

14-155



20127

Introduce: 12-8-14

ORDINANCE NO. 20127

1 AN ORDINANCE granting a cable communication facility franchise to  
 2 Windstream Nebraska, Inc. to provide cable television services and to maintain a cable  
 3 communication facility within the City of Lincoln pursuant to and subject to the  
 4 provisions of the Lincoln Municipal Code.

5 BE IT ORDAINED by the City Council of the City of Lincoln, Nebraska:

6 Section 1. Pursuant to the Cable Communications Ordinance of the  
 7 Lincoln Municipal Code, the Cable Television Franchise Agreement between the City of  
 8 Lincoln and Windstream Nebraska, Inc., attached hereto and marked as Exhibit "A" and  
 9 made a part hereof by reference, is hereby authorized and approved and the Mayor is  
 10 hereby authorized and directed to execute said Franchise Agreement on behalf of the  
 11 City.

12 Section 2. That this ordinance shall take effect and be in force from and  
 13 after its passage and publication in one issue of a daily or weekly newspaper of general  
 14 circulation in the City, according to law.

See further Council Proceedings on  
next page. Thank you.

Approved as to Form & Legality:

Jeffrey R. Kitzhaber  
 City Attorney

PASSED

JAN 05 2015

BY CITY COUNCIL

Introduced by:

Carl Steed  
 AYES: Camp, Christensen, Cook,  
 Emery, Eskridge, Fellers, Gaylor  
 Baird; NAYS: None.

Approved this 5th day of Jan., 2015:

Chris Benson  
 Mayor

**14-155**

01/05/15 Council Proceedings:

CHRISTENSEN Moved Motion to Amend No. 1 to amend Bill No. 14-155 by accepting the substitute Attachment (A) attached hereto to replace the Attachment (A) previously provided with Bill No. 14-155.

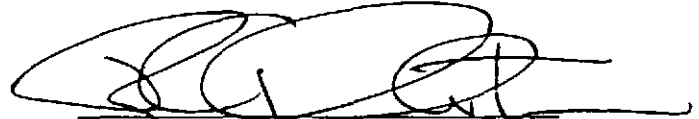
Seconded by Cook & carried by the following vote: AYES: Camp, Christensen, Cook, Eskridge, Emery, Fellers, Gaylor Baird; NAYS: None.

14-155

# MOTION TO AMEND NO. 1

I hereby move to amend Bill No. 14-155 by accepting the substitute Attachment (A) attached hereto to replace the Attachment (A) previously provided with Bill No. 14-155.

Introduced by:



AYES: Camp, Christensen, Cook,  
Emery, Eskridge, Fellers, Gaylor  
Baird; NAYS: None.

Approved as to Form and Legality:

  
City Attorney

Requested by: Law Department

Reason for Request: Several provisions in the Franchise Agreement have been further negotiated and resolution has been reached on all issues. The provisions that have been changed include Paragraphs

- a. 9.9(A)4 – (to provide more details about how interconnection with another provider could substitute for providing a separate public access studio),
- b. 9.9(C) – (to provide more details about how interconnection with another provider could substitute for providing a separate public access studio and requiring that the City review any failure to reach an interconnection agreement)
- c. 9.11 – (to mirror the TW agreement on the use of capital support monies for Education and Government access)
- d. 9.13(A) – (to provide requirements for fiber grant monies in years 11 thru 15 in the event Windstream doesn't reach 20,000 subscribers by year 10)
- e. 15.4 – (to provide further clarification on fiber grant obligations in the event of termination)
- f. 16.2 – (to provide clarification on determining when abandonment of the system occurs)

**ADOPTED**

**JAN 05 2015**

**BY CITY COUNCIL**

**EXHIBIT “A”**

**CITY OF LINCOLN, NEBRASKA**  
**CABLE TELEVISION FRANCHISE**  
**AGREEMENT**  
**WITH**  
**WINDSTREAM NEBRASKA, INC.**

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## **AGREEMENT**

This Agreement ("Agreement") is entered into in Lincoln, Nebraska this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, ("Effective Date") by and between Windstream Nebraska, Inc. ("Grantee"), and the CITY of LINCOLN, NEBRASKA, a municipal corporation, (the "City"). The City and Grantee are sometimes referred to hereinafter collectively as the "parties."

WHEREAS, the City has identified the future cable-related needs and interests of the City and its citizens, has considered the financial, technical and legal qualifications of Grantee, and has determined whether Grantee's plans for constructing, operating, upgrading and maintaining its Cable System are adequate, in a full public proceeding affording due process to all parties; and

WHEREAS, the public has had adequate notice and opportunity to comment on Grantee's proposal to provide cable television service within the City; and

WHEREAS, the City has a legitimate and necessary regulatory role in ensuring the availability of state-of-the-art cable communications service, high technical capability and reliability of Cable Systems in its jurisdiction, the availability of local programming (including educational and governmental access programming) and quality customer service; and

WHEREAS, diversity in cable service and local and non-local programming is an important policy goal and Grantee's Cable System should offer a wide range of programming services; and

WHEREAS, flexibility to respond to changes in technology, subscriber interests and competitive factors should be an essential characteristic of this Agreement and both the City and Grantee will stress maximum system flexibility to take advantage of new technology to benefit subscribers and citizens as such technology becomes available; and

WHEREAS, the City is authorized to grant one or more nonexclusive franchises to construct, operate and maintain a cable television system within the boundaries of the City.

NOW, THEREFORE, in consideration of the mutual promises made herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and Grantee do hereby agree as follows:

### **SECTION 1. DEFINITIONS**

For the purposes of this Agreement, and all exhibits attached hereto, the following terms, phrases, words and their derivations shall have the meanings given herein. Words defined in the Cable Communication Code shall have the meanings given therein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined shall be given their common and ordinary meaning. The word "shall" is always mandatory and not merely directory.

1.1 "Access" means the availability for use by various agencies, institutions, organizations, groups and individuals in the community, including the City and its designees, of the Cable System to distribute downstream, non-commercial video programming (including alpha numeric programming) as permitted under applicable law, including, but not limited to cablecasting spots to promote public or governmental announcements for services or programs that do not compete with services or programs offered by a Grantee.

(A) "Educational Access" means Access where Schools are the primary users having editorial control over non-commercial programming, signals and services.

(B) "Governmental Access" means Access where governmental institutions or their designees are the primary users having editorial control over non-commercial programming, signals and services; and

(C) "Public Access" means Access where members of the public are the primary users.

1.2 "Activation" or "Activated" means the status of any capacity on or part of the Cable System wherein the use of that capacity or part thereof may be made available without further installation of system equipment, whether hardware or software.

1.3 "Agreement" or "Franchise" means this document in which this definition appears, which is executed between the City and Grantee, containing the specific provisions of the authorization granted, including any exhibits attached hereto and incorporated herein.

1.4 "Bad Debt" means amounts lawfully owed by a customer and accrued as revenues on the books of Grantee, but not collected after reasonable efforts by Grantee.

1.5 "Broadcast Signal" means a television or radio signal transmitted over the air to a wide geographic audience, and received by a Cable System off-the-air by antenna, microwave, satellite dishes or any other means.

1.6 "Cable Acts" means the Cable Communications Policy Act of 1984, and the Cable Television Consumer Protection and Competition Act of 1992, as amended by the Telecommunications Act of 1996, regulations promulgated pursuant to such Acts, and any amendments or future federal cable television laws, acts or regulations.

1.7 "Franchise Area" means the area within the jurisdictional boundaries of the City, including any areas annexed by the City during the term of this Agreement

1.8 "Franchise Fee" means any tax, fee or assessment of any kind imposed by the City or other governmental entity on Grantee or Subscriber, or both, solely because of their status as such. The term "Franchise Fee" does not include:

(A) Any tax, fee or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services, but not

including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) Capital costs which are required under this Agreement to be incurred by Grantee for public, educational or governmental access equipment and facilities;

(C) Requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(D) Any fee imposed under Title 17, United States Code.

1.9 "Gross Revenues" means any and all revenues, (including cash, credits, or other consideration of any kind or nature not enumerated below but is "revenue" under generally accepted accounting principles ("GAAP")) arising from, attributable to or in any way derived directly or indirectly by Grantee, its Affiliates or by any other entity that is a cable operator of the Cable System, from the operation of Grantee's Cable System within the Franchise Area to provide Cable Services. Gross Revenues include, by way of illustration and not limitation:

- monthly fees charged Subscribers for Basic Service, expanded Basic Service, optional, premium, per channel, pay-per-view, video on demand or per program service;
- installation, disconnection, reconnection and change-in-service fees;
- leased channel fees;
- remote controls;
- late fees;
- revenues from rentals or sales of converters or other equipment;
- advertising revenues;
- revenues from program guides;
- additional outlet fees;
- Franchise Fees;
- interactive services to the extent they are a Cable Service;
- revenues from home shopping.

Gross Revenues shall include revenues received by an entity other than Grantee, an Affiliate or another entity that operates the System where necessary to prevent evasion or avoidance of the obligation under this Agreement to pay the Franchise Fees.

Gross Revenues shall not include: (i) bad debt; provided, however, that all or part of any such bad debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; or (ii) any taxes on services furnished by Grantee which are imposed directly on any Subscriber or user by the State or other governmental unit and which are collected by Grantee on behalf of said governmental unit (a Franchise Fee is not such a tax and is included within Gross Revenues); or (iii) the revenue of any Person where such revenue has otherwise been included in Grantee's revenue for franchise fee calculation purposes (so as to prevent revenue from being subject to a franchise fee twice); or (iv) money collected by Grantee



on behalf of the FCC in satisfaction of regulatory fees imposed upon Grantee under Section 47 U.S.C. 159 of federal law; (v) launch support; (vi) coop marketing; (vii) payments or other consideration received from programmers for carriage of programming on the System; (vi) advertising agency commissions; and (vii) the revenue collected by Grantee in satisfaction of the Educational and Government Access support fee required under the Franchise Agreement.

In the event Grantee receives consideration from the provision of Cable Service in the City from a source not specifically identified above, any franchise fee obligations will be determined pursuant to GAAP. If such consideration is "revenue" under GAAP then such consideration shall be included in Gross Revenues for franchise fee purposes. If such consideration is not "revenue" under GAAP then such consideration shall not be included in Gross Revenues.

If Grantee or an Affiliate bundles, ties, or combines the sale of some or all of its Cable Services with non-cable services, whether authorized or not by the Franchise, and if it is necessary to separately determine Gross Revenues attributable to particular Cable Services in order to determine franchise fees owed to the City, Grantee shall allocate revenues, to the extent consistent with any applicable state or federal law or tariffs, in a manner so as to accurately reflect the actual revenue from Cable Services, taking into account all relevant factors, including generally available package prices and discounts. Grantee shall provide a statement with its franchise fee payment reflecting the methodology used and shall bear any burden of proof regarding whether the methodology used accurately reflects Cable Service revenues.

1.10 "High Definition" or "HD" means a video signal with either 720 progressive scan lines of horizontal resolution or 1,080 interlaced scan lines of horizontal resolution.

1.11 "HD-1080p" means a video signal with 1,080 progressive scan lines of horizontal resolution.

1.12 "Person" means any natural person, sole proprietorship, partnership, joint venture, association, or limited liability entity or corporation, or any other form of entity or organization.

1.13 "Rights-of-Way" shall mean the surface of and space above and below any real property in the City in which the City has an interest as an owner or as a trustee for the public for purposes of public travel, as they now or hereafter exist, including, but not limited to, all public streets, highways, avenues, roads, alleys, easements, sidewalks, tunnels, viaducts, or bridges; provided, however, this shall not include other public property for which a separate authorization and agreement to utilize any part of same shall be required from the City.

1.14 "Standard Definition" or "SD" means a video signal with 480 interlaced scan lines of horizontal resolution.

1.15 "System" means Grantee's Cable System.

1.16 "Term Year" is a twelve (12) month period commencing on the Effective Date (as described in Section 2.4) or the anniversary of the Effective Date of the Agreement. A

particular Term Year is designated by the number of years that have passed since the Effective Date on the day after the end of the Term Year. Thus, for example, Term Year 1 begins on the Effective Date and ends on the day before the first anniversary of the Effective Date and Term Year 2 begins on the first anniversary of the Effective Date and ends on the day before the second anniversary of the Effective Date.

## **SECTION 2. GRANT OF AGREEMENT**

### **2.1 Grant**

(A) The City hereby grants to Grantee a nonexclusive and revocable authorization (the "Franchise") to make lawful use of the Streets within the Franchise Area to construct, operate, maintain, reconstruct, rebuild and upgrade a Cable System subject to the terms and conditions set forth in this Agreement and applicable law. This Agreement shall constitute both a right and an obligation to construct, operate, maintain, reconstruct, rebuild and upgrade a Cable System as required hereby, and to fulfill the obligations set forth in, the provisions of this Agreement all subject to applicable law.

(B) Grantee, through this Agreement, is granted the right to operate its Cable System using the City's Rights-of-Way within the Franchise Area in compliance with all applicable laws. Nothing in this Agreement shall be deemed to waive the requirements of the other codes and ordinances of general applicability enacted, or hereafter enacted, by the City.

(C) Grantee promises and guarantees, as a condition of exercising the privileges granted by this Agreement, that any Affiliate of Grantee directly involved in the offering of Cable Service in the Franchise Area, or directly involved in the management or operation of the Cable System in the Franchise Area, will also comply with the terms and conditions of this Agreement.

(D) This Agreement is intended to convey limited rights and interests only as to those Rights-of-Ways in which the City has an actual interest. It is not a warranty of title or interest in any Right-of-Way; it does not provide Grantee with any interest in any particular location within the Right-of-Way and it does not confer rights other than as expressly provided in the grant hereof. This Agreement does not provide Grantee with any right of eminent domain.

(E) To the extent permitted by law, this Agreement shall not limit the City or Grantee's rights with respect to the provision of telecommunications services.

### **2.2 Use of Public Rights-of-Way**

(A) Subject to the City's supervision and control, Grantee may erect, install, construct, repair, replace, reconstruct, and retain in, on, over, under, upon, across, and along the Rights-of-Way within the Franchise Area, such wires, cables, conductors, ducts, conduit, vaults, manholes, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of a Cable System within the Franchise Area. Grantee shall comply with all applicable laws.

(B) This grant does not include the installation, maintenance or construction, repair or replacement of any wireless telecommunications facilities or equipment within Rights-of Way or otherwise on City-owned property or on property held in trust or used by the City except for facilities or equipment used by Grantee for status monitoring of Grantee's Communication Facility; equipment utilized to provide "last mile" connectivity to a Subscriber who could not economically be serviced otherwise; or upon approval by the City which shall not be unreasonably withheld, other wireless transmit/receive equipment incidental to the operation of Grantee's Communication Facility.

2.3 Term. The term of this Agreement and all rights, privileges, obligations and restrictions pertaining thereto shall be fifteen (15) years from the Effective Date of this Agreement as set forth in Section 2.4 below, unless terminated sooner as hereinafter provided.

#### 2.4 Effective Date

(A) This Agreement and the rights, privileges and authority granted hereunder shall take effect and be in force from and after the Effective Date of this Agreement as specified in this Section.

(B) Within thirty (30) days after the Effective Date of the Ordinance granting this Agreement, Grantee shall signify its acceptance of this Agreement by executing a written acceptance of this Agreement. This franchise is void unless accepted in writing by Grantee within this timeframe.

(C) The Effective Date of this Agreement shall be the date on which it is accepted in writing by Grantee.

(D) The grant of this Agreement shall have no effect on Grantee's duty under the prior franchise agreement or any ordinance in effect prior to the Effective Date of this Agreement to indemnify or insure the City against acts and omissions occurring during the period that the prior franchise agreement was in effect. Nor shall it have any effect upon liability to pay all Franchise Fees which were due and owed under prior franchises and ordinances.

2.5 Agreement Nonexclusive. This Agreement shall be nonexclusive, and subject to all prior rights, interests, easements or licenses granted by the City or its predecessors to any Person to use any property, Right-of-Way, easement, right, interest or license for any purpose whatsoever, including the right of the City to use same for any purpose it deems fit, including the same or similar purposes allowed Grantee hereunder. The City may at any time grant authorization to use the Rights-of-Way for any purpose not incompatible with Grantee's authority under this Agreement and for such additional agreements for Cable Systems as the City deems appropriate.

## 2.6 Grant of Other Agreements.

(A) This Agreement shall be non-exclusive and the City reserves the right to grant to any other Person, at any time, the right to use or occupy the Streets or roads of the City for the construction and operation of any other Cable System, open video system or other multichannel video distribution system within the City or for whatever purposes deemed appropriate by the City. It is understood that nothing herein shall be construed to create any obligation to share any Access or Community Programming developed by Grantee with any other provider, except as specified by the City. Notwithstanding anything to the contrary, no such authorization or franchise granted to any other Person (whether by the City, State or Federal government) to operate a Cable System shall be on terms or conditions more favorable or less burdensome when taken as a whole than those imposed herein. Specifically, any franchisee shall be subject to the same requirements pertaining to the service area, contributions to the City's fiber system and PEG access as are imposed under this Agreement. In the event that such a franchise agreement is granted, pursuant to State or Federal law, on terms more favorable or less burdensome than those imposed in this agreement, then Grantee shall have the benefit of those more favorable terms.

(B) In the event the City or any operating division, department, agent or Franchisee of the City elects to build or operate its own Cable System or open video system, or leases dark fiber, poles or other facilities to third-party providers, neither the City nor any operating division, department or agent of the City shall discriminate against Grantee in pole attachment fees, permitting procedures, permitting fees and relocation practices.

(C) If the City, or any operating division or department thereof, including Lincoln Electric Service, grants another Franchise or enters into any lease of facilities so as to enable a third party to offer Cable Service, and which requires Grantee to relocate any of its facilities to accommodate such third party's use of the rights-of-way, easements or poles, the third party shall be required to reimburse Grantee for the actual costs of such relocation.

2.7 Effect of Acceptance. By accepting the Agreement, Grantee acknowledges and accepts the City's legal right to issue and enforce the Agreement subject to applicable law and agrees that the Agreement was granted pursuant to processes and procedures consistent with federal law.

