purpose of this chapter, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below.

1. “Basic cable” is the lowest priced tier of cable service that includes the retransmission of local broadcast television signals.
2. “Cable Act” means Title VI of the Communications Act of 1934, as amended.
3. “Cable services” means: (i) the one-way transmission to subscribers of video programming or other programming service; and (ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
4. “Cable system” means the Grantee’s 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.
5. “FCC” means Federal Communications Commission, or successor governmental entity thereto.
6. “Grantee” means MCC IOWA LLC or the lawful successor, transferee, or assignee thereof.
7. “Gross revenues” means any revenues from the operation of the cable system to provide cable services in the service area received by Grantee from subscribers, provided, however, that gross revenues do not include franchise fees, the FCC user fee, or any tax, fee, or assessment of general applicability collected by the Grantee from subscribers for pass-through to a government agency.
8. “Person” means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.
9. “Public way” means 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 now or hereafter held by the City in the service area

which shall entitle the Grantee to the use thereof for the purpose of installing, operating, repairing, and maintaining the cable system.

10. "Service area" means the present boundaries of the City, and includes any additions thereto by annexation or other legal means, subject to the exceptions in Section 113.13 of this chapter.

11. "Standard installation" is defined as 125 feet from the nearest tap to the subscriber's terminal.

12. "Subscriber" means a person who lawfully receives cable service of the cable system with the Grantee's express permission.

113.02 GRANT. The City hereby grants to the Grantee a nonexclusive franchise which authorizes the Grantee to construct and operate a cable system 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 such facilities and equipment as may be necessary or appurtenant to the cable system for the transmission and distribution of cable services, data services, information and other communications services or for any other lawful purposes.

113.03 OTHER ORDINANCES. The Grantee agrees to comply with the terms of any lawfully adopted generally applicable local ordinance, to the extent that the provisions of the ordinance do not have the effect of limiting the benefits or expanding the obligations of the Grantee that are granted by the franchise. Neither party may unilaterally alter the material rights and obligations set forth in this chapter. In the event of a conflict between any ordinance and this chapter, this chapter shall control.

113.04 OTHER AUTHORIZATIONS. The City shall not permit any person to provide services similar to those provided by the Grantee in the service area without first having secured a nonexclusive franchise from the City. The City agrees that any grant of additional franchises or other authorizations including OVS authorizations by the City to provide services similar to those provided by the Grantee pursuant to this chapter to any other entity shall cover the entire service area and shall not be on terms and conditions more favorable or less burdensome to the grantee of any such additional franchise or other authorization than those which are set forth herein. In any renewal of the franchise, the City, should it seek to impose increased obligations upon the Grantee, must take into account any additional franchises or authorizations previously granted and find that the proposed increased obligations in the renewal, are not more burdensome and/or less favorable than those contained in any such additional franchises or authorizations.

113.05 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.

113.06 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

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reasonably comparable to the condition of the public way existing immediately prior to such disturbance.

113.07 RELOCATION FOR THE CITY. Upon its receipt of reasonable advance written notice, to be not less than ten business days, the Grantee shall protect, support, raise, lower, temporarily disconnect, relocate in or remove from the public way, any property of the Grantee when lawfully required by the City 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 which are not used to compete with the Grantee's services. The Grantee shall in all cases have the right of abandonment of its property.

113.08 RELOCATION FOR A THIRD PARTY. The Grantee shall, on the request of any person holding a lawful permit issued by the City, protect, support, raise, lower, temporarily disconnect, relocate in or remove from the public way as necessary any property of the Grantee, provided: (i) 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 (ii) 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 30 business days in the event of a temporary relocation, and no less than 120 days for a permanent relocation.

113.09 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.

113.10 SAFETY REQUIREMENTS. Construction, operation, 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 generally applicable Federal, State, and local regulations and the *National Electric Safety Code*.

