

ORDINANCE NO. 488

AN ORDINANCE OF THE CITY OF POLSON GRANTING A FRANCHISE TO TCI CABLEVISION OF MONTANA, INC. FOR THE CONSTRUCTION AND OPERATION OF A CABLE SYSTEM.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF POLSON, MONTANA:

The City of Polson, having determined that the financial, legal and technical ability of TCI Cablevision of Montana, Inc. is sufficient to provide services, facilities and equipment necessary to meet the future cable-related needs of the community, does hereby ordain as follows:

1. TERMS - For the purpose of this Ordinance, the following terms, phrases, words, and abbreviations shall have the meanings 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:

- a. "Cable System" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment or other communications equipment that is designed to provide Cable Service and other service to subscribers.
- b. "Franchise Authority" means the City of Polson or the lawful successor, transferee or assignee thereof.
- c. "Grantee" means TCI Cablevision of Montana, Inc. or the lawful successor, transferee or assignee thereof.
- d. "Gross Revenues" mean the monthly Cable Service revenues received by Grantee from Subscribers of the Cable System; provided, however, that such phrase shall not include revenues received from any national advertising carried on the Cable System, nor shall such phrase include any taxes on Cable Service which are imposed directly or indirectly on any Subscriber thereof by any governmental unit or agency, and which are collected by the Grantee on behalf of such governmental unit or agency.
- e. "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, 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 and temporary or permanent fixtures or improvements located thereon now or hereafter held by the Franchise Authority in the City which shall entitle the Franchise Authority and the Grantee to the use thereof for the purpose of installing, operating, repairing and maintaining the Cable System.

2. GRANT - The City hereby grants to Grantee a non-exclusive Franchise 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 City and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain or retain in, on, over, under, upon, poles, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments, and other related property or equipment as may be necessary or appurt nant to the Cable System.

- a. This franchise does not relieve the Grantee of any requirement of the Grantor or of any ordinance the provisions of which are not inconsistent herewith including, but not limited to Ordinance No. 331, rule, regulation, or specification of the Grantor, including, but not limited to any requirement relating to street work, street excavation permits, or the use, removal or relocation of property in streets.
- b. Any privilege claimed under this franchise by the Grantee in any street shall be subordinate to any prior lawful occupancy of the street. The Grantor reserves the right to reasonably designate where a Grantee's facilities are to be placed within the public ways.
- c. The Grantee shall at all times comply with all applicable present and future rules of the Federal Communications Commission.
- d. The Grantee shall at all times during the life of the franchise, be subject to the lawful exercise of the Grantor's police power and such reasonable regulations as the Grantor may subsequently promulgate thereunder which are not inconsistent herewith.
- e. This franchise shall not relieve the Grantee of any obligations involved in obtaining pole or conduit space from any department of the City, utility company, or from others maintaining utilities in the public ways.
- f. Grantee shall be subject to all provisions of the other ordinances, rules, regulations, and other provisions of the City or State heretofore or hereafter adopted, including but not limited to Ordinance No. 331 and those pertaining to works and activities in, on, over, under and about public right-of-ways, so long as such ordinances, rules, regulations and other provisions of the City or State do not unreasonably interfere with or conflict with specific provisions of the franchise.
- g. Any privilege claimed under this franchise in any public right-of-way or other public property shall be subordinate to the public use and any other lawful use thereof.
- h. The Grantor reserves the right to join with one or more of the other local area City and/or County governments in the formation and operation of an intergovernmental administrative franchising authority for the purpose of joint administration of this franchise. The Grantor reserves the right to assign the administration of the provisions of any franchise granted pursuant to this ordinance to such a duly established joint authority, and to join with other members of the authority in developing such intergovernmental agreement bylaws, rules, and regulations as necessary for the proper administration of the joint authority.
- i. This franchise shall not become effective for any purpose unless and until written acceptance thereof, together with the bond and insurance policies and service map required by appropriate section hereof, shall have been filed with the City Clerk. Written acceptance, which shall be in the form and substance approved by the City Attorney, shall also be and operate as an acceptance of each and every term and condition and limitation contained in this franchise or otherwise specified as herein and therein provided.

- j. The written acceptance shall be filed by Grantee within forty five (45) days after notifying Grantor verbally of acceptance. In the event this day falls on a non-working day, then the next working day will suffice.
- k. In default of the filing of such written acceptance as herein required, the Grantee shall be deemed to have rejected and repudiated the franchise. Thereafter, the acceptance of the Grantee shall not be received or filed by the City Clerk. The Grantee shall have no rights, remedies, or redress in the premises, unless and until the Grantors, by resolution, shall determine that such acceptance be received or filed, and then upon such terms and conditions as the Grantors may impose.

3. TERM - The Franchise granted pursuant to this Ordinance shall be for an initial term of fifteen (15) years from its passage and final adoption.