## 2.8 Police Powers.

(A) In accepting this Franchise, Grantee acknowledges that its rights hereunder are subject to the police powers of the City to adopt and enforce general ordinances necessary to the safety and welfare of the public and it agrees to comply with all applicable general laws and ordinances enacted by the City pursuant to such power. Any conflicts between the provisions of this Franchise Agreement and any other present or future lawful exercise of the City's police power shall be resolved in favor of the latter, except that any such exercise that is not of a general application in the jurisdiction or applies exclusively to Grantee which contains provisions inconsistent with this Agreement shall prevail only if, upon such exercise, the City

finds that an emergency exists constituting a danger to health, safety, property or general welfare or such exercise is mandated by law, and only so long as such emergency exists.

(B) Except for the City's exercise of its police powers, pursuant to this section this Agreement may only be modified or amended with the express written consent of Grantee.

2.9 Franchise Area. Grantee shall offer Cable Service to every Person in the Franchise Area, subject to Section 13. In the event of annexation, Grantee shall offer Cable Services within six (6) months of notification of the annexation.

### **SECTION 3. FRANCHISE FEE AND FINANCIAL CONTROLS**

3.1 Franchise Fee. As compensation for the benefits and privileges granted under this Agreement and in consideration of permission to use the City's Streets, Grantee shall pay as a Franchise Fee to the City, throughout the duration of this Agreement, an amount equal to five (5%) percent of Grantee's Gross Revenues. Accrual of such Franchise Fee shall commence as of the Effective Date of this Agreement. Grantor reserves the right to unilaterally increase the franchise fee to the maximum that may be charged consistent with federal and state law.

3.2 Payments. Grantee's Franchise Fee payments to the City shall be computed quarterly for the preceding calendar quarter ending September 30, December 31, March 31 and June 30. Each quarterly payment shall be due and payable no later than thirty (30) days after said dates.

3.3 Quarterly Agreement Fee Reports. Each payment shall be accompanied by a written report to the City, verified by a responsible official of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's Gross Revenues and the computation of the payment amount. Such reports shall detail all Gross Revenues of the Cable System. In the event this Agreement is revoked or otherwise terminated prior to its expiration date, Grantee shall file with the City, within ninety (90) days of the date of revocation or termination, a C.P.A. certified revenue statement showing the Gross Revenues received by it since the end of the previous year and shall make adjustments at that time for the Franchise Fee due up to the date of revocation or termination.

3.4 No Accord and Satisfaction. No acceptance of any payment shall be construed as an accord by the City that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable or for the performance of any other obligation of Grantee.

3.5 Audits. No more than once every four (4) years the City shall have the right to conduct audits of Grantee's records related to the Franchise Fee payments made pursuant to this Agreement as well as Grantor's compliance with Sections 9.9(D), 9.11, and 9.13(A). No audit may go back more than five (5) years. Grantee shall pay City's out-of-pocket expenses associated with such audit up to a limit of \$50,000.00.

3.6 Financial Records. Grantee agrees to meet with a representative of the City upon request to review Grantee's methodology of record keeping related to the computation of the Franchise Fee.

3.7 Late Franchise Fee Payments. In the event any Franchise Fee payment is not received within thirty (30) days from the end of the calendar quarter, Grantee shall be assessed a late fee and may be assessed interest in accordance with the City's Cable Communications Ordinance.

3.8 Compensation. In the event the obligation of Grantee to compensate the City through Franchise Fees as set forth in this Franchise is lawfully suspended or eliminated, in whole or part, then Grantee shall, to the extent required by applicable law, pay to the City equivalent compensation to the compensation paid to the City by other similarly situated users of the Streets for Grantee's use of the Streets, provided that in no event shall such payments exceed the equivalent of five percent (5%) of Grantee's Gross Revenues or such other cap required by applicable law.

3.9 Payment on Termination. If this Agreement is revoked pursuant to the terms of this Agreement, Grantee shall, as per Section 3.3, file with the City within ninety (90) calendar days of the date of the revocation, a gross revenue statement, certified by a certified public accountant, showing the Gross Revenues received by Grantee since the end of the previous fiscal year. The City reserves the right in the event of revocation or expiration (if no application for renewal or appeal related thereto is pending), to satisfy any remaining financial obligations of Grantee to the City by utilizing the funds available in a Letter of Credit or other security provided by Grantee.

3.10 Tax Liability. The Franchise Fees shall be in addition to any and all taxes or other levies or assessments which are now or hereafter required to be paid by businesses in general by any law of the City, the State of Nebraska or the United States including, without limitation, sales, use and other taxes, business license fees or other payments. Payment of the Franchise Fee under this Agreement shall not exempt Grantee from the payment of any license fee, tax or charge on business, occupation, property or income that may be imposed by the City. Any other license fees, taxes or charges shall be of general applicability in nature and shall not be levied against Grantee solely because of its status as a Grantee as defined herein.

## **SECTION 4. ADMINISTRATION AND REGULATION**

4.1 Authority. The City shall be vested with the power and right to administer and enforce the requirements of this Agreement or to delegate that power and right, or any part thereof, to the extent permitted under Federal, State or local law, to any agent.

4.2 Rates and Charges. All Grantee rates and charges related to or regarding Cable Services shall be subject to regulation by the City to the full extent authorized by applicable Federal or State laws.

4.3 Filing of Rates and Charges. Upon request of City, Grantee shall file with the City a complete schedule of rates and charges for Cable Services and leased Access Channels provided under this Agreement.

4.4 Late Fees. Fees for the late payment of bills shall not be assessed until after the Service has been fully provided.

4.5 Performance Evaluation.

(A) Evaluation sessions may be held at any time by the City during the term of this Agreement, but no more frequently than annually.

(B) All evaluation sessions shall be open to the public and announced at least one week in advance in a newspaper of general circulation in the City. City shall notify Subscribers of all regular evaluation sessions by announcement on at least one Access Channel seven (7) times between the hours of 7:00 a.m. and 9:00 p.m. for five (5) consecutive days preceding each session.

(C) Topics which may be discussed at any evaluation session may include, but are not limited to, Cable Service rate structures; Franchise Fees; occupation taxes; liquidated damages; free or discounted Cable Services; application of new technologies; system performance; Cable Services provided; programming offered; customer complaints; privacy; amendments to this Agreement; judicial and FCC rulings; line extension policies; and the City's or Grantee's rules; provided that nothing in this subsection shall be construed as requiring the renegotiation of this Agreement.

(D) During evaluations under this Section, Grantee shall fully cooperate with the City and shall provide such information and documents as the City may lawfully and reasonably require to perform the evaluation.

(E) As a result of a periodic review or evaluation session, upon notification from City, Grantee shall meet with City and undertake good faith efforts to reach agreement on changes and modifications to the terms and conditions of this Franchise which are both economically and technically feasible.

## **SECTION 5. FINANCIAL AND INSURANCE REQUIREMENTS**

5.1 Indemnification

(A) General Indemnification. Upon timely notice and tender as set forth in Section 5.1(D), Grantee shall indemnify, defend and hold the City, its officers, elected and appointed officials, boards, committees, commissions, agents, volunteers and employees, harmless from any action or claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorneys' fees or expenses, in any way arising out of, resulting from, or alleged to arise out of or result from any construction, excavation, operation, maintenance, reconstruction, or any other act done under this Agreement, by or for Grantee, its agents or its

employees, or arising out of, resulting from or alleged to arise out of or result from any neglect or omission of Grantee. Grantee shall consult and cooperate with the City while conducting its defense of the City.

(B) Indemnification for Relocation. Grantee shall indemnify the City for any damages, claims, additional costs or expenses assessed against, or payable by, the City related to, arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its facilities in the Streets in a timely manner in accordance with any relocation lawfully required by the City.

(C) Non-Waiver. The fact that Grantee carries out any activities under this Agreement through independent contractors shall not constitute an avoidance of or defense to Grantee's duty of defense and indemnification under Section 5.1(A).

(D) Duty to Give Notice and Tender Defense. The City shall give Grantee timely written notice of any claim or of the commencement of any action, suit or other proceeding covered by the indemnity in this Section. In the event any such claim arises, the City or any other indemnified party shall timely tender the defense thereof to Grantee and Grantee shall have the obligation and duty to defend any claims arising thereunder, and the City shall cooperate fully therein.

(E) The indemnification of Section 5.1(A) shall survive the term of any franchise and shall continue in full force and effect as to Grantee's responsibility to indemnify. In no event shall the indemnification requirements of this Section 5.1 be construed to impose any obligation on the part of Grantee, its agents or employees to indemnify the City, its agents or employees or with respect to Government Access programming, or any utilization of the City's network, or the City's operation of the emergency over-ride system pursuant to section 14.2(B).

## 5.2 Insurance Requirements.

(A) General Requirement. Grantee must have adequate insurance during the entire term of this Agreement to protect the City against claims for injuries to Persons or damages to property which in any way relate to, arise from or are connected with this Agreement, or involve Grantee, its agents, representatives, contractors, subcontractors and their employees. However, no coverage shall be provided for claims arising out of or due to the sole negligence of the City.

(B) Initial Insurance Limits. Grantee must keep insurance in effect in accordance with the minimum insurance limits herein set forth below. Grantee shall obtain policies for the following initial minimum insurance limits:

1. Commercial General Liability: Five million dollars (\$5,000,000) aggregate limit per occurrence for bodily injury, personal injury and property damage;

2. Automobile Liability: Two million dollars (\$2,000,000) combined single limit per accident for bodily injury and property damage; and



3. Employer's Liability: Two million dollars (\$2,000,000).

5.3 Deductibles and Self Insured Retentions. If Grantee changes its policy to include a self-insured retention, Grantee shall give notice of such change to the City. The City's approval will be given if the self-insured retention is consistent with standard industry practices. Any deductible or self-insured retention of the policies shall not in any way limit Grantee's liability to the City. The insurance limits set forth above shall be adjusted from time to time upon notice to Grantee but in no event shall the insurance amounts required under this Agreement exceed the maximum municipal liability under State law.

(A) Endorsements.

1. All policies shall contain, or shall be endorsed so that:

(a) The City, its officers, officials, boards, commissions, employees and agents are to be covered as, and have the rights of, named additional insured with respect to liability related to, arising out of by reason of activities performed by, or on behalf of, Grantee under this Agreement or applicable law, or in the construction, operation or repair, or ownership of the Cable System;

(b) Grantee's insurance coverage shall be primary insurance with respect to the City, its officers, officials, boards, commissions, employees and agents. Any insurance or self insurance maintained by the City, its officers, officials, boards, commissions, employees and agents shall be in excess of Grantee's insurance and shall not contribute to it; and

(c) Grantee's insurance shall apply separately to each insured against whom a claim is made or lawsuit is brought, except with respect to the limits of the insurer's liability.

2. The insurance shall provide that it shall not be cancelled or materially altered so as to be out of compliance with the requirements of this section without thirty (30) days' written notice first being given to the City. If the insurance is cancelled or materially altered so as to be out of compliance with the requirements of this section within the term of this Agreement, Grantee shall provide a replacement policy. Grantee agrees to maintain continuous uninterrupted insurance coverage, in the amounts required, for the duration of this Agreement.

(B) Verification of Coverage. Grantee shall furnish the City with certificates of insurance and endorsements or a copy of the page of the policy reflecting blanket additional insured status. The certificates and endorsements for each insurance policy are to be signed by a *Person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices, and are to be received subject to approval by City as to compliance with Section 5.2 and 5.3 herein prior to the commencement of activities associated*

with this Agreement. Grantee hereby warrants that its insurance policies satisfy the requirements of this Agreement and City laws.

(C) In the alternative to providing a certificate of insurance to the City certifying insurance coverage as required above, Grantee's self-insurance shall provide the same amount and level of protection for Grantee and the City, its officers, officials, boards, commissions, agents and employees as otherwise required under this Section. The adequacy of the self-insurance shall be subject to the periodic review and approval of the City. If Grantee elects to provide self-insurance under this Section, any failure to maintain adequate self-insurance shall be cause for immediate termination of this Agreement by the City.

#### 5.4 Letter of Credit

(A) On the Effective Date of this Franchise, Grantee shall deliver to the City an irrevocable and unconditional Letter of Credit, in a form and substance acceptable to the City, from a National or State bank approved by the City, in the amount of \$100,000.00.

(B) The Letter of Credit shall provide that funds will be paid to the City upon written demand of the City, and in accordance with the terms of this Agreement, in payment for liquidated damages charged pursuant to this Section, in payment for any monies owed by Grantee to the City pursuant to its obligations under this Franchise, or in payment for any damage incurred by the City as a result of any claims arising out of acts or omissions by Grantee pursuant to this Franchise.

(C) As an alternative to recovery of any monies owed by Grantee to the City for actual damages to the City as a result of any claims arising out of acts or omissions by Grantee pursuant to the Franchise, the City, in its sole discretion, may charge to and collect from the Letter of Credit the following liquidated damages:

1. For failure to provide data, documents, reports or information as required herein, the liquidated damage shall be \$250.00 per day for each day, or part thereof, such failure occurs or continues.

2. For failure to comply with construction, operation or maintenance standards, the liquidated damage shall be \$350.00 per day for each day, or part thereof, such failure occurs or continues.

3. For failure to comply with any of the material provisions of this franchise, for which a liquidated damage is not otherwise specifically provided pursuant to this paragraph (C), the liquidated damage shall be \$500.00 per day for each day, or part thereof, such failure occurs or continues.

(D) Each violation of any material provision of this Franchise shall be considered a separate violation for which a separate liquidated damage can be imposed.

(E) Whenever the Mayor determines that there is a basis to charge to and collect from the Letter of Credit under subparagraph (B) above or for any other violation contemplated in subparagraph (C) above, a written notice shall be given to Grantee informing it of such basis or violation. During the thirty (30) days following such notice, Grantee shall be given an opportunity to be heard by the Mayor and an opportunity to cure. Should Grantee cure such violation within such thirty-day period, no liquidated damages shall apply to the pertinent violation(s).

(F) Nothing contained herein shall preclude Grantee from appearing before the City Council at any time in response to any alleged violations in accordance with the rules of the City Council.

(G) If said Letter of Credit or any subsequent Letter of Credit delivered pursuant thereto expires prior to twelve (12) months after the expiration of the term of this Franchise, it shall be renewed or replaced during the term of this Franchise to provide that it will not expire earlier than twelve (12) months after the expiration of this Franchise. The renewed or replaced Letter of Credit shall be of the same form and with a bank authorized herein and for the full amount stated in subparagraph (A) of this Section.

(H) If the City draws upon the Letter of Credit or any subsequent Letter of Credit delivered pursuant hereto, in whole or in part, Grantee shall immediately replace or replenish it to its full amount and shall deliver to the City a like replacement Letter of Credit or certification of replenishment for the full amount as a substitution of the previous Letter of Credit. This shall be a continuing obligation for any withdrawals from the Letter of Credit.

(I) If any Letter of Credit is not so replaced or replenished, the City may draw on said Letter of Credit for the whole amount thereof and use the proceeds as satisfaction of Grantee's performance of franchise obligations to the extent necessary. The failure to replace or replenish any Letter of Credit may also, at the option of the City, be deemed a default by Grantee under this Franchise. The drawing on the Letter of Credit by the City, and use of the money so obtained for payment or performance of the obligations, duties and responsibilities of Grantee which are in default, shall not be a waiver or release of such default.

(J) The collection by City of any damages or monies from the Letter of Credit shall not affect any other right or remedy available to it, nor shall any act, or failure to act, by the City pursuant to the Letter of Credit, be deemed a waiver of any right of the City pursuant to this Franchise or otherwise.

(K) Action by the City or Mayor under this Section shall be subject to judicial review in a court of competent jurisdiction.

## **SECTION 6. CUSTOMER SERVICE**

6.1 Customer Service Standards. Grantee shall comply with the customer service standards set forth by the Federal Communications Commission, as amended.

## **SECTION 7. REPORTS AND RECORDS**

7.1 Open Records. Access to the books and records of Grantee shall be governed by Section 5.15.330 of the City's Cable Communications Ordinance.

7.2 Confidentiality. The City agrees to keep confidential any trade secrets, proprietary or confidential books records, or any other filings with City by Grantee to the extent permitted by law and may not use any such information to compete with Grantee in any manner, directly or through any operating division, department or agent. Grantee shall be responsible for clearly and conspicuously stamping the work "Confidential" on each page that contains trade secret, confidential or proprietary information, and shall provide a brief written explanation as to why such information is trade secret, confidential or proprietary and how it may be treated as such under State or Federal law. If the City receives a demand from any Person for disclosure of any information designated by Grantee as trade secret, proprietary or confidential, the City shall, so far as consistent with applicable law, advise Grantee and provide Grantee with a copy of any written request by the party demanding access to such information within a reasonable time. City will reasonably cooperate with Grantee in any efforts by Grantee to protect the confidentiality of any such material.

### **7.3 Reports Required.**

(A) Grantee is expressly exempted from and relieved of compliance with the following Section 5.15.320 of the City's Cable Communications Ordinance. In lieu thereof Grantee shall be subject to the requirements set forth below.

(B) Grantee shall submit to the City no later than ninety (90) days after the end of each of Grantee's fiscal years, an annual written report with the following information:

(1) A summary of the previous calendar year's activities in development of this system, including but not limited to services begun or dropped, number of subscribers, including gains and losses, homes passed, and miles of cable distribution plants in service, including different classes if applicable.

(2)(i) A financial statement including a statement of income, a balance sheet, and a statement of cash flows that, at Grantee's election, may be audited or unaudited. To the extent that the Grantee submits unaudited financial statements, such submission shall be accompanied by a certification from a corporate officer attesting to the accuracy of such financial statements. The statement shall include notes that specify all significant accounting policies and practices upon which it is based, including, but not limited to, depreciation rates and methodology, and basis for interest expense. A summary shall be provided comparing the current year with the three previous years.

(ii) If the Grantee operates other cable systems, then, in lieu of financial statements of the system in (i), the Grantee may submit the financial statement referred to above as supplementary information to the financial statements of its entire operations. Such financial statements of a multiple system operator shall contain an accountant's report stating what procedures have been applied to the supplementary information and the accountant's opinion on

the supplementary information in relation to the basic financial statements taken as a whole. The Grantee shall obtain written permission from the City in advance in order to submit his financial statements in this manner, and an officer of the company shall attest to the accuracy of the financial information provided.