113.11 UNDERGROUND CONSTRUCTION. In those areas of the service area where all of the transmission or distribution facilities of the respective public utilities providing telephone communications and electric services are underground, the Grantee likewise shall construct, operate, and maintain its cable system underground. Nothing contained in this section shall require the Grantee to construct, operate, and maintain underground any ground-mounted appurtenances.

113.12 ACCESS TO OPEN TRENCHES. The City agrees to include the Grantee in the platting process for any new subdivision. At a minimum, the City agrees to require as a condition of issuing a permit for open trenching to any utility or developer that: (i) the utility or developer give the Grantee at least ten days' advance written notice of the availability of the open trench; and (ii) the utility or developer provide the Grantee with reasonable access to the open trench. Notwithstanding the foregoing, the Grantee shall not be required to utilize any open trench.

113.13 REQUIRED EXTENSIONS OF THE CABLE SYSTEM. Grantee agrees to provide cable service to all residences in the service area subject to the density requirements specified in this subsection. Whenever the Grantee receives a request for cable service from a potential subscriber in an unserved area contiguous to Grantee's existing distribution facilities

where there are at least 10 residences within 1,320 cable-bearing strand feet (one-quarter cable mile) from the portion of the Grantee's trunk or distribution cable which is to be extended, it shall extend its cable system to such subscribers at no cost to said subscribers for the cable system extension, other than the published standard/nonstandard installation fees charged to all subscribers. Notwithstanding the foregoing, the Grantee shall have the right, but not the obligation, to extend the cable system into any portion of the service area where another operator is providing cable service, into any annexed area which is not contiguous to the present service area of the Grantee, or into any area which is financially or technically infeasible due to extraordinary circumstances, such as a runway or freeway crossing.

113.14 SUBSCRIBER CHARGES FOR EXTENSIONS. No subscriber shall be refused service arbitrarily. However, if an area does not meet the density requirements of Section 113.13 above, the Grantee shall only be required to extend the cable system to subscribers in that area if the subscribers are willing to share the capital costs of extending the cable system. Specifically, the Grantee shall contribute a capital amount equal to the construction cost per mile, multiplied by a fraction whose numerator equals the actual number of residences per 1,320 cable-bearing strand feet from the Grantee's trunk or distribution cable, and whose denominator equals 10. Subscribers who request service hereunder shall bear the remaining cost to extend the cable system on a pro rata basis. The Grantee may require that payment of the capital contribution in aid of construction borne by such potential subscribers be paid in advance. Subscribers shall also be responsible for any standard/nonstandard installation charges to extend the cable system from the tap to the residence.

113.15 CABLE SERVICE TO PUBLIC BUILDINGS.

1. The Grantee, upon request, shall provide without charge, a standard installation and one outlet of family basic cable to those administrative buildings owned and occupied by the City (e.g., City Hall, Library, Convention Center, Wellness Center, Weidler Community Service Center, Street Building, Water Building, Waste Water Building, National Guard Armory, Fire Stations, police stations, etc.), and K-12 public and Gehlen schools that are passed by its cable system. The cable service provided shall not be distributed beyond the originally installed outlet without authorization from the Grantee. The cable service provided shall not be used for commercial purposes, and such outlets shall not be located in areas open to the public. The City shall take reasonable precautions to prevent any inappropriate use of the Grantee's cable system or any loss or damage to Grantee's cable system. The City shall hold the Grantee harmless from any and all liability or claims arising out of the provision and use of cable service required by this subsection. The Grantee shall not be required to provide an outlet to such buildings where a nonstandard installation is required, unless the City or building owner/occupant agrees to pay the incremental cost of any necessary cable system extension and/or nonstandard installation. If additional outlets of basic cable are provided to such buildings, the building owner/occupant shall pay the usual installation and service fees associated therewith.