- a. The Grantor may terminate this franchise in the event of the willful failure, refusal or neglect by the Grantee to do or comply with any material requirement or limitation contained in this franchise, or other applicable rule or regulation of the Grantor insofar as such rule or regulation does not conflict with the provisions of the franchise, subject to the provision of, in any event the Grantor shall not take any punitive action or commence any action at law without first conducting a public hearing. Grantee shall be notified of the time and place of such hearing and have an opportunity to be heard.

4. CONDITIONS OF STREET OCCUPANCY - All transmission and distribution structures, poles, other lines and equipment installed or erected by the Grantee pursuant to the terms hereof shall be so 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 said Public Ways.

5. Whenever in the judgment of the Grantor it is deemed impracticable to permit erection of poles or construction of underground conduit system by any utility which may at the time have authority to construct or maintain a conduit or poles in street areas, the Grantor may require the Grantee to afford to such utility the right to use such poles or facilities of the Grantee as the Grantor finds practicable in common with the Grantee, so long as the use of such poles or facilities does not interfere with the Grantee's present and future use of such poles or facilities.

6. The Grantor reserves the right to enact reasonable regulations pertaining to this franchise which may include, but is not limited to:

- a. Construction and use of poles;
- b. Use of poles and conduits by the City;
- c. Common user;
- d. Filing of pole user agreement;
- e. Reservation of street rights;
- f. Restoration of streets; and
- g. Movement of facilities.

7. RESTORATION OF PUBLIC WAYS - If during the course of Grantee's construction operation or maintenance of the Cable System there occurs a disturbance of any Public Way by Grantee, it shall, at its expense, replace and restore such Public Way to a condition reasonably comparable to the condition of the Public Way existing immediately prior to such disturbance.

8. SAFETY REQUIREMENTS - Construction, installation and maintenance of the Cable System shall be performed in an orderly workmanlike manner. All such work shall be performed in substantial accordance with applicable Federal Communications Commission or other federal, state and local regulations. The Cable System shall not unreasonably endanger or interfere with the safety of persons or property in the City.

9. FRANCHISE FEE - Grantee shall pay to the Franchising Authority a franchise fee equal to 3% of the quarterly Gross Revenue received by Grantee from operating the cable system on a quarterly basis; provided, however, that the Grantor reserves the right to increase the franchise fee, subject to a cap of five (5%) percent, upon ninety (90) days written notice. The franchise fee shall be due and payable thirty (30) days after close of quarter. Each payment shall be accompanied by a report from a representative of Grantee showing the basis for the computation.

10. Should the Grantee ever fail to pay any sums of money to the Grantor owing to the Grantor under provisions of this agreement when such sum becomes due and payable, Grantee shall pay interest to the Grantor on the delinquent sum, until it is fully paid, at two (2) interest points above the prime rate of interest charged in the Polson area as calculated by the Grantor.

11. The Grantor or its representative shall have the right to inspect the Grantee's records to determine if proper payments have been made to the Grantor. The costs of such audits shall be borne by Grantee if same results in increasing, by more than two percent (2%), the Grantee's annual payment to the Grantor.

12. No acceptance of any payment shall be construed as release or as an accord and satisfaction of any claim the Grantor may have for further or additional sums payable under this franchise agreement for the performance of any obligation thereunder.

13. RENEWAL OF FRANCHISE - The Franchising Authority and the Grantee agree that any proceedings undertaken by the Franchising Authority that relate to the renewal of the Grantee's Franchise shall be governed by and comply with the provisions of the Cable Communications Policy Act of 1984, as amended.

14. TRANSFER OF FRANCHISE - 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 Grantee, without the prior consent of the Franchising Authority, such consent not to be unreasonably withheld. 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 Grantee in the Franchise or Cable System in order to secure indebtedness.

15. INSURANCE REQUIREMENTS - Grantee shall maintain in full force and effect, at its own cost and expense, during the term of the Franchise, Comprehensive General Liability Insurance providing an amount of \$300,000 for bodily injuries (including accidental death) to any one person, and subject to an aggregate limit in the amount of \$500,000 for property damage.

16. INDEMNIFICATION - The Grantee agrees to indemnify, save and hold harmless, and defend the Franchising Authority, 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, including, but not limited to, reasonable attorney's fees and costs.

17. NOTICE OF VIOLATION - In the event that the Franchising Authority believes that the Grantee has not complied with the terms of the Franchise, it shall notify Grantee of the exact nature of the alleged non-compliance. Grantee shall have thirty (30) days from receipt of the notice to respond to the Franchising Authority to cure such default or, in the event that, by the nature of default, such default cannot be cured within the thirty (30) day period, to initiate reasonable steps to remedy such default and notify the Franchising Authority of the steps being taken and the projected date that they will be completed.

18. ACTS OF GOD - The Grantee shall not be held in default or non-compliance with the provisions of the Franchise, nor suffer any enforcement or penalty relating thereto, where such non-compliance or alleged defaults are caused by strikes, acts of God, power outages, or other events reasonably beyond its ability to control.