(3) A current statement of cost of any construction by component category.

(4) A summary of complaints, identifying the number and nature of complaints and their disposition.

(5) A list of corporate officers and members of the board and the officers and board members of any parent corporation.

(6) A list of all partners or stockholders holding one percent or more ownership interest in the franchisee and any parent corporation; provided, however, that when any parent corporation has in excess of 1,000 shareholders and its shares are publicly traded on a national stock exchange, then a list of the twenty largest stockholders of the voting stock of such corporation shall be disclosed.

(7) A report of franchisee's employees in the City designed to demonstrate compliance with Section 5.15.490 of the City's Cable Communications Ordinance upon a form prescribed by the City.

(8) A copy of all the franchisee's rules and regulations applicable to subscribers and users of the cable communications system.

(9) A report relating to all copyright fees paid and copies of all reports or documents submitted to the copyright office of the Library of Congress.

(10) A summary of Grantee's understanding, to the best of its knowledge, of any technologies or products that became commercially available in the previous calendar year that would permit Grantee to increase the maximum length of loops over which Grantee can provide cable service (see Section 13). To the extent that Grantee does not expect to deploy such technology or product within one (1) year of the filing of the written report, Grantee shall provide an explanation for why it elected not to do so.

(11) To the extent that Grantee's take rate, that is, the percentage of homes passed exceeded 25% as of the end of the reporting period, a description of Grantee's plans to increase the number of homes passed in the ensuing reporting period.

(12) A summary of franchise fee payments and any adjustment thereto as specified in Section 5.15.210 of the City's Cable Communications Ordinance, including a summary comparing the current year with the three previous years. Such summary shall be accompanied by a certification from a corporate officer attesting to the accuracy of such summary.

(C) A written report summarizing complaints, identifying the number and nature of complaints and their disposition shall be filed no later than ninety (90) days after the end of each of Grantee's fiscal quarters that are not also the end of Grantee's fiscal year.

(D) Except with regard to Section 7.3(B)(2), the City may specify the form and details of all reports, with the franchisee given an opportunity to comment in advance upon such forms and details. The City may change the filing dates for reports upon reasonable request of the franchisee.

## **SECTION 8. PROGRAMMING AND CHANNEL CAPACITY**

8.1 Provision of Programming and Channel Capacity. Grantee shall provide the programming and Channel capacity required in this Agreement.

8.2 Broad Programming Categories. Grantee shall offer programming in the following broad categories:

- News
- Weather
- Sports
- Public affairs
- Educational
- Cultural
- Music
- Religious

8.3 Cable Service to City Offices, Schools, Libraries. Grantee shall provide without charge one drop and Standard Service (defined to be the Basic Service and the next most highly penetrated tier of programming) to current and future buildings with City and County employees, state-accredited Public and Parochial K-12 schools and City libraries to the extent that Grantee is required to provide service to such particular location under Section 13.

## **SECTION 9. PUBLIC, GOVERNMENT, EDUCATION ACCESS CHANNELS**

9.1 Grantee shall initially provide four (four) channels for non-commercial Public, Educational and Government ("PEG") access use. The channels will be initially allocated as follows:

- (A) 1 channel for Public Access
- (B) 2 channels for Government Access
- (C) 1 channel for Educational Access

9.2 The City may reallocate the four PEG access channels among "Public", "Educational" and "Government" with the approval of Grantee.

9.3 At the City's request, Grantee shall provide a secured digital video stream for city government training purposes and provide the converters in training rooms at the city locations for viewing that training channel.

9.4 Grantee shall provide an additional channel for Educational Access, upon request of the City, at any time after the tenth anniversary of the Effective Date of this Agreement, if the then existing Educational Access channel(s) is Fully Programmed. For the purposes of this requirement, fully programmed means that the Educational Access channel(s) is programmed with Locally-Produced audio-video television programming (i.e. not character generated or bulletin board type programming) from 4 p.m. to 10 p.m. seven (7) days a week for six (6) consecutive weeks.

9.5 Grantee shall provide an additional channel for Government Access, upon request of the City, whenever the then existing Government Access channels are Fully Programmed. For the purposes of this provision, Fully Programmed means:

(A) The Government Access channel (currently channel 5) is programmed with Locally-Produced audio-video television programming (i.e. not character generated programming) from 4 p.m. to 10 p.m. seven days a week for six consecutive weeks; and

(B) The Health Government Access channel (currently channel 10) is programmed at least fifty percent of the time from 4 p.m. to 10 p.m. with Locally-Produced audio-video television programming (i.e. not character generated programming) seven days a week for six consecutive weeks.

9.6 For the purposes of the "triggers" set forth in this Section 9, a program may be repeated twice for the purposes of calculating the hours of programming. Additional repeats of programming are permitted but such additional repeats shall not be counted in any usage formula set forth above.

9.7 For the purposes of the triggers set forth in this Section 9, "Locally-Produced" means audio-video television programming produced within the City of Lincoln; except, however, up to 10% of such programming may be imported from outside the City of Lincoln.

9.8 Grantor Channel Flexibility, PEG Channel Resolution.

(A) Upon written notice of no less than one hundred eighty (180) days, Grantor may request and elect that Grantee provide additional Public Access, Government Access, Educational Access, or training channels in either SD or HD in addition to those described in Sections 9.1, 9.4, and 9.5. Grantor may elect no more than a cumulative total of four (4) additional channels pursuant to this Section 9.8(B) under this Agreement. Absent election to the contrary by Grantor, Grantee shall bear the cost of any encoders necessary for provision of such channels which shall be deemed to be an approved capital expenditure pursuant to Section 9.9(D).

(B) Grantee shall initially provide each of the channels described in Sections 9.1, 9.4, and 9.5 in SD. Upon written notice of no less than one hundred eighty (180) days, Grantor may request and elect that one or more PEG channels described in Sections 9.1, 9.4, 9.5, or 9.8(A) that are then-currently provided in SD be converted to HD. To the extent that Grantee has begun to provide any programming in a particular HD format, Grantor may also request that that one or more PEG channels described in Sections 9.1, 9.4, 9.5, or 9.8(A) that are then-currently provided in SD or HD be converted to the same HD format. Absent election to the contrary by Grantor, Grantee shall bear the cost of any encoders necessary for the conversion described in this Section 9.8(B), which shall be deemed to be an approved capital expenditure pursuant to Section 9.9(D). Grantor and Grantee shall jointly decide the types of encoding equipment that may be used in this Section.

(C) To the extent that Grantor wishes to make a one-time election to convert a single channel described in Section 9.1, 9.4, 9.5, or 9.8(A) to multiple audio channels and Grantor has made similar requests to all other providers of Cable Service in the City, Grantee agrees to negotiate in good faith commercially-reasonable conditions for such conversion provided that under no circumstances shall Grantee both be required to bear the cost of any necessary encoders and not be permitted to classify such cost as an approved capital expenditure pursuant to Section 9.9(D).

(D) Grantee shall provide on Basic Service all additional PEG channel feeds the Grantor chooses to provide, whether standard definition or high definition feeds. Digital Programming provided for any PEG or training channel, regardless of source (the Grantor, LPS, Grantee's studio, outside videotape or DVD, etc.) shall not have its quality reduced by Grantee (by rate shaping or down sampling or any other method) either during direct broadcast or by any method used to store the programming for later broadcast or rebroadcast, without the Grantor's consent. Grantee may compress any analog source at rates that show no noticeable difference in quality from the original feed.

#### 9.9 Public Access.

(A) Grantee shall have the exclusive responsibility for administering and operating Public Access subject to the following conditions:

1. Grantee will operate Public Access on a non-discriminatory basis.
2. Grantee shall not exercise any editorial control except as otherwise permitted by applicable law. Grantee shall be the final arbiter on scheduling conflicts.
3. The City or its designee may review and comment upon the Public Access rules.
4. Grantee shall maintain a public access studio. This obligation may be met through the sharing of the costs of another Cable Service provider in the City that administers Public Access and/or maintains a Public Access studio, so long as Grantee maintains the interconnection arrangements described in Section 9.9(C).



5. This Section 9.9(A) shall not become effective until six (6) months after Grantee has reported serving at least twenty thousand (20,000) subscribers.

(B) Grantee shall continue to operate Public Access at the same level, if any, that it operates Public Access as of the Effective Date of this Agreement.

(C) To the extent that Section 9.9(A) is not effective, Grantor's obligation to deliver content on any Public Access channels shall be met through interconnecting with a Cable Service provider in the City that administers Public Access and/or maintains a Public Access studio. In this regard, Grantee shall make a good faith effort at its own expense to enter into a fair and equitable agreement on interconnection and cost sharing with the current provider of any operator of a Cable System maintaining a Public Access studio so as obtain Public Access content for distribution as required under this Agreement. Failure or refusal by such Cable System operator to provide such interconnection on commercially reasonable rates, terms and conditions, shall excuse Grantee's performance under this Agreement with regard to delivery of Public Access channel content; provided, however, that any alleged failure or refusal of the Cable System operator to provide interconnection to Grantee, on commercially reasonable terms and conditions shall be subject to review by the Mayor, and the corresponding excusal must be approved by the City.

(D) Expenditures to support the capital needs of Public Access.

1. For the period commencing on the Effective Date and ending on the day immediately prior to the fifth anniversary of the Effective Date, Grantee shall expend a minimum of four dollars (\$4.00) per subscriber (measured as of the third anniversary of the Effective Date (reported pursuant to Section 7.3(F)) cumulatively over such period;

2. For the period commencing on the fifth anniversary of the Effective Date and ending on the day immediately prior to the tenth anniversary of the Effective Date, Grantee shall expend a minimum of four dollars (\$4.00) per subscriber (measured as of the eighth anniversary of the Effective Date (reported pursuant to Section 7.3(F)) cumulatively over such period;

3. For the period commencing on the tenth anniversary of the Effective Date and ending on the day immediately prior to the fifteenth anniversary of the Effective Date, Grantee shall expend a minimum of four dollars (\$4.00) per subscriber (measured as of the thirteenth anniversary of the Effective Date (reported pursuant to Section 7.3(F)) cumulatively over such period;

4. For Grantee's expenditures to be considered as fulfilling the requirements of this Subsection (D), they must be approved as eligible by the Grantor. Such requests for approval shall include the expected or actual date/period of expenditure. Grantee may seek approval after such expenditures have been made, so long as such expenditures were made on or after the Effective Date. To the extent that Grantee has made a written request for

approval, such approval shall be deemed granted if not denied in writing by the Mayor within ninety (90) days. Approval shall not be unreasonably withheld.

(E) Grantee shall make reasonable efforts to develop an advisory group of Public Access users and to consider the suggestions from this group when making Public Access capital expenditures; provided, however, the role of the users is advisory only and all purchasing decisions shall be at the sole discretion of Grantee.

9.10 Unused Access Channels. The City shall adopt rules that enable Grantee to use a PEG access channel when that channel is not being used for its designated purpose.

9.11 Grantee shall collect and remit to the City forty-one cents (\$0.41) per directly billed Basic Service customer (or subscriber to higher tier of service) per month hereinafter the "G/E Grant"). The G/E grant shall be used exclusively for the support of the capital needs associated with Government and Educational Access; provided, however, up to \$.05 (5 cents) of the G/E grant may be applied to the non-capital needs (operating costs) associated with Government and Educational Access.

9.12 Live Cablecasting Return Locations. Grantee shall maintain a return path from City Hall and the Q St. Fire Station to Grantee's headend to accommodate programming originated by the City for the Government Access channel(s). Grantee shall maintain a return path from the Lincoln Public School's District Office to Grantee's headend to accommodate programming originated by the schools for the Educational Access channel.

#### 9.13 City Fiber Grant.

(A) Grantee shall make a City Fiber Grant to the City of forty thousand dollars (\$40,000) in each of the first ten (10) Term Years, payable within sixty (60) days of the commencement of each such Term Year. Within sixty (60) days of the commencement of Term Years 11, 12, 13, 14, and 15, Grantee shall make a City Fiber Grant to the City of three dollars (\$3.00) per subscriber as reflected in the most recently-submitted annual report described in Section 7.3(B) (which the City acknowledges may pertain to a Term Year two years prior to the Term Year in which payment is made) up to a maximum of fifty thousand dollars (\$50,000.00).

(B) The City Fiber Loop Grant shall be used by the City exclusively for completing fiber loops, conduits or conduit appurtenances, or electronic transport equipment connected to the fiber loop for the City's internal communications needs as requested by the City and shall not be used for commercial or competitive purposes except where the City is required by applicable law or has current efforts to share conduit space with another user.

9.14 Simultaneously with the execution of this agreement, Grantee will execute a ten-year conduit lease with the City for a minimum of 5,000 feet of conduit at a monthly-recurring rate of \$0.33 per foot per month, which can be increased annually based on inflation, with a cap of 3.25% per year.

9.15 Payments Not Franchise Fees. Except as specifically provided in this Section 9, none of the payments required under this Section 9 shall be treated by Grantee, or considered in any way by Grantee, a Franchise Fee. All such payments shall be in addition to the Franchise Fee required of Grantee pursuant to Section 3.1 hereof. Provided that the City expends the additional financial obligations, payments and other commitments in a manner required herein, Grantee agrees not to assert or claim at any time before any court or administrative agency that the additional financial obligations, payments and other commitments expressed herein are franchise fees, so as to form the basis for offset or credit against any payments due the City.

## **SECTION 10. GENERAL RIGHT-OF-WAY USE AND CONSTRUCTION**

### **10.1 Compliance with Applicable Laws, Resolutions and Ordinances.**

(A) The terms of this Franchise shall define the contractual rights and obligations of Grantee with respect to operation of the System in the City. However, Grantee shall at all times during the term of this Franchise be subject to the lawful exercise of the police powers of the City. The grant of this Franchise does not relieve Grantee of its obligations to obtain any licenses, permits or other authority as may be required by the City Code, as it may be amended, for the privilege of operating a business within the City or for performing work on City property or within the Rights-of-Way, to the extent not inconsistent with this Franchise.

(B) In the event Grantee cannot determine how to comply with any Rights-of-Way requirement of the City, whether pursuant to this Franchise or other requirement, Grantee shall immediately provide written notice of such question, including Grantee's proposed interpretation, to the City, in accordance with Section 18.1. The City shall provide a written response within fourteen (14) days of receipt indicating how the requirements cited by Grantee apply. Grantee may proceed in accordance with its proposed interpretation in the event a written response is not received within seventeen (17) days of mailing or delivering such written question.

### **10.2 Construction.**

(A) Subject to applicable laws and the provisions of this Agreement, Grantee may perform all construction necessary for the operation of its Cable System. All construction and maintenance of any and all facilities within Rights-of-Way incident to Grantee's Cable System shall, regardless of who performs the construction, be and remain Grantee's responsibility. Grantee shall apply for, and obtain, all permits necessary for construction or installation of any facilities, and for excavating and laying any facilities, within the Rights-of-Way. Grantee shall pay all applicable permit fees required of any Person (except for the City) working in the Rights-of-Way upon issuance of the requisite construction permits by the City to Grantee.

(B) Prior to beginning any construction, Grantee shall secure any required permits for work in the Rights-of-Ways.

(C) Grantee may make excavations in Rights-of-Way for any facility needed for the maintenance or extension of Grantee's Cable System. Prior to doing such work, Grantee shall apply for, and obtain, applicable permits from the City. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts, Grantee shall work with the City and other providers, licensees, permittees and franchisees so as to reduce the number of Rights-of-Way cuts within the City.

(D) In the event of an unexpected repair or emergency, a Grantee may commence such repair and emergency response work as required under the circumstances, provided Grantee shall notify the Director of Public Works and Utilities promptly, before such repair or emergency work, or the next business morning thereafter if advance notice is not practicable.

### 10.3 Maintenance and Workmanship

(A) Grantee, at its own expense, shall repair, renew, change and improve its facilities to keep them in good repair and safe condition,

(B) Grantee's Cable System shall be located, erected and maintained so as not to endanger or interfere with the safety of Persons, or so as not to unnecessarily hinder or obstruct the free use of Rights-of-Way, alleys, bridges or other public property.

(C) Repair and Restoration of Property.

1. If Grantee reasonably knows or should have known it has, damaged public or private property, it shall promptly notify the property owner within twenty-four (24) hours in writing.

2. If public or private property is disturbed or damaged, Grantee shall restore the property equivalent to its former condition. Public Rights-of-Way or other City property shall be restored in a manner and within a timeframe approved by the City's Director of Public Works. If restoration of public Rights-of-Way or other property of the City is not satisfactorily performed within a reasonable time, the Director of Public Works may, after prior notice to Grantee, or without notice, where the disturbance or damage creates a risk to public health or safety, or cause delay or added expense to a public project or activity, cause the repairs to be made at Grantee's expense and recover the cost of those repairs from Grantee. Within thirty (30) days of receipt of an itemized list of those costs, including the costs of labor, materials and equipment, Grantee shall pay the City. If suit is brought by City or Grantee with respect to the obligations of this Section 10.3(C), the non-prevailing party shall pay all reasonable attorney's fees and costs of the prevailing party.

(D) Movement on behalf of Other Rights-of-Way users. If any removal, replacement, modification or disconnection is required to accommodate the construction, operation or repair of the facilities or equipment of another Rights-of-Way, Grantee shall, after at least thirty (30) days' advance written notice, take action to effect the necessary changes

requested by the responsible entity. The expense of such changes shall be paid by the other user of the Rights-of-Way for whose benefit the work is being done other than the City.

(E) Relocation or Removal of Facilities. Within 120 days, weather permitting, following written notice from the City, or immediately in an emergency, Grantee shall, to the extent permitted by law, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any of Grantee's facilities within the right-of-way whenever the Mayor making a final determination that such removal, relocation, change or alterations is reasonably necessary for:

1. The construction, repair, maintenance or installation of any non-competitive City or other non-competitive public improvements in or upon the Rights-of-Way.

2. The vacation of a public street or the release of a utility easement. In the event the City compensates any other Person (other than the City) for such work, then Grantee shall be similarly compensated.