2. The Grantee shall activate and assign one channel on the cable system to the full-time non-commercial transmission of public, education and governmental (PEG) programming to be determined and carried out at the sole discretion of the City. The City may request and the Grantee shall provide a second channel for the use of PEG programming but not until the City can demonstrate that the first channel assigned to PEG programming is used on an average of eight (8) hours per day with not less than

five (5) hours each week being new programming. Upon reasonable request by the Grantee, the City shall provide a written report describing the use and programming of said PEG access channel or channels.

3. The Grantee shall provide ongoing capital support for public, educational, and governmental access equipment and facilities in the amount of twenty cents (\$.20) per subscriber per month for the entire term of the franchise payable in the same manner as the franchise fee payment pursuant to this chapter. The Grantee acknowledges that this amount shall not be considered gross revenues subject to the payment of franchise fees pursuant to this chapter. Furthermore, payments of this ongoing support shall not be deemed to be "franchise fees" within the meaning of Section 622 of the Cable Act and such payment shall not be deemed to be "payments-in-kind" or any involuntary payments chargeable against the compensation to be paid to the City by Grantee pursuant to this chapter. Grantee shall be allowed to collect such fee as a pass-through to cable subscribers. The City shall indemnify the Grantee for all programming provided on the access channel and hold the Grantee harmless from any claims by any person that the PEG Capital Support Grant violates applicable law.

4. In addition to two existing locations, Le Mars Public High School and Le Mars City Council Chambers, Grantee agrees to establish three additional locations for a total of five (5) locations within the service area to the cable system, such new locations to be identified and approved by the City, that will be capable of communication to the head end for further distribution throughout the cable system of audio and video signals. Said locations are intended to serve as remote points from which live and taped PEG programming can be transmitted via the cable system and the PEG access channels. The City and Grantee agree to negotiate in good faith to identify further specifics regarding the location and use of the three new locations.

113.16 FRANCHISE FEE.

1. The Grantee shall pay to the City a franchise fee of five percent (5%) of annual gross revenues (as defined in Section 113.01 of this chapter). In accordance with the Cable Act, the 12-month period applicable under the franchise for the computation of the franchise fee shall be a calendar year. The franchise fee payment shall be due annually and payable within 90 days after the close of the preceding calendar year. Each payment shall be accompanied by a brief report prepared by a representative of the Grantee showing the basis for the computation.

2. **Limitation on Franchise Fee Actions.** The period of limitation for recovery by the City of any franchise fee payable hereunder shall be three (3) years from the date on which payment by the Grantee is due to the City.

3. **Rates and Charges.** The City may regulate rates for the provision of basic cable and equipment as expressly permitted by Federal law.

4. **Renewal of Franchise.**

A. The City and the Grantee agree that any proceedings undertaken by the City that relate to the renewal of the Grantee's franchise shall be governed by and comply with the renewal provisions of Federal law.

B. In addition to the procedures set forth in the Cable Act, the City agrees to notify the Grantee of all of its assessments regarding the identity of

future cable-related community needs and interests, as well as the past performance of the Grantee under the then-current franchise term. The City further agrees that such assessments shall be provided to the Grantee promptly so that the Grantee has adequate time to submit a proposal pursuant to the Cable Act and complete renewal of the franchise prior to expiration of its term.

C. Notwithstanding anything to the contrary set forth in this subsection, the Grantee and the City agree that at any time during the term of the then-current franchise, while affording the public appropriate notice and opportunity to comment in accordance with the provisions of Federal law, the City and the Grantee may agree to undertake and finalize informal negotiations regarding renewal of the then-current franchise and the City may grant a renewal thereof.

D. The Grantee and the City consider the terms set forth in this subsection to be consistent with the express renewal provisions of the Cable Act.