19. NOTICE - Unless expressly otherwise agreed between the parties, every notice or response to be served upon the Franchising Authority or Grantee shall be in writing, and shall be deemed to have been duly given to the required party five (5) business days after having been posted in a properly sealed and correctly addressed envelope by certified or registered mail, postage prepaid, at a Post Office or branch thereof regularly maintained by the U. S. Postal Service. The notices or responses to the Franchising Authority shall be addressed as follows:

City of Polson
112 First Street East
Polson, Montana 59860

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

TCI Cablevision of Montana, Inc.
333 First Avenue East
Kalispell, Montana 59901

with copy to: TCI Cablevision of Montana, Inc.
Attention: Legal Department
P. O. Box 5630 Terminal Annex, Denver, Colorado
80217
or
4643 So. Ulster Street, Denver, Colorado 80237

The Franchising Authority and the Grantee may designate such other address or addresses from time to time by giving notice to the other.

20. The Grantee shall provide cable television service to all areas of the City currently served and will extend service upon request in areas containing a density of at least eighteen (18) subscribers per cable mile of its trunk or distribution cable. After the Grantee shall have established service pursuant to this franchise in any areas of the City, service to such area shall not be suspended or abandoned unless such suspension or abandonment be authorized or ordered by Grantor, provided such authorization or order is not to be unreasonably withheld.

21. The Grantee shall maintain a business office and service center with toll free telephone numbers so that subscribers may report service outages or deficiencies at any time. The office shall maintain an adequate staff such that subscribers may transact all necessary business during regular business hours. Grantee's employees shall maintain a high standard of courtesy in customer relations at all time.

22. UNDERGROUND FACILITIES - Unless otherwise authorized by Grantor, in those areas and portions of the City where the transmission and/or distribution facilities of the public utility providing telephone service, and those of the utility providing electric service, are underground or hereafter are placed underground, or are to be placed underground by a builder, developer or subdivider as part of a development or subdivision, then the Grantee shall likewise construct, operate and maintain all its transmission and distribution facilities underground to the maximum extent that existing technology permits the Grantee to do so.

23. STREET WORK - The Grantee at his expense shall protect, support, temporarily disconnect, relocate, or remove any property of Grantee when required by the Grantor or other relevant governmental unit by reason of traffic conditions, public safety, street vacation, freeway or street construction; change or establishment of street grade, installation of sewers, drains, water pipes, power lines, structure or improvements by governmental agencies whether acting in a governmental or proprietary capacity, or any other structure of public improvement, including but not limited to, movement of buildings, urban renewal and redevelopment, and any general program under which the Grantor or other relevant governmental unit shall undertake to cause all such properties to be located beneath the surface of the ground; provided that Grantee shall in all cases have the privileges and be under the obligations as to the abandonment of franchise property in place which are provided in the appropriate sections hereof.

24. REMOVAL OR ABANDONMENT OF GRANTEE PROPERTY - In the event the use of any Grantee property is permanently discontinued, or upon expiration of or within twelve (12) months after any termination of a franchise, and subject to applicable Federal or State law, the Grantee shall promptly remove from the streets all property involved, other than that which the Grantor may, at its sole option, permit to be abandoned in place.

A permit to abandon in place must be obtained from Grantor. Nothing hereunder shall be deemed as taking of the property of Grantee, and Grantee shall be entitled to no surcharge by reason of anything hereunder.

25. Any property of the Grantee remaining in place one hundred and twenty (120) days after termination or expiration of the franchise shall be considered permanently abandoned. The Grantor may extend such time in thirty (30) day increments not to exceed two such extensions, or a total of one hundred and eighty (180) days.

26. REPORTS, RECORDS AND PLANS - The Grantee shall at all times make and keep at its Kalispell offices full and complete plans and records showing the exact location of all cable communications system equipment installed or in use in the streets and other public places in the City. The Grantee shall file with the Grantor, on or before the last day of June of each year, a current map or set of maps drawn to scale, showing all cable communications system equipment installed and in place in streets and other public places in the City.

27. PROGRAMMING - Grantee shall at a minimum, provide television broadcast signals, and an array of satellite-delivered cable programming. The Grantee reserves the right to make changes should services no longer be available, or if programming better responding to the needs and interests of our subscribers becomes available.

28. SEVERABILITY - If any Section, sentence, paragraph, term or provision hereof is determined to be illegal, invalid or unconstitutional, by any court of common 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, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

29. REPEALING CLAUSE - All ordinances or parts of ordinances in conflict herewith are hereby repealed.

FIRST READING December 18, 1989

SECOND READING January 2, 1990

PASSED AND ADOPTED THIS 2nd DAY OF January, 1990.

CITY OF POLSON

BY: James W. Jones
James W. Jones, Mayor

ATTEST:

Jayne Devlin
Jayne Devlin, City Clerk

TCI CABLEVISION OF MONTANA, INC.

BY: J. C. Sparkman
J. C. Sparkman
President

TITLE: _____

ATTEST:

Patricia Jones Jordan
Patricia Jones Jordan
Secretary