(F) Movement for Other Permittees. At the request of any Person holding a valid permit to move a building, house or structure and upon reasonable advance notice, Grantee shall temporarily raise, lower or remove its wires as necessary to permit the moving of a building, house or structure. The expense of such temporary changes must be paid by the permit holder, and Grantee may require a reasonable deposit of the estimated payment in advance.

10.4 Construction and Use of Poles. Whenever feasible, Grantee shall use existing poles when the installation of facilities aboveground is permitted. In the event Grantee cannot obtain the necessary poles and related facilities pursuant to a pole attachment agreement, and only in such event, then it shall be lawful for Grantee to make all needed excavations in the Streets for the purpose of placing, erecting, laying, maintaining, repairing and removing poles, conduits, supports for wires and conductors and any other facility needed for the maintenance or extension of Grantee's Cable System. The City shall have the right to require Grantee to change the location of any of Grantee's poles within Rights-of-Way when, in the opinion of the City, the public convenience requires such change, and the expense thereof shall be paid by Grantee. Notwithstanding the foregoing, the erection of new poles is only to be a last resort and in any event new poles may not be erected in any new subdivision.

10.5 Standards. In the maintenance and operation of its Cable System in Rights-of-Way, alleys and other public places, and in the course of any new construction or addition to its facilities, Grantee shall proceed so as to not unreasonably interfere with the use of the Rights-of-Way.

10.6 Work of Contractors and Subcontractors. Grantee will take prompt corrective action if it finds that any facilities or equipment on the Cable System are not operating in compliance with the requirements of this Agreement or applicable law.

10.7 The Grantor acknowledges that the vast majority, if not all, of Grantee's facilities that are or would be used to provide Cable Service are or would also may be used to provide

services other than Cable Service, such as, but not limited, to telecommunications and broadband service ("Mixed Use Facilities"). To the extent that such Mixed Use Facilities use or would use Rights-of-Way and such use is also governed by a provision of the City Code other than Chapter 5.15 or a written agreement with Grantor, such provision of City Code or other written agreement shall govern such use rather than this Section 10.

## **SECTION 11. SYSTEM DESIGN**

11.1 Cable System. Grantee shall maintain and operate a modern, high quality Cable System technically capable of delivering Customers' choice of no fewer than 140 channels of digital programming. The Cable System shall be two-way activated; support interactive cable services; and shall be designed for optimum reliability and flexibility; and Grantee shall regularly evaluate the need for new programming or incorporating new technologies.

11.2 Corrective Action. Grantee will take prompt corrective action if it finds that any facilities or equipment in the Cable system are not operating in compliance with the requirements of this Agreement or applicable law.

## **SECTION 12. TECHNICAL STANDARDS**

12.1 Technical Performance. Grantee shall comply with the technical standards set forth in the rules and regulations of the FCC as such rules and regulations may from time to time be amended.

12.2 System Tests and Inspections; Special Testing.

(A) Grantee shall perform all tests required under the rules and regulations of the FCC.

(B) The City shall have the right to inspect all construction or installation work performed pursuant to the provisions of the Franchise. In addition, the City may require special testing of a location or locations within the System if there is a particular matter of controversy or unresolved complaints regarding System construction, operations or installation work pertaining to such locations(s). Such tests shall be limited to the particular matter in controversy and the applicable standards. The City shall endeavor to so arrange its request for such special testing so as to minimize hardship or inconvenience to Grantee or to the Subscribers of such testing.

(C) Before ordering such tests, Grantee shall be afforded thirty (30) days following receipt of written notice to investigate and, if necessary, correct problems or complaints upon which tests were ordered. The City shall meet with Grantee prior to requiring special tests to discuss the need for such and, if possible, visually inspect those locations which are the focus of concern. If, after such meetings and inspections, the City wishes to commence special tests and the thirty (30) days have elapsed without correction of the matter in controversy or resolution of complaints, the tests shall be conducted by a qualified engineer selected by the City and Grantee, and Grantee shall cooperate in such testing. If Grantee fails to meet the

applicable lawful standards as evidenced by the test results, such tests shall be paid for by Grantee.

(D) Unless otherwise provided in this Franchise, the test shall be supervised by Grantee's chief technical authority, or an appropriate designee, who shall certify all records of tests provided to the City.

(E) Test results under this Section shall be filed with the City within fourteen (14) days of written request of the City.

(F) If any test indicates that any part or component of the System fails to meet applicable requirements, Grantee, without requirement of additional notice or request from the City shall take corrective action, retest the locations and advise the City of the action taken and the results achieved by filing a written report certified by Grantee's chief technical authority or its appropriate designee.

### **SECTION 13. SERVICE EXTENSION**

#### **13.1 Service to Potential Subscribers**

(A) Subject to Section 13.1(B), no later than one (1) year after the Effective Date, Grantee shall offer service in every U.S. Census Tract in the Franchise Area and in every neighborhood recognized by the City of Lincoln Department of Urban Development.

(B) Grantee's obligation to provide service to particular locations within such Census Tracts and neighborhoods shall be dependent on then-current industry standard technical qualifications regarding the maximum loop lengths over which Cable Service similar to Grantee's can be provisioned over a broadband network, that is, the distance, as measured by facility routes, between a potential customer location and the digital subscriber line access multiplexer ("DSLAM") used or potentially used to provide broadband Internet access service to such location, as applied to actual loop lengths. While Grantee shall not be obligated under this Agreement to reduce actual loop lengths through deployment of additional DSLAMs, Grantee commits to making commercially-reasonable efforts to deploy technology and manage loop lengths in a manner so as to reach a goal of being able to serve at least 80% of locations in the City by the end of Year 15, subject to marketplace success.

### **SECTION 14. STANDBY POWER EAS**

14.1 Standby Power. Grantee shall maintain standby power at the headend, hubs and node locations.

#### **14.2 Emergency Alert Capability.**

(A) Grantee shall comply with the EAS requirements imposed under federal law.

(B) Grantee shall continue to provide the City with a separate over-ride system that can provide local alerts.

## **SECTION 15. AGREEMENT BREACHES; TERMINATION of AGREEMENT**

15.1 Procedure for Revocation. The City shall undertake the following procedures for revocation:

(A) If the City believes that Grantee has breached any material provision of this Agreement and the City intends to pursue revocation of this Agreement, the City shall notify Grantee in writing, stating with reasonable specificity the nature of the alleged default. Grantee shall have thirty (30) days from the receipt of such notice to:

1. Respond to the City, contesting the City's assertion that a default has occurred, and requesting a hearing in accordance with subsection (B), below; or

2. Cure the default; or

3. Notify the City that Grantee cannot cure the default within the thirty (30) days, because of the nature of the default. In the event the default cannot be cured within thirty (30) days, Grantee shall promptly take all reasonable steps to cure the default and notify the City in writing and in detail as to the exact steps that will be taken and the projected completion date. In such case, the City may set a hearing in accordance with subsection (B) below to determine whether additional time beyond the thirty (30) days specified above is indeed needed, and whether Grantee's proposed completion schedule and steps are reasonable. Upon five (5) business days' prior written notice, either the City or Grantee may call an informal meeting to discuss the alleged default.

(B) If Grantee does not cure the alleged default within the cure period stated above, or by the projected completion date under subsection (A)(3), or denies the default and requests a hearing in accordance with subsection (A)(1), or the City orders a hearing in accordance with subsection (A)(3), the City Council shall set a public hearing to investigate said issues or the existence of the alleged default. The City shall notify Grantee of the hearing in writing and such hearing shall take place no sooner than fourteen (14) days after Grantee's receipt of notice of the hearing. At the hearing, Grantee shall be provided an opportunity to be heard and to present evidence in its defense. The City Council's determination as to whether a default or a material breach of this Agreement has occurred shall be subject to judicial review in a court of competent jurisdiction.

(C) If, after the public hearing, the City Council determines that a default or material breach still exists, the City shall order Grantee to correct or remedy the default or breach within seven (7) business days or within such other longer time frame as the City shall determine. In the event Grantee does not cure within such time to the City's reasonable satisfaction, the City may revoke this Agreement.



15.2 Alternative Remedies. No provision of this Agreement shall be deemed to bar the right of the City to seek or obtain judicial relief from a violation of any provision of the Agreement or any rule, regulation, requirement or directive promulgated thereunder. Neither the existence of other remedies identified in this Agreement nor the exercise thereof shall be deemed to bar or otherwise limit the right of the City to recover monetary damages for such violations by Grantee, or to seek and obtain judicial enforcement of Grantee's obligations by means of specific performance, injunctive relief or mandate, or any other remedy at law or in equity.

15.3 Revocation.

(A) In addition to revocation in accordance with other provisions of this Agreement, the City may revoke this Agreement and rescind all rights and privileges associated with this Agreement in the following circumstances, each of which represents a material breach of this Agreement:

1. If Grantee, after written notice and a reasonable opportunity to cure, continues to fail to perform or attempts to evade any material obligation under this Agreement or under any other agreement, ordinance or document between the City and Grantee;
2. If Grantee abandons the Cable System, or terminates the Cable System's operations;
3. If Grantee fails to restore service to the Cable System or institutional networks after three consecutive days of an outage or interruption in service; except when approval of such outage or interruption is obtained from the City, it being the intent that there shall be continuous operation of the Cable System;
4. If Grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt, or there is an assignment for the benefit of Grantee's creditors, or all or part of Grantee's Cable System is sold under an instrument to secure a debt and is not redeemed by Grantee within thirty (30) days from said sale; or
5. This Agreement may be revoked one hundred twenty (120) days after the appointment of a receiver or trustee to take over and conduct the business of Grantee (at the option of the City and subject to applicable law) whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless elsewhere provided herein.

(B) The City shall provide Grantee written notice of its intent to consider revocation under this subsection and hold a hearing and provide Grantee due process and the opportunity to cure in accordance with the provisions of Section 15.1 of this Agreement.

15.4 Termination by Grantee. On or after the eighth anniversary of the Effective Date, Grantee may terminate this agreement without penalty or incurring damages upon twelve (12) months' written notice. Grantee's obligations under Section 9.13 shall survive unilateral termination of this Agreement by Grantee prior to Year 15 of this Agreement with the exception of any payment obligations due in years 11 through 15 to the extent that either this Agreement is

no longer in effect at such time or Grantee did not served twenty thousand (20,000) or more customers as of the end of Year 10.

15.5 Reservation of Rights. Unless otherwise set forth in this Agreement, each party expressly reserves any right it may now have or be hereafter granted under federal or state law. The rights of the City under this Agreement shall not be read to limit any immunities the City may enjoy under Federal, State or local law.

## **SECTION 16. ABANDONMENT**

16.1 Effect of Abandonment. If the Grantee abandons its Cable System (meaning that portion or portions of the System used exclusively for the provision of Cable Services) during the term of this Agreement, the Grantee shall pay a liquidated damage amount of the greater of: (a) five hundred thousand and 00/100 dollars (\$500,000.00); or (b) fifty and 00/100 dollars (\$50.00) per subscriber, as most recently reported pursuant to Section 7.

16.2 What Constitutes Abandonment. The Grantee shall be deemed to have abandoned the System and the City shall be entitled to exercise its option if the Grantee willfully or without cause fails to provide Cable Service to a substantial portion of the Franchise Area for seventy-two (72) consecutive hours, unless the City authorizes a longer interruption of service. The calculation of such seventy-two hour period shall exclude twenty-four (24) hour periods on any calendar day of any City-recognized holiday in which its offices are closed.

## **SECTION 17. TRANSFER**

17.1 A transfer of the franchise to any Person controlling, controlled by or under the same common control as Grantee shall not require prior City approval. The Transferee shall represent to the City that it has tile legal, technical and financial qualifications to fulfill the Franchise. A breach of that representation shall be a material breach of the Franchise.

17.2 A Transfer pursuant to this Section shall not be deemed to waive any rights of the City to subsequently enforce noncompliance issues relating to the franchise.

17.3 In no event shall a transfer of this Franchise be effective without the transferee becoming a signatory to this Agreement and assuming all of the rights and obligations hereunder.

## **SECTION 18. MISCELLANEOUS PROVISIONS**

18.1 Notices. Throughout the term of the Agreement, each party shall maintain and file with the other a local address for the service of notices by mail. All notices shall be sent to such respective address, and such notices shall be effective upon the date of mailing. At the Effective Date of this Agreement:

Grantee's address shall be: Division Vice President  
Windstream  
1440 M. St.  
Lincoln, NE 68508

With a copy to: Regulatory Legal  
Windstream  
4001 Rodney Parham Rd.  
Little Rock, AR 72212

The City's address shall be: City of Lincoln, Nebraska  
555 South 10<sup>th</sup> St.  
Lincoln, NE 68508  
Attn: Steve Huggenberger, Assistant City Attorney

18.2 Costs to be Borne by Grantee. Grantee shall pay for all costs of publication of this Agreement.

18.3 Binding Effect. This Agreement shall be binding upon the parties hereto, their permitted successors and assigns.

18.4 Authority to Amend. This Agreement may be amended at any time by written agreement between the parties.

18.5 Rights of Third Parties. This Franchise is not intended to, and shall not be construed to, grant any rights to or vest any rights in third parties, unless expressly provided herein.

18.6 Governing Law. This Agreement shall be governed in all respects by the laws of the State of Nebraska.

18.7 Captions. The captions and headings of this Agreement are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of any provisions of this Agreement.

18.8 No Joint Venture. Nothing herein shall be deemed to create a joint venture or principal agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner which would indicate any such relationship with the other.

18.9 Waiver. Except as expressly provided herein, the failure of the City at any time to require performance by Grantee of any provision hereof shall in no way affect the right of the City hereafter to enforce the same. Nor shall the waiver by the City of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

18.10 Compliance with Federal, State and Local Laws.

(A) This agreement shall at all times be subject to applicable local, state and federal law, except as specifically provided otherwise.

(B) If any federal or State law or regulation shall require or permit City or Grantee to perform any service or act or shall prohibit City or Grantee from performing any service or act which may be in conflict with the terms of this Franchise, either party shall notify the other of the point in conflict believed to exist between such law or regulation. Grantee and City shall conform to State laws and regulations regarding cable communications as they become effective, unless otherwise stated, and to conform to federal laws and regulations as they become effective.

(C) In the event that federal or state laws or regulations preempt a provision or limit the enforceability of a provision of this Franchise, the provision shall be read to be preempted to the extent and for the time, but only to the extent and for the time, required or necessitated by law. In the event such federal or state law or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the City.

(D) If any term, condition or provision of this Franchise or the application thereof to any Person or circumstance shall, to any extent, be held to be invalid or unenforceable, the remainder hereof and the application of such term, condition or provision to Persons or circumstances other than those as to whom it shall be held invalid or unenforceable shall not be affected thereby, and this Franchise and all terms, provisions and conditions hereof shall, in all other respects, continue to be effective. In the event such law or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision which had been held invalid or modified is no longer in conflict with the law and regulations then in effect, said provision shall thereupon return to full force and effect and shall thereafter be binding on Grantee and City without further action by the City.

18.11. Grantee Acknowledgment of Validity of Franchise. Grantee acknowledges that it has had an opportunity to review the terms and conditions of this Franchise and that under current law Grantee believes that said terms and conditions are not unreasonable or arbitrary, and that Grantee believes City has the power and legal authority to make the terms and conditions contained in this Franchise.

18.12 Entire Agreement. This Agreement and all Exhibits represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersede all prior oral negotiations between the parties, including any prior franchises, cable ordinances or proposals.

18.13 Cumulative Rights. All rights and remedies given to the City by this Franchise or retained by the City herein shall be in addition to and cumulative with any and all other rights

and remedies, existing or implied, now or hereafter available to City, at law or in equity, and such rights and remedies shall not be exclusive, but each and every right and remedy specifically given by this Franchise or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by City and the exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy.

18.14 Force Majeure. Grantee shall not be deemed in default of provisions of this Franchise or the City Code (and Grantee shall not be subject to any sanction, or enforcement measure of any kind whatsoever) where performance was rendered impossible by war or riots, labor strikes or civil disturbances, extreme weather, floods or other causes beyond Grantee's control, and the Franchise shall not be revoked or Grantee penalized for such noncompliance, provided that Grantee, when possible, takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible, under the circumstances, with the Franchise without unduly endangering the health, safety and integrity of Grantee's employees or property, or the health, safety and integrity of the public, the Rights-of-way, public property or private property.

18.15 Non-Waiver. Unless otherwise set forth in this Agreement, neither party waives any right, immunity, limitation or protection otherwise available to such party, its officers, employees or agents under federal or state law.

18.16 Costs. Any cost to be borne by Grantee may, at the discretion of Grantee, be passed through to Grantee's customers, unless otherwise prohibited by applicable law.

18.17 Miscellaneous Fees. Grantee shall not be required to and shall be relieved of any requirement to remit any franchise renewal application fee to the City or to reimburse the City for any franchise renewal consultant services.


IN WITNESS WHEREOF, this Agreement is signed in the name of the City of Lincoln, Nebraska, a municipal corporation, this date 1-8-15.

ATTEST:

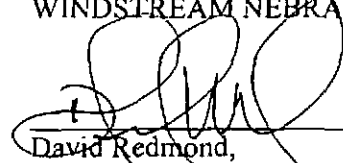
CITY OF LINCOLN, NEBRASKA,  
a municipal corporation,

  
City Clerk



  
Chris Beutler, Mayor

WINDSTREAM NEBRASKA, INC.,



---

David Redmond,  
President - Consumer Services

# CITY OF LINCOLN REQUEST FORM

Submit one original to City Clerk

REQUEST FOR (please check one): ☒ ORDINANCE ☐ RESOLUTION

DESIRED DOCKET DATE: 12-8-14

REQUEST MADE BY: Steve Huggenberger

DEPARTMENT: Law

TO BE COMPLETED BY CITY CLERK	
BILL #:	14-155
DATE:	11/26
INTRO:	12/8
P.H.:	12/15

EMERGENCY MEASURE REQUIRED: ☒ No ☐ Yes  
IF EMERGENCY, GIVE REASON (See Art. 6, Sec. 2 of Charter):

DIRECTOR'S EST'D TIME/TESTIMONY, please check one:

☐ 0 - No Hearing (Consent Agenda) ☒ 1 - Short ☐ 2 - Average ☐ 3 - Long

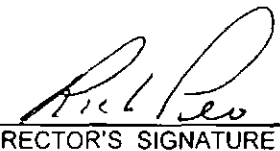
REASONS OR JUSTIFICATION FOR PROPOSED LEGISLATION:

Approving a cable television franchise agreement for a 15 year term between the City of Lincoln and Windstream Nebraska, Inc. to provide cable television services and products to the citizens of Lincoln.