5. Conditions of Sale. If a renewal or extension of the Grantee's franchise is denied or the franchise is lawfully terminated, and the City either lawfully acquires ownership of the cable system or by its actions lawfully effects a transfer of ownership of the cable system to another party, any such acquisition or transfer shall be at the price determined pursuant to the provisions set forth in Section 627 of the Cable Act. The Grantee and the City agree that in the case of a final determination of a lawful revocation of the franchise, the Grantee shall be given at least twelve (12) months to effectuate a transfer of its cable system to a qualified third party. Furthermore, the Grantee shall be authorized to continue to operate pursuant to the terms of its prior franchise during this period. If, at the end of that time, the Grantee is unsuccessful in procuring a qualified transferee or assignee of its cable system which is reasonably acceptable to the City, the Grantee and the City may avail themselves of any rights they may have pursuant to Federal or State law. It is further agreed that the Grantee's continued operation of the cable system during the 12-month period shall not be deemed to be a waiver or an extinguishment of any rights of either the City or the Grantee.

6. 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, without prior written notice to the City. No such notice 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.

113.17 BOOKS AND RECORDS. The Grantee agrees that the City, upon 30 days' written notice to the Grantee and no more than once annually may review such of its books and records at the Grantee's business office, during normal business hours and on a non-disruptive basis, as is reasonably necessary to ensure compliance with the terms of this chapter. Such notice shall specifically reference the subsection of this chapter which is under review, so that the Grantee may organize the necessary books and records for easy access by the City. Alternatively, if the books and records are not easily accessible at the local office of

the Grantee, the Grantee may, at its sole option, choose to pay the reasonable travel costs of the City's representative to view the books and records at the appropriate location. The Grantee shall not be required to maintain any books and records for franchise compliance purposes longer than three (3) years. Notwithstanding anything to the contrary set forth herein, the Grantee shall not be required to disclose information which it reasonably deems to be proprietary or confidential in nature, or disclose books and records of any affiliate which is not providing cable service in the service area. The City agrees to treat any information disclosed by the Grantee as confidential and only to disclose it to employees, representatives, and agents thereof that have a need to know, or in order to enforce the provisions hereof. The Grantee shall not be required to provide subscriber information in violation of Section 631 of the Cable Act.

113.18 INSURANCE AND INDEMNIFICATION.

1. 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 \$1,000,000 combined single limit for bodily injury and property damage. The City shall be designated as an additional insured. Such insurance shall be non-cancelable except upon 30 days' prior written notice to the City. Upon written request, the Grantee shall provide a Certificate of Insurance showing evidence of the coverage required by this subsection.
2. Indemnification. The Grantee agrees to indemnify, save and hold harmless, and defend the City, its officers, boards and employees, from and against any liability for damages and for any liability or claims resulting from property damage or bodily injury (including accidental death), which arise out of the Grantee's construction, operation, or maintenance of its cable system in the service area provided that the City shall give the Grantee written notice of its obligation to indemnify the City within ten days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, the Grantee shall not indemnify the City for any damages, liability, or claims resulting from the willful misconduct or negligence of the City.

113.19 ENFORCEMENT AND TERMINATION OF FRANCHISE.

1. Notice of Violation. In the event that the City believes that the Grantee has not complied with the terms of the franchise, the City shall informally discuss the matter with Grantee. If these discussions do not lead to resolution of the problem, the City shall notify the Grantee in writing of the exact nature of the alleged noncompliance.
2. The Grantee's Right to Cure or Respond. The Grantee shall have 30 days from receipt of the notice described in subsection 1: (i) to respond to the City, contesting the assertion of noncompliance; or (ii) to cure such default; or (iii) in the event that, by the nature of default, such default cannot be cured within the 30-day period, initiate reasonable steps to remedy such default and notify the City of the steps being taken and the projected date that they will be completed.
3. Public Hearing. In the event that the Grantee fails to respond to the notice described in subsection 1 pursuant to the procedures set forth in subsection 2, or in the event that the alleged default is not remedied within 30 days or the date projected pursuant to paragraph 2(iii) above, if it intends to continue its investigation into the

default, then the City shall schedule a public hearing. The City shall provide the Grantee at least 10 days' prior written notice of such hearing, which specifies the time, place, and purpose of such hearing, and provide the Grantee the opportunity to be heard.