FILED  
NOV 26 2014  
CITY CLERK'S OFFICE

DOES REQUESTOR WISH TO REVIEW AND APPROVE THIS ORDINANCE PRIOR TO ITS INTRODUCTION?

☐ DOES ☐ DOES NOT

  
DIRECTOR'S SIGNATURE

11/26/2014  
DATE

TO BE USED BY THE FINANCE DEPARTMENT

BUDGET REVIEW:

DATE:

ACCOUNT NUMBER AND APPROPRIATE BALANCES:

DATE:

FUND AVAILABILITY APPROVED

DATE:

FINANCE DIRECTOR'S SIGNATURE

DATE

City Council Introduction: December 8, 2014

BILL NUMBER: 14-155

Public Hearing: December 15, 2014

Date Factsheet Prepared: December 2, 2014

## FACTSHEET

**Instructions:** If a question does not apply, just put "NA". Please try to keep it to **ONE** page only. Submit **one original**, with your Request Form, to City Clerk.

**TITLE:** Cable Franchise Agr

**BOARD/COMMITTEE:**

**APPLICANT:** Law Dept.

**RECOMMENDATION:**

**STAFF  
RECOMMENDATION:**

**OTHER DEPARTMENTS  
AFFECTED:** Public Works

**SPONSOR:** Steve Huggenberger

**OPPONENTS:**

### REASON FOR LEGISLATION

Approving a cable television franchise agreement for a 15 year term between the City of Lincoln and Windstream Nebraska, Inc. to provide cable television services and products to the citizens of Lincoln.

### **DISCUSSION / FINDINGS OF FACT:**

This is a 15 year franchise agreement to provide cable television within the City of Lincoln. There is a franchise fee requirement to pay 5% of gross revenues to the City. This agreement provides Government/Education monies to be used for government and education access purposes. It provides for support of public access. There is the provision of fiber grant monies for the City to use for its fiber conduit system and institutional network. There are also a number of other provisions dealing with Surety issues, Reporting, Right-of-Way management issues, termination, abandonment, etc.

**POLICY OR PROGRAM CHANGE:** ☐ Yes ☐ No

**OPERATIONAL IMPACT ASSESSMENT:**

**COST OF TOTAL PROJECT:** n/a

**RELATED ANNUAL OPERATING COSTS:**

**SOURCE OF FUNDS:**

**CITY:**

**NON CITY:**

**FACTSHEET PREPARED BY:** Steve Huggenberger

**DATE:** 12-2-14

**REVIEWED BY:**

**DATE:**



## CABLE TELEVISION FRANCHISE AGREEMENT SUMMARY - Windstream

Section 1. Standard definitions with the exception of Gross Revenues definition. Definitions generally identical to Time Warner franchise.

### Sec. 2. Grant of Agreement

- 15 year nonexclusive franchise
- City retains police power abilities

### Sec. 3. Franchise Fee

- Franchise fee 5% of gross revenues
- Audits every 4 years, paid for by company.

### Sec. 4. Administration and Regulation

- Performance evaluations may be conducted annually by City

### Sec. 5. Financial and Insurance Requirements

- Indemnifications required
- Insurance requirements in line with other City requirements
- Letter of Credit at \$100,000

### Sec. 6. Customer Service Standards

- Continuation of using federal customer service standards

### Sec. 7. Reports

- Utilized the code requirements more than in TW franchise
- Annual reports with complaints and resolutions
- Expansion reporting

### Sec. 8. Programming

- Same as TW
- Free drops and service to City Offices, schools and libraries

### Sec. 9. PEG

- 4 access channels
- Government training channel
- Triggers for additional channels
- HD requirements
- Support for access capital needs
  - .41/sub/month for Educ. and Gov.
  - 4.00/sub per yr for Public access
- Fiber grant
  - \$40,000/YR for 10 yrs, then \$50,000 /yr for 5 years
- Conduit lease

### Sec. 10. General ROW use

- Generally same requirements for cable as are in place or being put in place for all telecom or other ROW users

Sec. 11. System Design

- System with a minimum 140 channels
- All digital

Sec. 12. Technical Standards

- FCC standards
- City has right to examine test results or order other tests

Sec. 13. Service Extension

- No area exempt from service as in the TW franchise
- Extension requirements based on market success
- Has a goal of serving at least 80% of City by end of 15 yr franchise.

Sec. 14. Standby Power

- City to have override capability for local emergency alerts. Same as TW franchise

Sec. 15 Termination

- Uncured breaches of any material provision allows City to terminate agreement. Same as TW

Sec. 16. Abandonment

- Any abandonment gives the City an option of a \$500,000 penalty

Sec. 17 Transfer

- Transfers to affiliated entities allowed without City approval
- Transferee has to agree to franchise and ordinance obligations

Sec. 18. Miscellaneous

- Reserves the ability to pass through any costs to customers

VOID

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## **AGREEMENT**

This Agreement ("Agreement") is entered into in Lincoln, Nebraska this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, ("Effective Date") by and between Windstream Nebraska, Inc. ("Grantee"), and the CITY of LINCOLN, NEBRASKA, a municipal corporation, (the "City"). The City and Grantee are sometimes referred to hereinafter collectively as the "parties."

WHEREAS, the City has identified the future cable-related needs and interests of the City and its citizens, has considered the financial, technical and legal qualifications of Grantee, and has determined whether Grantee's plans for constructing, operating, upgrading and maintaining its Cable System are adequate, in a full public proceeding affording due process to all parties; and

WHEREAS, the public has had adequate notice and opportunity to comment on Grantee's proposal to provide cable television service within the City; and

WHEREAS, the City has a legitimate and necessary regulatory role in ensuring the availability of state-of-the-art cable communications service, high technical capability and reliability of Cable Systems in its jurisdiction, the availability of local programming (including educational and governmental access programming) and quality customer service; and

WHEREAS, diversity in cable service and local and non-local programming is an important policy goal and Grantee's Cable System should offer a wide range of programming services; and

WHEREAS, flexibility to respond to changes in technology, subscriber interests and competitive factors should be an essential characteristic of this Agreement and both the City and Grantee will stress maximum system flexibility to take advantage of new technology to benefit subscribers and citizens as such technology becomes available; and

WHEREAS, the City is authorized to grant one or more nonexclusive franchises to construct, operate and maintain a cable television system within the boundaries of the City.

NOW, THEREFORE, in consideration of the mutual promises made herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and Grantee do hereby agree as follows:

### **SECTION 1. DEFINITIONS**

For the purposes of this Agreement, and all exhibits attached hereto, the following terms, phrases, words and their derivations shall have the meanings given herein. Words defined in the Cable Communication Code shall have the meanings given therein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined shall be given their common and ordinary meaning. The word "shall" is always mandatory and not merely directory.

1.1 "Access" means the availability for use by various agencies, institutions, organizations, groups and individuals in the community, including the City and its designees, of the Cable System to distribute downstream, non-commercial video programming (including alpha numeric programming) as permitted under applicable law, including, but not limited to cablecasting spots to promote public or governmental announcements for services or programs that do not compete with services or programs offered by a Grantee.

(A) "Educational Access" means Access where Schools are the primary users having editorial control over non-commercial programming, signals and services.

(B) "Governmental Access" means Access where governmental institutions or their designees are the primary users having editorial control over non-commercial programming, signals and services; and

(C) "Public Access" means Access where members of the public are the primary users.

1.2 "Activation" or "Activated" means the status of any capacity on or part of the Cable System wherein the use of that capacity or part thereof may be made available without further installation of system equipment, whether hardware or software.

1.3 "Agreement" or "Franchise" means this document in which this definition appears, which is executed between the City and Grantee, containing the specific provisions of the authorization granted, including any exhibits attached hereto and incorporated herein.

1.4 "Bad Debt" means amounts lawfully owed by a customer and accrued as revenues on the books of Grantee, but not collected after reasonable efforts by Grantee.

1.5 "Broadcast Signal" means a television or radio signal transmitted over the air to a wide geographic audience, and received by a Cable System off-the-air by antenna, microwave, satellite dishes or any other means.

1.6 "Cable Acts" means the Cable Communications Policy Act of 1984, and the Cable Television Consumer Protection and Competition Act of 1992, as amended by the Telecommunications Act of 1996, regulations promulgated pursuant to such Acts, and any amendments or future federal cable television laws, acts or regulations.

1.7 "Franchise Area" means the area within the jurisdictional boundaries of the City, including any areas annexed by the City during the term of this Agreement

1.8 "Franchise Fee" means any tax, fee or assessment of any kind imposed by the City or other governmental entity on Grantee or Subscriber, or both, solely because of their status as such. The term "Franchise Fee" does not include:

(A) Any tax, fee or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services, but not

including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) Capital costs which are required under this Agreement to be incurred by Grantee for public, educational or governmental access equipment and facilities;

(C) Requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(D) Any fee imposed under Title 17, United States Code.

1.9 "Gross Revenues" means any and all revenues, (including cash, credits, or other consideration of any kind or nature not enumerated below but is "revenue" under generally accepted accounting principles ("GAAP")) arising from, attributable to or in any way derived directly or indirectly by Grantee, its Affiliates or by any other entity that is a cable operator of the Cable System, from the operation of Grantee's Cable System within the Franchise Area to provide Cable Services. Gross Revenues include, by way of illustration and not limitation:

- monthly fees charged Subscribers for Basic Service, expanded Basic Service, optional, premium, per channel, pay-per-view, video on demand or per program service;
- installation, disconnection, reconnection and change-in-service fees;
- leased channel fees;
- remote controls;
- late fees;
- revenues from rentals or sales of converters or other equipment;
- advertising revenues;
- revenues from program guides;
- additional outlet fees;
- Franchise Fees;
- interactive services to the extent they are a Cable Service;
- revenues from home shopping.

Gross Revenues shall include revenues received by an entity other than Grantee, an Affiliate or another entity that operates the System where necessary to prevent evasion or avoidance of the obligation under this Agreement to pay the Franchise Fees.

Gross Revenues shall not include: (i) bad debt; provided, however, that all or part of any such bad debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; or (ii) any taxes on services furnished by Grantee which are imposed directly on any Subscriber or user by the State or other governmental unit and which are collected by Grantee on behalf of said governmental unit (a Franchise Fee is not such a tax and is included within Gross Revenues); or (iii) the revenue of any Person where such revenue has otherwise been included in Grantee's revenue for franchise fee calculation purposes (so as to prevent revenue from being subject to a franchise fee twice); or (iv) money collected by Grantee

on behalf of the FCC in satisfaction of regulatory fees imposed upon Grantee under Section 47 U.S.C. 159 of federal law; (v) launch support; (vi) coop marketing; (vii) payments or other consideration received from programmers for carriage of programming on the System; (vi) advertising agency commissions; and (vii) the revenue collected by Grantee in satisfaction of the Educational and Government Access support fee required under the Franchise Agreement.

In the event Grantee receives consideration from the provision of Cable Service in the City from a source not specifically identified above, any franchise fee obligations will be determined pursuant to GAAP. If such consideration is "revenue" under GAAP then such consideration shall be included in Gross Revenues for franchise fee purposes. If such consideration is not "revenue" under GAAP then such consideration shall not be included in Gross Revenues.

If Grantee or an Affiliate bundles, ties, or combines the sale of some or all of its Cable Services with non-cable services, whether authorized or not by the Franchise, and if it is necessary to separately determine Gross Revenues attributable to particular Cable Services in order to determine franchise fees owed to the City, Grantee shall allocate revenues, to the extent consistent with any applicable state or federal law or tariffs, in a manner so as to accurately reflect the actual revenue from Cable Services, taking into account all relevant factors, including generally available package prices and discounts. Grantee shall provide a statement with its franchise fee payment reflecting the methodology used and shall bear any burden of proof regarding whether the methodology used accurately reflects Cable Service revenues.

1.10 "High Definition" or "HD" means a video signal with either 720 progressive scan lines of horizontal resolution or 1,080 interlaced scan lines of horizontal resolution.

1.11 "HD-1080p" means a video signal with 1,080 progressive scan lines of horizontal resolution.

1.12 "Person" means any natural person, sole proprietorship, partnership, joint venture, association, or limited liability entity or corporation, or any other form of entity or organization.

1.13 "Rights-of-Way" shall mean the surface of and space above and below any real property in the City in which the City has an interest as an owner or as a trustee for the public for purposes of public travel, as they now or hereafter exist, including, but not limited to, all public streets, highways, avenues, roads, alleys, easements, sidewalks, tunnels, viaducts, or bridges; provided, however, this shall not include other public property for which a separate authorization and agreement to utilize any part of same shall be required from the City.

1.14 "Standard Definition" or "SD" means a video signal with 480 interlaced scan lines of horizontal resolution.

1.15 "System" means Grantee's Cable System.

1.16 "Term Year" is a twelve (12) month period commencing on the Effective Date (as described in Section 2.4) or the anniversary of the Effective Date of the Agreement. A

particular Term Year is designated by the number of years that have passed since the Effective Date on the day after the end of the Term Year. Thus, for example, Term Year 1 begins on the Effective Date and ends on the day before the first anniversary of the Effective Date and Term Year 2 begins on the first anniversary of the Effective Date and ends on the day before the second anniversary of the Effective Date.

## **SECTION 2. GRANT OF AGREEMENT**

### **2.1 Grant**

(A) The City hereby grants to Grantee a nonexclusive and revocable authorization (the "Franchise") to make lawful use of the Streets within the Franchise Area to construct, operate, maintain, reconstruct, rebuild and upgrade a Cable System subject to the terms and conditions set forth in this Agreement and applicable law. This Agreement shall constitute both a right and an obligation to construct, operate, maintain, reconstruct, rebuild and upgrade a Cable System as required hereby, and to fulfill the obligations set forth in, the provisions of this Agreement all subject to applicable law.

(B) Grantee, through this Agreement, is granted the right to operate its Cable System using the City's Rights-of-Way within the Franchise Area in compliance with all applicable laws. Nothing in this Agreement shall be deemed to waive the requirements of the other codes and ordinances of general applicability enacted, or hereafter enacted, by the City.

(C) Grantee promises and guarantees, as a condition of exercising the privileges granted by this Agreement, that any Affiliate of Grantee directly involved in the offering of Cable Service in the Franchise Area, or directly involved in the management or operation of the Cable System in the Franchise Area, will also comply with the terms and conditions of this Agreement.

(D) This Agreement is intended to convey limited rights and interests only as to those Rights-of-Ways in which the City has an actual interest. It is not a warranty of title or interest in any Right-of-Way; it does not provide Grantee with any interest in any particular location within the Right-of-Way and it does not confer rights other than as expressly provided in the grant hereof. This Agreement does not provide Grantee with any right of eminent domain.

(E) To the extent permitted by law, this Agreement shall not limit the City or Grantee's rights with respect to the provision of telecommunications services.

### **2.2 Use of Public Rights-of-Way**

(A) Subject to the City's supervision and control, Grantee may erect, install, construct, repair, replace, reconstruct, and retain in, on, over, under, upon, across, and along the Rights-of-Way within the Franchise Area, such wires, cables, conductors, ducts, conduit, vaults, manholes, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of a Cable System within the Franchise Area. Grantee shall comply with all applicable laws.



(B) This grant does not include the installation, maintenance or construction, repair or replacement of any wireless telecommunications facilities or equipment within Rights-of Way or otherwise on City-owned property or on property held in trust or used by the City except for facilities or equipment used by Grantee for status monitoring of Grantee's Communication Facility; equipment utilized to provide "last mile" connectivity to a Subscriber who could not economically be serviced otherwise; or upon approval by the City which shall not be unreasonably withheld, other wireless transmit/receive equipment incidental to the operation of Grantee's Communication Facility.

2.3 Term. The term of this Agreement and all rights, privileges, obligations and restrictions pertaining thereto shall be fifteen (15) years from the Effective Date of this Agreement as set forth in Section 2.4 below, unless terminated sooner as hereinafter provided.

#### 2.4 Effective Date

(A) This Agreement and the rights, privileges and authority granted hereunder shall take effect and be in force from and after the Effective Date of this Agreement as specified in this Section.

(B) Within thirty (30) days after the Effective Date of the Ordinance granting this Agreement, Grantee shall signify its acceptance of this Agreement by executing a written acceptance of this Agreement. This franchise is void unless accepted in writing by Grantee within this timeframe.

(C) The Effective Date of this Agreement shall be the date on which it is accepted in writing by Grantee.

(D) The grant of this Agreement shall have no effect on Grantee's duty under the prior franchise agreement or any ordinance in effect prior to the Effective Date of this Agreement to indemnify or insure the City against acts and omissions occurring during the period that the prior franchise agreement was in effect. Nor shall it have any effect upon liability to pay all Franchise Fees which were due and owed under prior franchises and ordinances.

2.5 Agreement Nonexclusive. This Agreement shall be nonexclusive, and subject to all prior rights, interests, easements or licenses granted by the City or its predecessors to any Person to use any property, Right-of-Way, easement, right, interest or license for any purpose whatsoever, including the right of the City to use same for any purpose it deems fit, including the same or similar purposes allowed Grantee hereunder. The City may at any time grant authorization to use the Rights-of-Way for any purpose not incompatible with Grantee's authority under this Agreement and for such additional agreements for Cable Systems as the City deems appropriate.

## 2.6 Grant of Other Agreements.

(A) This Agreement shall be non-exclusive and the City reserves the right to grant to any other Person, at any time, the right to use or occupy the Streets or roads of the City for the construction and operation of any other Cable System, open video system or other multichannel video distribution system within the City or for whatever purposes deemed appropriate by the City. It is understood that nothing herein shall be construed to create any obligation to share any Access or Community Programming developed by Grantee with any other provider, except as specified by the City. Notwithstanding anything to the contrary, no such authorization or franchise granted to any other Person (whether by the City, State or Federal government) to operate a Cable System shall be on terms or conditions more favorable or less burdensome when taken as a whole than those imposed herein. Specifically, any franchisee shall be subject to the same requirements pertaining to the service area, contributions to the City's fiber system and PEG access as are imposed under this Agreement. In the event that such a franchise agreement is granted, pursuant to State or Federal law, on terms more favorable or less burdensome than those imposed in this agreement, then Grantee shall have the benefit of those more favorable terms.

(B) In the event the City or any operating division, department, agent or Franchisee of the City elects to build or operate its own Cable System or open video system, or leases dark fiber, poles or other facilities to third-party providers, neither the City nor any operating division, department or agent of the City shall discriminate against Grantee in pole attachment fees, permitting procedures, permitting fees and relocation practices.

(C) If the City, or any operating division or department thereof, including Lincoln Electric Service, grants another Franchise or enters into any lease of facilities so as to enable a third party to offer Cable Service, and which requires Grantee to relocate any of its facilities to accommodate such third party's use of the rights-of-way, easements or poles, the third party shall be required to reimburse Grantee for the actual costs of such relocation.

2.7 Effect of Acceptance. By accepting the Agreement, Grantee acknowledges and accepts the City's legal right to issue and enforce the Agreement subject to applicable law and agrees that the Agreement was granted pursuant to processes and procedures consistent with federal law.

## 2.8 Police Powers.

(A) In accepting this Franchise, Grantee acknowledges that its rights hereunder are subject to the police powers of the City to adopt and enforce general ordinances necessary to the safety and welfare of the public and it agrees to comply with all applicable general laws and ordinances enacted by the City pursuant to such power. Any conflicts between the provisions of this Franchise Agreement and any other present or future lawful exercise of the City's police power shall be resolved in favor of the latter, except that any such exercise that is not of a general application in the jurisdiction or applies exclusively to Grantee which contains provisions inconsistent with this Agreement shall prevail only if, upon such exercise, the City

finds that an emergency exists constituting a danger to health, safety, property or general welfare or such exercise is mandated by law, and only so long as such emergency exists.

(B) Except for the City's exercise of its police powers, pursuant to this section this Agreement may only be modified or amended with the express written consent of Grantee.

2.9 Franchise Area. Grantee shall offer Cable Service to every Person in the Franchise Area, subject to Section 13. In the event of annexation, Grantee shall offer Cable Services within six (6) months of notification of the annexation.

### **SECTION 3. FRANCHISE FEE AND FINANCIAL CONTROLS**

3.1 Franchise Fee. As compensation for the benefits and privileges granted under this Agreement and in consideration of permission to use the City's Streets, Grantee shall pay as a Franchise Fee to the City, throughout the duration of this Agreement, an amount equal to five (5%) percent of Grantee's Gross Revenues. Accrual of such Franchise Fee shall commence as of the Effective Date of this Agreement. Grantor reserves the right to unilaterally increase the franchise fee to the maximum that may be charged consistent with federal and state law.

3.2 Payments. Grantee's Franchise Fee payments to the City shall be computed quarterly for the preceding calendar quarter ending September 30, December 31, March 31 and June 30. Each quarterly payment shall be due and payable no later than thirty (30) days after said dates.

3.3 Quarterly Agreement Fee Reports. Each payment shall be accompanied by a written report to the City, verified by a responsible official of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's Gross Revenues and the computation of the payment amount. Such reports shall detail all Gross Revenues of the Cable System. In the event this Agreement is revoked or otherwise terminated prior to its expiration date, Grantee shall file with the City, within ninety (90) days of the date of revocation or termination, a C.P.A. certified revenue statement showing the Gross Revenues received by it since the end of the previous year and shall make adjustments at that time for the Franchise Fee due up to the date of revocation or termination.

3.4 No Accord and Satisfaction. No acceptance of any payment shall be construed as an accord by the City that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable or for the performance of any other obligation of Grantee.

3.5 Audits. No more than once every four (4) years the City shall have the right to conduct audits of Grantee's records related to the Franchise Fee payments made pursuant to this Agreement as well as Grantor's compliance with Sections 9.9(D), 9.11, and 9.13(A). No audit may go back more than five (5) years. Grantee shall pay City's out-of-pocket expenses associated with such audit up to a limit of \$50,000.00.

3.6 Financial Records. Grantee agrees to meet with a representative of the City upon request to review Grantee's methodology of record keeping related to the computation of the Franchise Fee.

3.7 Late Franchise Fee Payments. In the event any Franchise Fee payment is not received within thirty (30) days from the end of the calendar quarter, Grantee shall be assessed a late fee and may be assessed interest in accordance with the City's Cable Communications Ordinance.

3.8 Compensation. In the event the obligation of Grantee to compensate the City through Franchise Fees as set forth in this Franchise is lawfully suspended or eliminated, in whole or part, then Grantee shall, to the extent required by applicable law, pay to the City equivalent compensation to the compensation paid to the City by other similarly situated users of the Streets for Grantee's use of the Streets, provided that in no event shall such payments exceed the equivalent of five percent (5%) of Grantee's Gross Revenues or such other cap required by applicable law.

3.9 Payment on Termination. If this Agreement is revoked pursuant to the terms of this Agreement, Grantee shall, as per Section 3.3, file with the City within ninety (90) calendar days of the date of the revocation, a gross revenue statement, certified by a certified public accountant, showing the Gross Revenues received by Grantee since the end of the previous fiscal year. The City reserves the right in the event of revocation or expiration (if no application for renewal or appeal related thereto is pending), to satisfy any remaining financial obligations of Grantee to the City by utilizing the funds available in a Letter of Credit or other security provided by Grantee.

3.10 Tax Liability. The Franchise Fees shall be in addition to any and all taxes or other levies or assessments which are now or hereafter required to be paid by businesses in general by any law of the City, the State of Nebraska or the United States including, without limitation, sales, use and other taxes, business license fees or other payments. Payment of the Franchise Fee under this Agreement shall not exempt Grantee from the payment of any license fee, tax or charge on business, occupation, property or income that may be imposed by the City. Any other license fees, taxes or charges shall be of general applicability in nature and shall not be levied against Grantee solely because of its status as a Grantee as defined herein.

#### **SECTION 4. ADMINISTRATION AND REGULATION**

4.1 Authority. The City shall be vested with the power and right to administer and enforce the requirements of this Agreement or to delegate that power and right, or any part thereof, to the extent permitted under Federal, State or local law, to any agent.

4.2 Rates and Charges. All Grantee rates and charges related to or regarding Cable Services shall be subject to regulation by the City to the full extent authorized by applicable Federal or State laws.

4.3 Filing of Rates and Charges. Upon request of City, Grantee shall file with the City a complete schedule of rates and charges for Cable Services and leased Access Channels provided under this Agreement.

4.4 Late Fees. Fees for the late payment of bills shall not be assessed until after the Service has been fully provided.

4.5 Performance Evaluation.

(A) Evaluation sessions may be held at any time by the City during the term of this Agreement, but no more frequently than annually.

(B) All evaluation sessions shall be open to the public and announced at least one week in advance in a newspaper of general circulation in the City. City shall notify Subscribers of all regular evaluation sessions by announcement on at least one Access Channel seven (7) times between the hours of 7:00 a.m. and 9:00 p.m. for five (5) consecutive days preceding each session.

(C) Topics which may be discussed at any evaluation session may include, but are not limited to, Cable Service rate structures; Franchise Fees; occupation taxes; liquidated damages; free or discounted Cable Services; application of new technologies; system performance; Cable Services provided; programming offered; customer complaints; privacy; amendments to this Agreement; judicial and FCC rulings; line extension policies; and the City's or Grantee's rules; provided that nothing in this subsection shall be construed as requiring the renegotiation of this Agreement.

(D) During evaluations under this Section, Grantee shall fully cooperate with the City and shall provide such information and documents as the City may lawfully and reasonably require to perform the evaluation.

(E) As a result of a periodic review or evaluation session, upon notification from City, Grantee shall meet with City and undertake good faith efforts to reach agreement on changes and modifications to the terms and conditions of this Franchise which are both economically and technically feasible.

## **SECTION 5. FINANCIAL AND INSURANCE REQUIREMENTS**

5.1 Indemnification

(A) General Indemnification. Upon timely notice and tender as set forth in Section 5.1(D), Grantee shall indemnify, defend and hold the City, its officers, elected and appointed officials, boards, committees, commissions, agents, volunteers and employees, harmless from any action or claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorneys' fees or expenses, in any way arising out of, resulting from, or alleged to arise out of or result from any construction, excavation, operation, maintenance, reconstruction, or any other act done under this Agreement, by or for Grantee, its agents or its

employees, or arising out of, resulting from or alleged to arise out of or result from any neglect or omission of Grantee. Grantee shall consult and cooperate with the City while conducting its defense of the City.

(B) Indemnification for Relocation. Grantee shall indemnify the City for any damages, claims, additional costs or expenses assessed against, or payable by, the City related to, arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its facilities in the Streets in a timely manner in accordance with any relocation lawfully required by the City.

(C) Non-Waiver. The fact that Grantee carries out any activities under this Agreement through independent contractors shall not constitute an avoidance of or defense to Grantee's duty of defense and indemnification under Section 5.1(A).

(D) Duty to Give Notice and Tender Defense. The City shall give Grantee timely written notice of any claim or of the commencement of any action, suit or other proceeding covered by the indemnity in this Section. In the event any such claim arises, the City or any other indemnified party shall timely tender the defense thereof to Grantee and Grantee shall have the obligation and duty to defend any claims arising thereunder, and the City shall cooperate fully therein.

(E) The indemnification of Section 5.1(A) shall survive the term of any franchise and shall continue in full force and effect as to Grantee's responsibility to indemnify. In no event shall the indemnification requirements of this Section 5.1 be construed to impose any obligation on the part of Grantee, its agents or employees to indemnify the City, its agents or employees or with respect to Government Access programming, or any utilization of the City's network, or the City's operation of the emergency over-ride system pursuant to section 14.2(B).

## 5.2 Insurance Requirements.

(A) General Requirement. Grantee must have adequate insurance during the entire term of this Agreement to protect the City against claims for injuries to Persons or damages to property which in any way relate to, arise from or are connected with this Agreement, or involve Grantee, its agents, representatives, contractors, subcontractors and their employees. However, no coverage shall be provided for claims arising out of or due to the sole negligence of the City.

(B) Initial Insurance Limits. Grantee must keep insurance in effect in accordance with the minimum insurance limits herein set forth below. Grantee shall obtain policies for the following initial minimum insurance limits:

1. Commercial General Liability: Five million dollars (\$5,000,000) aggregate limit per occurrence for bodily injury, personal injury and property damage;
2. Automobile Liability: Two million dollars (\$2,000,000) combined single limit per accident for bodily injury and property damage; and

3. Employer's Liability: Two million dollars (\$2,000,000).

5.3 Deductibles and Self Insured Retentions. If Grantee changes its policy to include a self-insured retention, Grantee shall give notice of such change to the City. The City's approval will be given if the self-insured retention is consistent with standard industry practices. Any deductible or self-insured retention of the policies shall not in any way limit Grantee's liability to the City. The insurance limits set forth above shall be adjusted from time to time upon notice to Grantee but in no event shall the insurance amounts required under this Agreement exceed the maximum municipal liability under State law.

(A) Endorsements.

1. All policies shall contain, or shall be endorsed so that:

(a) The City, its officers, officials, boards, commissions, employees and agents are to be covered as, and have the rights of, named additional insured with respect to liability related to, arising out of by reason of activities performed by, or on behalf of, Grantee under this Agreement or applicable law, or in the construction, operation or repair, or ownership of the Cable System;

(b) Grantee's insurance coverage shall be primary insurance with respect to the City, its officers, officials, boards, commissions, employees and agents. Any insurance or self insurance maintained by the City, its officers, officials, boards, commissions, employees and agents shall be in excess of Grantee's insurance and shall not contribute to it; and

(c) Grantee's insurance shall apply separately to each insured against whom a claim is made or lawsuit is brought, except with respect to the limits of the insurer's liability.

2. The insurance shall provide that it shall not be cancelled or materially altered so as to be out of compliance with the requirements of this section without thirty (30) days' written notice first being given to the City. If the insurance is cancelled or materially altered so as to be out of compliance with the requirements of this section within the term of this Agreement, Grantee shall provide a replacement policy. Grantee agrees to maintain continuous uninterrupted insurance coverage, in the amounts required, for the duration of this Agreement.

(B) Verification of Coverage. Grantee shall furnish the City with certificates of insurance and endorsements or a copy of the page of the policy reflecting blanket additional insured status. The certificates and endorsements for each insurance policy are to be signed by a Person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices, and are to be received subject to approval by City as to compliance with Section 5.2 and 5.3 herein prior to the commencement of activities associated

with this Agreement. Grantee hereby warrants that its insurance policies satisfy the requirements of this Agreement and City laws.

(C) In the alternative to providing a certificate of insurance to the City certifying insurance coverage as required above, Grantee's self-insurance shall provide the same amount and level of protection for Grantee and the City, its officers, officials, boards, commissions, agents and employees as otherwise required under this Section. The adequacy of the self-insurance shall be subject to the periodic review and approval of the City. If Grantee elects to provide self-insurance under this Section, any failure to maintain adequate self-insurance shall be cause for immediate termination of this Agreement by the City.

#### 5.4 Letter of Credit

(A) On the Effective Date of this Franchise, Grantee shall deliver to the City an irrevocable and unconditional Letter of Credit, in a form and substance acceptable to the City, from a National or State bank approved by the City, in the amount of \$100,000.00.

(B) The Letter of Credit shall provide that funds will be paid to the City upon written demand of the City, and in accordance with the terms of this Agreement, in payment for liquidated damages charged pursuant to this Section, in payment for any monies owed by Grantee to the City pursuant to its obligations under this Franchise, or in payment for any damage incurred by the City as a result of any claims arising out of acts or omissions by Grantee pursuant to this Franchise.

(C) As an alternative to recovery of any monies owed by Grantee to the City for actual damages to the City as a result of any claims arising out of acts or omissions by Grantee pursuant to the Franchise, the City, in its sole discretion, may charge to and collect from the Letter of Credit the following liquidated damages:

1. For failure to provide data, documents, reports or information as required herein, the liquidated damage shall be \$250.00 per day for each day, or part thereof, such failure occurs or continues.

2. For failure to comply with construction, operation or maintenance standards, the liquidated damage shall be \$350.00 per day for each day, or part thereof, such failure occurs or continues.

3. For failure to comply with any of the material provisions of this franchise, for which a liquidated damage is not otherwise specifically provided pursuant to this paragraph (C), the liquidated damage shall be \$500.00 per day for each day, or part thereof, such failure occurs or continues.

(D) Each violation of any material provision of this Franchise shall be considered a separate violation for which a separate liquidated damage can be imposed.



(E) Whenever the Mayor determines that there is a basis to charge to and collect from the Letter of Credit under subparagraph (B) above or for any other violation contemplated in subparagraph (C) above, a written notice shall be given to Grantee informing it of such basis or violation. During the thirty (30) days following such notice, Grantee shall be given an opportunity to be heard by the Mayor and an opportunity to cure. Should Grantee cure such violation within such thirty-day period, no liquidated damages shall apply to the pertinent violation(s).

(F) Nothing contained herein shall preclude Grantee from appearing before the City Council at any time in response to any alleged violations in accordance with the rules of the City Council.

(G) If said Letter of Credit or any subsequent Letter of Credit delivered pursuant thereto expires prior to twelve (12) months after the expiration of the term of this Franchise, it shall be renewed or replaced during the term of this Franchise to provide that it will not expire earlier than twelve (12) months after the expiration of this Franchise. The renewed or replaced Letter of Credit shall be of the same form and with a bank authorized herein and for the full amount stated in subparagraph (A) of this Section.

(H) If the City draws upon the Letter of Credit or any subsequent Letter of Credit delivered pursuant hereto, in whole or in part, Grantee shall immediately replace or replenish it to its full amount and shall deliver to the City a like replacement Letter of Credit or certification of replenishment for the full amount as a substitution of the previous Letter of Credit. This shall be a continuing obligation for any withdrawals from the Letter of Credit.

(I) If any Letter of Credit is not so replaced or replenished, the City may draw on said Letter of Credit for the whole amount thereof and use the proceeds as satisfaction of Grantee's performance of franchise obligations to the extent necessary. The failure to replace or replenish any Letter of Credit may also, at the option of the City, be deemed a default by Grantee under this Franchise. The drawing on the Letter of Credit by the City, and use of the money so obtained for payment or performance of the obligations, duties and responsibilities of Grantee which are in default, shall not be a waiver or release of such default.

(J) The collection by City of any damages or monies from the Letter of Credit shall not affect any other right or remedy available to it, nor shall any act, or failure to act, by the City pursuant to the Letter of Credit, be deemed a waiver of any right of the City pursuant to this Franchise or otherwise.

(K) Action by the City or Mayor under this Section shall be subject to judicial review in a court of competent jurisdiction.

## **SECTION 6. CUSTOMER SERVICE**

6.1 Customer Service Standards. Grantee shall comply with the customer service standards set forth by the Federal Communications Commission, as amended.

## **SECTION 7. REPORTS AND RECORDS**

7.1 Open Records. Access to the books and records of Grantee shall be governed by Section 5.15.330 of the City's Cable Communications Ordinance.

7.2 Confidentiality. The City agrees to keep confidential any trade secrets, proprietary or confidential books records, or any other filings with City by Grantee to the extent permitted by law and may not use any such information to compete with Grantee in any manner, directly or through any operating division, department or agent. Grantee shall be responsible for clearly and conspicuously stamping the work "Confidential" on each page that contains trade secret, confidential or proprietary information, and shall provide a brief written explanation as to why such information is trade secret, confidential or proprietary and how it may be treated as such under State or Federal law. If the City receives a demand from any Person for disclosure of any information designated by Grantee as trade secret, proprietary or confidential, the City shall, so far as consistent with applicable law, advise Grantee and provide Grantee with a copy of any written request by the party demanding access to such information within a reasonable time. City will reasonably cooperate with Grantee in any efforts by Grantee to protect the confidentiality of any such material.