4. Enforcement. Subject to applicable Federal and State law, in the event the City, after the hearing set forth in subsection 3, determines that the Grantee is in default of any provision of the franchise, the City may:

- A. Seek specific performance of any provision, which reasonably lends itself to such remedy, as an alternative to damages; or
- B. Commence an action at law for monetary damages or seek other equitable relief; or
- C. In the case of a substantial default of a material provision of the franchise, seek to revoke the franchise in accordance with subsection 5.

5. Revocation. Should the City seek to revoke the franchise after following the procedures set forth in subsections 1 through 4 above, the City shall give written notice to the Grantee of its intent. The notice shall set forth the exact nature of the noncompliance. The Grantee shall have 90 days from such notice to object in writing and to state its reasons for such objection. In the event the City has not received a satisfactory response from the Grantee, it may then seek termination of the franchise at a public hearing. The City shall cause to be served upon the Grantee, at least 30 days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke the franchise. At the designated hearing, Grantee shall be provided a fair opportunity for full participation, including the right to be represented by legal counsel, to introduce relevant evidence, to require the production of evidence, to compel the relevant testimony of the officials, agents, employees, or consultants of the City, to compel the testimony of other persons as permitted by law, and to question witnesses. A complete verbatim record and transcript shall be made of such hearing. Following the hearing, the City shall determine whether or not the franchise shall be revoked. If the City determines that the franchise shall be revoked, the City shall promptly provide Grantee with its decision in writing. The Grantee may appeal such determination of the City to an appropriate court which shall have the power to review the decision of the City de novo. Grantee shall be entitled to such relief as the court finds appropriate. Such appeal must be taken within 60 days of Grantee's receipt of the determination of the City. The City may, at its sole discretion, take any lawful action which it deems appropriate to enforce the City's rights under the franchise in lieu of revocation of the franchise.

6. Force Majeure. The Grantee shall not be held in default under, or in noncompliance with, the provisions of the franchise, or suffer any enforcement or penalty relating to noncompliance or default, where such noncompliance or alleged defaults occurred or were caused by circumstances reasonably beyond the ability of the Grantee to anticipate and control. This provision includes work delays caused by waiting for utility providers to service or monitor their utility poles to which the Grantee's cable system is attached, as well as unavailability of materials and/or qualified labor to perform the work necessary. Furthermore, the parties hereby agree that it is not the City's intention to subject the Grantee to penalties, fines, forfeitures or revocation of the franchise for violations of the franchise where the violation was a

good faith error that resulted in no or minimal negative impact on the subscribers within the service area, or where strict performance would result in practical difficulties and hardship to the Grantee which outweigh the benefit to be derived by the City and/or subscribers.

113.20 ACTIONS OF PARTIES. In any action by the City 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.

113.21 ENTIRE AGREEMENT. This chapter constitutes the entire agreement between the Grantee and the City and supersedes all other prior understandings and agreements oral or written. Any amendments to this chapter shall be mutually agreed to in writing by the parties.

113.22 RESERVATION OF RIGHTS. Acceptance of the terms and conditions of the franchise will not constitute, or be deemed to constitute, a waiver, either express or implied, by Grantee of any constitutional or legal right which it may have or may be determined to have, either by subsequent legislation or court decisions. The City acknowledges that Grantee reserves all of its rights under applicable Federal and State Constitutions and laws.

113.23 NOTICE. Unless expressly otherwise agreed between the parties, every notice or response required by this chapter to be served upon the City 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: (i) upon receipt when hand delivered with receipt/acknowledgment; (ii) upon receipt when sent certified, registered mail; (iii) within five business days after having been posted in the regular mail; or (iv) on the next business day if sent by express mail or overnight air courier.

EDITOR'S NOTE

Ordinance No. 845 adopting a cable television franchise for the City was passed and adopted on September 21, 2004. The franchise shall expire on February 21, 2020, unless extended by the mutual agreement of the parties.