### **7.3 Reports Required.**

(A) Grantee is expressly exempted from and relieved of compliance with the following Section 5.15.320 of the City's Cable Communications Ordinance. In lieu thereof Grantee shall be subject to the requirements set forth below.

(B) Grantee shall submit to the City no later than ninety (90) days after the end of each of Grantee's fiscal years, an annual written report with the following information:

(1) A summary of the previous calendar year's activities in development of this system, including but not limited to services begun or dropped, number of subscribers, including gains and losses, homes passed, and miles of cable distribution plants in service, including different classes if applicable.

(2)(i) A financial statement including a statement of income, a balance sheet, and a statement of cash flows that, at Grantee's election, may be audited or unaudited. To the extent that the Grantee submits unaudited financial statements, such submission shall be accompanied by a certification from a corporate officer attesting to the accuracy of such financial statements. The statement shall include notes that specify all significant accounting policies and practices upon which it is based, including, but not limited to, depreciation rates and methodology, and basis for interest expense. A summary shall be provided comparing the current year with the three previous years.

(ii) If the Grantee operates other cable systems, then, in lieu of financial statements of the system in (i), the Grantee may submit the financial statement referred to above as supplementary information to the financial statements of its entire operations. Such financial statements of a multiple system operator shall contain an accountant's report stating what procedures have been applied to the supplementary information and the accountant's opinion on

the supplementary information in relation to the basic financial statements taken as a whole. The Grantee shall obtain written permission from the City in advance in order to submit his financial statements in this manner, and an officer of the company shall attest to the accuracy of the financial information provided.

(3) A current statement of cost of any construction by component category.

(4) A summary of complaints, identifying the number and nature of complaints and their disposition.

(5) A list of corporate officers and members of the board and the officers and board members of any parent corporation.

(6) A list of all partners or stockholders holding one percent or more ownership interest in the franchisee and any parent corporation; provided, however, that when any parent corporation has in excess of 1,000 shareholders and its shares are publicly traded on a national stock exchange, then a list of the twenty largest stockholders of the voting stock of such corporation shall be disclosed.

(7) A report of franchisee's employees in the City designed to demonstrate compliance with Section 5.15.490 of the City's Cable Communications Ordinance upon a form prescribed by the City.

(8) A copy of all the franchisee's rules and regulations applicable to subscribers and users of the cable communications system.

(9) A report relating to all copyright fees paid and copies of all reports or documents submitted to the copyright office of the Library of Congress.

(10) A summary of Grantee's understanding, to the best of its knowledge, of any technologies or products that became commercially available in the previous calendar year that would permit Grantee to increase the maximum length of loops over which Grantee can provide cable service (see Section 13). To the extent that Grantee does not expect to deploy such technology or product within one (1) year of the filing of the written report, Grantee shall provide an explanation for why it elected not to do so.

(11) To the extent that Grantee's take rate, that is, the percentage of homes passed exceeded 25% as of the end of the reporting period, a description of Grantee's plans to increase the number of homes passed in the ensuing reporting period.

(12) A summary of franchise fee payments and any adjustment thereto as specified in Section 5.15.210 of the City's Cable Communications Ordinance, including a summary comparing the current year with the three previous years. Such summary shall be accompanied by a certification from a corporate officer attesting to the accuracy of such summary.

(C) A written report summarizing complaints, identifying the number and nature of complaints and their disposition shall be filed no later than ninety (90) days after the end of each of Grantee's fiscal quarters that are not also the end of Grantee's fiscal year.

(D) Except with regard to Section 7.3(B)(2), the City may specify the form and details of all reports, with the franchisee given an opportunity to comment in advance upon such forms and details. The City may change the filing dates for reports upon reasonable request of the franchisee.

## **SECTION 8. PROGRAMMING AND CHANNEL CAPACITY**

8.1 Provision of Programming and Channel Capacity. Grantee shall provide the programming and Channel capacity required in this Agreement.

8.2 Broad Programming Categories. Grantee shall offer programming in the following broad categories:

- News
- Weather
- Sports
- Public affairs
- Educational
- Cultural
- Music
- Religious

8.3 Cable Service to City Offices, Schools, Libraries. Grantee shall provide without charge one drop and Standard Service (defined to be the Basic Service and the next most highly penetrated tier of programming) to current and future buildings with City and County employees, state-accredited Public and Parochial K-12 schools and City libraries to the extent that Grantee is required to provide service to such particular location under Section 13.

## **SECTION 9. PUBLIC, GOVERNMENT, EDUCATION ACCESS CHANNELS**

9.1 Grantee shall initially provide four (four) channels for non-commercial Public, Educational and Government ("PEG") access use. The channels will be initially allocated as follows:

- (A) 1 channel for Public Access
- (B) 2 channels for Government Access
- (C) 1 channel for Educational Access

9.2 The City may reallocate the four PEG access channels among "Public", "Educational" and "Government" with the approval of Grantee.

9.3 At the City's request, Grantee shall provide a secured digital video stream for city government training purposes and provide the converters in training rooms at the city locations for viewing that training channel.

9.4 Grantee shall provide an additional channel for Educational Access, upon request of the City, at any time after the tenth anniversary of the Effective Date of this Agreement, if the then existing Educational Access channel(s) is Fully Programmed. For the purposes of this requirement, fully programmed means that the Educational Access channel(s) is programmed with Locally-Produced audio-video television programming (i.e. not character generated or bulletin board type programming) from 4 p.m. to 10 p.m. seven (7) days a week for six (6) consecutive weeks.

9.5 Grantee shall provide an additional channel for Government Access, upon request of the City, whenever the then existing Government Access channels are Fully Programmed. For the purposes of this provision, Fully Programmed means:

(A) The Government Access channel (currently channel 5) is programmed with Locally-Produced audio-video television programming (i.e. not character generated programming) from 4 p.m. to 10 p.m. seven days a week for six consecutive weeks; and

(B) The Health Government Access channel (currently channel 10) is programmed at least fifty percent of the time from 4 p.m. to 10 p.m. with Locally-Produced audio-video television programming (i.e. not character generated programming) seven days a week for six consecutive weeks.

9.6 For the purposes of the "triggers" set forth in this Section 9, a program may be repeated twice for the purposes of calculating the hours of programming. Additional repeats of programming are permitted but such additional repeats shall not be counted in any usage formula set forth above.

9.7 For the purposes of the triggers set forth in this Section 9, "Locally-Produced" means audio-video television programming produced within the City of Lincoln; except, however, up to 10% of such programming may be imported from outside the City of Lincoln.

9.8 Grantor Channel Flexibility, PEG Channel Resolution.

(A) Upon written notice of no less than one hundred eighty (180) days, Grantor may request and elect that Grantee provide additional Public Access, Government Access, Educational Access, or training channels in either SD or HD in addition to those described in Sections 9.1, 9.4, and 9.5. Grantor may elect no more than a cumulative total of four (4) additional channels pursuant to this Section 9.8(B) under this Agreement. Absent election to the contrary by Grantor, Grantee shall bear the cost of any encoders necessary for provision of such channels which shall be deemed to be an approved capital expenditure pursuant to Section 9.9(D).

(B) Grantee shall initially provide each of the channels described in Sections 9.1, 9.4, and 9.5 in SD. Upon written notice of no less than one hundred eighty (180) days, Grantor may request and elect that one or more PEG channels described in Sections 9.1, 9.4, 9.5, or 9.8(A) that are then-currently provided in SD be converted to HD. To the extent that Grantee has begun to provide any programming in a particular HD format, Grantor may also request that one or more PEG channels described in Sections 9.1, 9.4, 9.5, or 9.8(A) that are then-currently provided in SD or HD be converted to the same HD format. Absent election to the contrary by Grantor, Grantee shall bear the cost of any encoders necessary for the conversion described in this Section 9.8(B), which shall be deemed to be an approved capital expenditure pursuant to Section 9.9(D). Grantor and Grantee shall jointly decide the types of encoding equipment that may be used in this Section.

(C) To the extent that Grantor wishes to make a one-time election to convert a single channel described in Section 9.1, 9.4, 9.5, or 9.8(A) to multiple audio channels and Grantor has made similar requests to all other providers of Cable Service in the City, Grantee agrees to negotiate in good faith commercially-reasonable conditions for such conversion provided that under no circumstances shall Grantee both be required to bear the cost of any necessary encoders and not be permitted to classify such cost as an approved capital expenditure pursuant to Section 9.9(D).

(D) Grantee shall provide on Basic Service all additional PEG channel feeds the Grantor chooses to provide, whether standard definition or high definition feeds. Digital Programming provided for any PEG or training channel, regardless of source (the Grantor, LPS, Grantee's studio, outside videotape or DVD, etc.) shall not have its quality reduced by Grantee (by rate shaping or down sampling or any other method) either during direct broadcast or by any method used to store the programming for later broadcast or rebroadcast, without the Grantor's consent. Grantee may compress any analog source at rates that show no noticeable difference in quality from the original feed.

#### 9.9 Public Access.

(A) Grantee shall have the exclusive responsibility for administering and operating Public Access subject to the following conditions:

1. Grantee will operate Public Access on a non-discriminatory basis.
2. Grantee shall not exercise any editorial control except as otherwise permitted by applicable law. Grantee shall be the final arbiter on scheduling conflicts.
3. The City or its designee may review and comment upon the Public Access rules.
4. Grantee shall maintain a public access studio.
5. This Section 9.9(A) shall not become effective until six (6) months after Grantee has reported serving at least twenty thousand (20,000) subscribers.

(B) Grantee shall continue to operate Public Access at the same level, if any, that it operates Public Access as of the Effective Date of this Agreement.

(C) To the extent that Section 9.9(A) is not effective, Grantor's obligation to deliver content on any Public Access channels shall be met through interconnecting with a Cable Service provider in the City that administers Public Access and/or maintains a Public Access studio. In this regard, Grantee shall make commercially-reasonable efforts at its own expense to interconnect with the current provider of any operator of a Cable System maintaining a Public Access studio so as obtain Public Access content for distribution as required under this Agreement. Failure by such Cable System operator to provide such interconnection on commercially reasonable rates (limited solely to the actual cost of providing interconnection), terms and conditions, shall excuse Grantee's performance under this Agreement with regard to delivery of Public Access channel content.

(D) Expenditures to support the capital needs of Public Access.

1. For the period commencing on the Effective Date and ending on the day immediately prior to the fifth anniversary of the Effective Date, Grantee shall expend a minimum of four dollars (\$4.00) per subscriber (measured as of the third anniversary of the Effective Date (reported pursuant to Section 7.3(F)) cumulatively over such period;

2. For the period commencing on the fifth anniversary of the Effective Date and ending on the day immediately prior to the tenth anniversary of the Effective Date, Grantee shall expend a minimum of four dollars (\$4.00) per subscriber (measured as of the eighth anniversary of the Effective Date (reported pursuant to Section 7.3(F)) cumulatively over such period;

3. For the period commencing on the tenth anniversary of the Effective Date and ending on the day immediately prior to the fifteenth anniversary of the Effective Date, Grantee shall expend a minimum of four dollars (\$4.00) per subscriber (measured as of the thirteenth anniversary of the Effective Date (reported pursuant to Section 7.3(F)) cumulatively over such period;

4. For Grantee's expenditures to be considered as fulfilling the requirements of this Subsection (D), they must be approved as eligible by the Grantor. Such requests for approval shall include the expected or actual date/period of expenditure. Grantee may seek approval after such expenditures have been made, so long as such expenditures were made on or after the Effective Date. To the extent that Grantee has made a written request for approval, such approval shall be deemed granted if not denied in writing by the Mayor within ninety (90) days. Approval shall not be unreasonably withheld.

(E) Grantee shall make reasonable efforts to develop an advisory group of Public Access users and to consider the suggestions from this group when making Public Access capital expenditures; provided, however, the role of the users is advisory only and all purchasing decisions shall be at the sole discretion of Grantee.

9.10 Unused Access Channels. The City shall adopt rules that enable Grantee to use a PEG access channel when that channel is not being used for its designated purpose.

9.11 Grantee shall collect and remit to the City forty-one cents (\$0.41) per directly billed Basic Service customer (or subscriber to higher tier of service) per month.

9.12 Live Cablecasting Return Locations. Grantee shall maintain a return path from City Hall and the Q St. Fire Station to Grantee's headend to accommodate programming originated by the City for the Government Access channel(s). Grantee shall maintain a return path from the Lincoln Public School's District Office to Grantee's headend to accommodate programming originated by the schools for the Educational Access channel.

#### 9.13 City Fiber Grant.

(A) Grantee shall make a City Fiber Grant to the City of forty thousand dollars (\$40,000) in each of the first ten (10) Term Years, payable within sixty (60) days of the commencement of each such Term Year. If Grantee serves twenty thousand (20,000) or more customers as of the end of Year 10, Grantee shall make a City Fiber Grant to the City in the amount of fifty thousand dollars (\$50,000.00) within sixty (60) days of the commencement of each of Term Years 11, 12, 13, 14, and 15.

(B) The City Fiber Loop Grant shall be used by the City exclusively for completing fiber loops, conduits or conduit appurtenances, or electronic transport equipment connected to the fiber loop for the City's internal communications needs as requested by the City and shall not be used for commercial or competitive purposes except where the City is required by applicable law or has current efforts to share conduit space with another user.

9.14 Simultaneously with the execution of this agreement, Grantee will execute a ten-year conduit lease with the City for a minimum of 5,000 feet of conduit at a monthly-recurring rate of \$0.33 per foot per month, which can be increased annually based on inflation, with a cap of 3.25% per year.

9.15 Payments Not Franchise Fees. Except as specifically provided in this Section 9, none of the payments required under this Section 9 shall be treated by Grantee, or considered in any way by Grantee, a Franchise Fee. All such payments shall be in addition to the Franchise Fee required of Grantee pursuant to Section 3.1 hereof. Provided that the City expends the additional financial obligations, payments and other commitments in a manner required herein, Grantee agrees not to assert or claim at any time before any court or administrative agency that the additional financial obligations, payments and other commitments expressed herein are franchise fees, so as to form the basis for offset or credit against any payments due the City.



## **SECTION 10. GENERAL RIGHT-OF-WAY USE AND CONSTRUCTION**

### **10.1 Compliance with Applicable Laws, Resolutions and Ordinances.**

(A) The terms of this Franchise shall define the contractual rights and obligations of Grantee with respect to operation of the System in the City. However, Grantee shall at all times during the term of this Franchise be subject to the lawful exercise of the police powers of the City. The grant of this Franchise does not relieve Grantee of its obligations to obtain any licenses, permits or other authority as may be required by the City Code, as it may be amended, for the privilege of operating a business within the City or for performing work on City property or within the Rights-of-Way, to the extent not inconsistent with this Franchise.

(B) In the event Grantee cannot determine how to comply with any Rights-of-Way requirement of the City, whether pursuant to this Franchise or other requirement, Grantee shall immediately provide written notice of such question, including Grantee's proposed interpretation, to the City, in accordance with Section 18.1. The City shall provide a written response within fourteen (14) days of receipt indicating how the requirements cited by Grantee apply. Grantee may proceed in accordance with its proposed interpretation in the event a written response is not received within seventeen (17) days of mailing or delivering such written question.

### **10.2 Construction.**

(A) Subject to applicable laws and the provisions of this Agreement, Grantee may perform all construction necessary for the operation of its Cable System. All construction and maintenance of any and all facilities within Rights-of-Way incident to Grantee's Cable System shall, regardless of who performs the construction, be and remain Grantee's responsibility. Grantee shall apply for, and obtain, all permits necessary for construction or installation of any facilities, and for excavating and laying any facilities, within the Rights-of-Way. Grantee shall pay all applicable permit fees required of any Person (except for the City) working in the Rights-of-Way upon issuance of the requisite construction permits by the City to Grantee.

(B) Prior to beginning any construction, Grantee shall secure any required permits for work in the Rights-of-Ways.

(C) Grantee may make excavations in Rights-of-Way for any facility needed for the maintenance or extension of Grantee's Cable System. Prior to doing such work, Grantee shall apply for, and obtain, applicable permits from the City. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts, Grantee shall work with the City and other providers, licensees, permittees and franchisees so as to reduce the number of Rights-of-Way cuts within the City.

(D) In the event of an unexpected repair or emergency, a Grantee may commence such repair and emergency response work as required under the circumstances, provided Grantee shall notify the Director of Public Works and Utilities promptly, before such

repair or emergency work, or the next business morning thereafter if advance notice is not practicable.

### 10.3 Maintenance and Workmanship

(A) Grantee, at its own expense, shall repair, renew, change and improve its facilities to keep them in good repair and safe condition.

(B) Grantee's Cable System shall be located, erected and maintained so as not to endanger or interfere with the safety of Persons, or so as not to unnecessarily hinder or obstruct the free use of Rights-of-Way, alleys, bridges or other public property.

#### (C) Repair and Restoration of Property.

1. If Grantee reasonably knows or should have known it has damaged public or private property, it shall promptly notify the property owner within twenty-four (24) hours in writing.

2. If public or private property is disturbed or damaged, Grantee shall restore the property equivalent to its former condition. Public Rights-of-Way or other City property shall be restored in a manner and within a timeframe approved by the City's Director of Public Works. If restoration of public Rights-of-Way or other property of the City is not satisfactorily performed within a reasonable time, the Director of Public Works may, after prior notice to Grantee, or without notice, where the disturbance or damage creates a risk to public health or safety, or cause delay or added expense to a public project or activity, cause the repairs to be made at Grantee's expense and recover the cost of those repairs from Grantee. Within thirty (30) days of receipt of an itemized list of those costs, including the costs of labor, materials and equipment, Grantee shall pay the City. If suit is brought by City or Grantee with respect to the obligations of this Section 10.3(C), the non-prevailing party shall pay all reasonable attorney's fees and costs of the prevailing party.

(D) Movement on behalf of Other Rights-of-Way users. If any removal, replacement, modification or disconnection is required to accommodate the construction, operation or repair of the facilities or equipment of another Rights-of-Way, Grantee shall, after at least thirty (30) days' advance written notice, take action to effect the necessary changes requested by the responsible entity. The expense of such changes shall be paid by the other user of the Rights-of-Way for whose benefit the work is being done other than the City.

(E) Relocation or Removal of Facilities. Within 120 days, weather permitting, following written notice from the City, or immediately in an emergency, Grantee shall, to the extent permitted by law, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any of Grantee's facilities within the right-of-way whenever the Mayor making a final determination that such removal, relocation, change or alterations is reasonably necessary for:

1. The construction, repair, maintenance or installation of any non-competitive City or other non-competitive public improvements in or upon the Rights-of-Way.

2. The vacation of a public street or the release of a utility easement. In the event the City compensates any other Person (other than the City) for such work, then Grantee shall be similarly compensated.

(F) Movement for Other Permittees. At the request of any Person holding a valid permit to move a building, house or structure and upon reasonable advance notice, Grantee shall temporarily raise, lower or remove its wires as necessary to permit the moving of a building, house or structure. The expense of such temporary changes must be paid by the permit holder, and Grantee may require a reasonable deposit of the estimated payment in advance.

10.4 Construction and Use of Poles. Whenever feasible, Grantee shall use existing poles when the installation of facilities aboveground is permitted. In the event Grantee cannot obtain the necessary poles and related facilities pursuant to a pole attachment agreement, and only in such event, then it shall be lawful for Grantee to make all needed excavations in the Streets for the purpose of placing, erecting, laying, maintaining, repairing and removing poles, conduits, supports for wires and conductors and any other facility needed for the maintenance or extension of Grantee's Cable System. The City shall have the right to require Grantee to change the location of any of Grantee's poles within Rights-of-Way when, in the opinion of the City, the public convenience requires such change, and the expense thereof shall be paid by Grantee. Notwithstanding the foregoing, the erection of new poles is only to be a last resort and in any event new poles may not be erected in any new subdivision.

10.5 Standards. In the maintenance and operation of its Cable System in Rights-of-Way, alleys and other public places, and in the course of any new construction or addition to its facilities, Grantee shall proceed so as to not unreasonably interfere with the use of the Rights-of-Way.

10.6 Work of Contractors and Subcontractors. Grantee will take prompt corrective action if it finds that any facilities or equipment on the Cable System are not operating in compliance with the requirements of this Agreement or applicable law.

10.7 The Grantor acknowledges that the vast majority, if not all, of Grantee's facilities that are or would be used to provide Cable Service are or would also may be used to provide services other than Cable Service, such as, but not limited, to telecommunications and broadband service ("Mixed Use Facilities"). To the extent that such Mixed Use Facilities use or would use Rights-of-Way and such use is also governed by a provision of the City Code other than Chapter 5.15 or a written agreement with Grantor, such provision of City Code or other written agreement shall govern such use rather than this Section 10.

## **SECTION 11. SYSTEM DESIGN**

11.1 Cable System. Grantee shall maintain and operate a modern, high quality Cable System technically capable of delivering Customers' choice of no fewer than 140 channels of

digital programming. The Cable System shall be two-way activated; support interactive cable services; and shall be designed for optimum reliability and flexibility; and Grantee shall regularly evaluate the need for new programming or incorporating new technologies.

11.2 Corrective Action. Grantee will take prompt corrective action if it finds that any facilities or equipment in the Cable system are not operating in compliance with the requirements of this Agreement or applicable law.

## **SECTION 12. TECHNICAL STANDARDS**

12.1 Technical Performance. Grantee shall comply with the technical standards set forth in the rules and regulations of the FCC as such rules and regulations may from time to time be amended.

12.2 System Tests and Inspections; Special Testing.

(A) Grantee shall perform all tests required under the rules and regulations of the FCC.

(B) The City shall have the right to inspect all construction or installation work performed pursuant to the provisions of the Franchise. In addition, the City may require special testing of a location or locations within the System if there is a particular matter of controversy or unresolved complaints regarding System construction, operations or installation work pertaining to such location(s). Such tests shall be limited to the particular matter in controversy and the applicable standards. The City shall endeavor to so arrange its request for such special testing so as to minimize hardship or inconvenience to Grantee or to the Subscribers of such testing.

(C) Before ordering such tests, Grantee shall be afforded thirty (30) days following receipt of written notice to investigate and, if necessary, correct problems or complaints upon which tests were ordered. The City shall meet with Grantee prior to requiring special tests to discuss the need for such and, if possible, visually inspect those locations which are the focus of concern. If, after such meetings and inspections, the City wishes to commence special tests and the thirty (30) days have elapsed without correction of the matter in controversy or resolution of complaints, the tests shall be conducted by a qualified engineer selected by the City and Grantee, and Grantee shall cooperate in such testing. If Grantee fails to meet the applicable lawful standards as evidenced by the test results, such tests shall be paid for by Grantee.

(D) Unless otherwise provided in this Franchise, the test shall be supervised by Grantee's chief technical authority, or an appropriate designee, who shall certify all records of tests provided to the City.

(E) Test results under this Section shall be filed with the City within fourteen (14) days of written request of the City.

(F) If any test indicates that any part or component of the System fails to meet applicable requirements, Grantee, without requirement of additional notice or request from the City shall take corrective action, retest the locations and advise the City of the action taken and the results achieved by filing a written report certified by Grantee's chief technical authority or its appropriate designee.

## **SECTION 13. SERVICE EXTENSION**

### **13.1 Service to Potential Subscribers**

(A) Subject to Section 13.1(B), no later than one (1) year after the Effective Date, Grantee shall offer service in every U.S. Census Tract in the Franchise Area and in every neighborhood recognized by the City of Lincoln Department of Urban Development.

(B) Grantee's obligation to provide service to particular locations within such Census Tracts and neighborhoods shall be dependent on then-current industry standard technical qualifications regarding the maximum loop lengths over which Cable Service similar to Grantee's can be provisioned over a broadband network, that is, the distance, as measured by facility routes, between a potential customer location and the digital subscriber line access multiplexer ("DSLAM") used or potentially used to provide broadband Internet access service to such location, as applied to actual loop lengths. While Grantee shall not be obligated under this Agreement to reduce actual loop lengths through deployment of additional DSLAMs, Grantee commits to making commercially-reasonable efforts to deploy technology and manage loop lengths in a manner so as to reach a goal of being able to serve at least 80% of locations in the City by the end of Year 15, subject to marketplace success.

## **SECTION 14. STANDBY POWER EAS**

14.1 Standby Power. Grantee shall maintain standby power at the headend, hubs and node locations.

### **14.2 Emergency Alert Capability.**

(A) Grantee shall comply with the EAS requirements imposed under federal law.

(B) Grantee shall continue to provide the City with a separate over-ride system that can provide local alerts.

## **SECTION 15. AGREEMENT BREACHES; TERMINATION of AGREEMENT**

15.1 Procedure for Revocation. The City shall undertake the following procedures for revocation:

(A) If the City believes that Grantee has breached any material provision of this Agreement and the City intends to pursue revocation of this Agreement, the City shall notify

Grantee in writing, stating with reasonable specificity the nature of the alleged default. Grantee shall have thirty (30) days from the receipt of such notice to:

1. Respond to the City, contesting the City's assertion that a default has occurred, and requesting a hearing in accordance with subsection (B), below; or
2. Cure the default; or
3. Notify the City that Grantee cannot cure the default within the thirty (30) days, because of the nature of the default. In the event the default cannot be cured within thirty (30) days, Grantee shall promptly take all reasonable steps to cure the default and notify the City in writing and in detail as to the exact steps that will be taken and the projected completion date. In such case, the City may set a hearing in accordance with subsection (B) below to determine whether additional time beyond the thirty (30) days specified above is indeed needed, and whether Grantee's proposed completion schedule and steps are reasonable. Upon five (5) business days' prior written notice, either the City or Grantee may call an informal meeting to discuss the alleged default.

(B) If Grantee does not cure the alleged default within the cure period stated above, or by the projected completion date under subsection (A)(3), or denies the default and requests a hearing in accordance with subsection (A)(1), or the City orders a hearing in accordance with subsection (A)(3), the City Council shall set a public hearing to investigate said issues or the existence of the alleged default. The City shall notify Grantee of the hearing in writing and such hearing shall take place no sooner than fourteen (14) days after Grantee's receipt of notice of the hearing. At the hearing, Grantee shall be provided an opportunity to be heard and to present evidence in its defense. The City Council's determination as to whether a default or a material breach of this Agreement has occurred shall be subject to judicial review in a court of competent jurisdiction.

(C) If, after the public hearing, the City Council determines that a default or material breach still exists, the City shall order Grantee to correct or remedy the default or breach within seven (7) business days or within such other longer time frame as the City shall determine. In the event Grantee does not cure within such time to the City's reasonable satisfaction, the City may revoke this Agreement.

15.2 Alternative Remedies. No provision of this Agreement shall be deemed to bar the right of the City to seek or obtain judicial relief from a violation of any provision of the Agreement or any rule, regulation, requirement or directive promulgated thereunder. Neither the existence of other remedies identified in this Agreement nor the exercise thereof shall be deemed to bar or otherwise limit the right of the City to recover monetary damages for such violations by Grantee, or to seek and obtain judicial enforcement of Grantee's obligations by means of specific performance, injunctive relief or mandate, or any other remedy at law or in equity.

### 15.3 Revocation.

(A) In addition to revocation in accordance with other provisions of this Agreement, the City may revoke this Agreement and rescind all rights and privileges associated with this Agreement in the following circumstances, each of which represents a material breach of this Agreement:

1. If Grantee, after written notice and a reasonable opportunity to cure, continues to fail to perform or attempts to evade any material obligation under this Agreement or under any other agreement, ordinance or document between the City and Grantee;
2. If Grantee abandons the Cable System, or terminates the Cable System's operations;
3. If Grantee fails to restore service to the Cable System or institutional networks after three consecutive days of an outage or interruption in service; except when approval of such outage or interruption is obtained from the City, it being the intent that there shall be continuous operation of the Cable System;
4. If Grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt, or there is an assignment for the benefit of Grantee's creditors, or all or part of Grantee's Cable System is sold under an instrument to secure a debt and is not redeemed by Grantee within thirty (30) days from said sale; or
5. This Agreement may be revoked one hundred twenty (120) days after the appointment of a receiver or trustee to take over and conduct the business of Grantee (at the option of the City and subject to applicable law) whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless elsewhere provided herein.

(B) The City shall provide Grantee written notice of its intent to consider revocation under this subsection and hold a hearing and provide Grantee due process and the opportunity to cure in accordance with the provisions of Section 15.1 of this Agreement.

15.4 Termination by Grantee. On or after the eighth anniversary of the Effective Date, Grantee may terminate this agreement without penalty or incurring damages upon twelve (12) months' written notice. Grantee's obligations under Section 9.13 shall survive unilateral termination of this Agreement by Grantee prior to Year 15 of this Agreement with the exception of any obligations pertaining to Years 11 through 15 to the extent that either this Agreement is no longer in effect at such time or Grantee did not served twenty thousand (20,000) or more customers as of the end of Year 10.

15.5 Reservation of Rights. Unless otherwise set forth in this Agreement, each party expressly reserves any right it may now have or be hereafter granted under federal or state law. The rights of the City under this Agreement shall not be read to limit any immunities the City may enjoy under Federal, State or local law.

## **SECTION 16. ABANDONMENT**

16.1 **Effect of Abandonment.** If the Grantee abandons its Cable System (meaning that portion or portions of the System used exclusively for the provision of Cable Services) during the term of this Agreement, the Grantee shall pay a liquidated damage amount of the greater of: (a) five hundred thousand and 00/100 dollars (\$500,000.00); or (b) fifty and 00/100 dollars (\$50.00) per subscriber, as most recently reported pursuant to Section 7.

16.2 **What Constitutes Abandonment.** The Grantee shall be deemed to have abandoned the System and the City shall be entitled to exercise its option if the Grantee willfully or without cause fails to provide Cable Service to a substantial portion of the Franchise Area for forty-eight (48) consecutive hours, unless the City authorizes a longer interruption of service.

## **SECTION 17. TRANSFER**

17.1 A transfer of the franchise to any Person controlling, controlled by or under the same common control as Grantee shall not require prior City approval. The Transferee shall represent to the City that it has the legal, technical and financial qualifications to fulfill the Franchise. A breach of that representation shall be a material breach of the Franchise.

17.2 A Transfer pursuant to this Section shall not be deemed to waive any rights of the City to subsequently enforce noncompliance issues relating to the franchise.

17.3 In no event shall a transfer of this Franchise be effective without the transferee becoming a signatory to this Agreement and assuming all of the rights and obligations hereunder.

## **SECTION 18. MISCELLANEOUS PROVISIONS**

18.1 **Notices.** Throughout the term of the Agreement, each party shall maintain and file with the other a local address for the service of notices by mail. All notices shall be sent to such respective address, and such notices shall be effective upon the date of mailing. At the Effective Date of this Agreement:

Grantee's address shall be: Division Vice President  
Windstream  
1440 M. St.  
Lincoln, NE 68508

With a copy to: Regulatory Legal  
Windstream  
4001 Rodney Parham Rd.  
Little Rock, AR 72212



The City's address shall be: City of Lincoln, Nebraska  
555 South 10<sup>th</sup> St.  
Lincoln, NE 68508  
Attn: Steve Huggenberger, Assistant City Attorney

18.2 Costs to be Borne by Grantee. Grantee shall pay for all costs of publication of this Agreement.

18.3 Binding Effect. This Agreement shall be binding upon the parties hereto, their permitted successors and assigns.

18.4 Authority to Amend. This Agreement may be amended at any time by written agreement between the parties.

18.5 Rights of Third Parties. This Franchise is not intended to, and shall not be construed to, grant any rights to or vest any rights in third parties, unless expressly provided herein.

18.6 Governing Law. This Agreement shall be governed in all respects by the laws of the State of Nebraska.

18.7 Captions. The captions and headings of this Agreement are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of any provisions of this Agreement.

18.8 No Joint Venture. Nothing herein shall be deemed to create a joint venture or principal agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner which would indicate any such relationship with the other.

18.9 Waiver. Except as expressly provided herein, the failure of the City at any time to require performance by Grantee of any provision hereof shall in no way affect the right of the City hereafter to enforce the same. Nor shall the waiver by the City of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

18.10 Compliance with Federal, State and Local Laws.

(A) This agreement shall at all times be subject to applicable local, state and federal law, except as specifically provided otherwise.

(B) If any federal or State law or regulation shall require or permit City or Grantee to perform any service or act or shall prohibit City or Grantee from performing any service or act which may be in conflict with the terms of this Franchise, either party shall notify the other of the point in conflict believed to exist between such law or regulation. Grantee and City shall conform to State laws and regulations regarding cable communications as they become

effective, unless otherwise stated, and to conform to federal laws and regulations as they become effective.

(C) In the event that federal or state laws or regulations preempt a provision or limit the enforceability of a provision of this Franchise, the provision shall be read to be preempted to the extent and for the time, but only to the extent and for the time, required or necessitated by law. In the event such federal or state law or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the City.

(D) If any term, condition or provision of this Franchise or the application thereof to any Person or circumstance shall, to any extent, be held to be invalid or unenforceable, the remainder hereof and the application of such term, condition or provision to Persons or circumstances other than those as to whom it shall be held invalid or unenforceable shall not be affected thereby, and this Franchise and all terms, provisions and conditions hereof shall, in all other respects, continue to be effective. In the event such law or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision which had been held invalid or modified is no longer in conflict with the law and regulations then in effect, said provision shall thereupon return to full force and effect and shall thereafter be binding on Grantee and City without further action by the City.

18.11. Grantee Acknowledgment of Validity of Franchise. Grantee acknowledges that it has had an opportunity to review the terms and conditions of this Franchise and that under current law Grantee believes that said terms and conditions are not unreasonable or arbitrary, and that Grantee believes City has the power and legal authority to make the terms and conditions contained in this Franchise.

18.12 Entire Agreement. This Agreement and all Exhibits represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersede all prior oral negotiations between the parties, including any prior franchises, cable ordinances or proposals.

18.13 Cumulative Rights. All rights and remedies given to the City by this Franchise or retained by the City herein shall be in addition to and cumulative with any and all other rights and remedies, existing or implied, now or hereafter available to City, at law or in equity, and such rights and remedies shall not be exclusive, but each and every right and remedy specifically given by this Franchise or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by City and the exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy.

18.14 Force Majeure. Grantee shall not be deemed in default of provisions of this Franchise or the City Code (and Grantee shall not be subject to any sanction, or enforcement measure of any kind whatsoever) where performance was rendered impossible by war or riots,

labor strikes or civil disturbances, extreme weather, floods or other causes beyond Grantee's control, and the Franchise shall not be revoked or Grantee penalized for such noncompliance, provided that Grantee, when possible, takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible, under the circumstances, with the Franchise without unduly endangering the health, safety and integrity of Grantee's employees or property, or the health, safety and integrity of the public, the Rights-of-way, public property or private property.

18.15 Non-Waiver. Unless otherwise set forth in this Agreement, neither party waives any right, immunity, limitation or protection otherwise available to such party, its officers, employees or agents under federal or state law.

18.16 Costs. Any cost to be borne by Grantee may, at the discretion of Grantee, be passed through to Grantee's customers, unless otherwise prohibited by applicable law.

18.17 Miscellaneous Fees. Grantee shall not be required to and shall be relieved of any requirement to remit any franchise renewal application fee to the City or to reimburse the City for any franchise renewal consultant services.

IN WITNESS WHEREOF, this Agreement is signed in the name of the City of Lincoln, Nebraska, a municipal corporation, this date \_\_\_\_\_.

ATTEST:

CITY OF LINCOLN, NEBRASKA,  
a municipal corporation,

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Chris Beutler, Mayor

WINDSTREAM NEBRASKA, INC.,

\_\_\_\_\_  
David Redmond,  
President – Consumer Services

14-155-18

## COMPARISON OF TIME WARNER VS. WINDSTREAM SERVICE AND SUPPORT REQUIREMENTS

Support and Service Area Requirements	Time Warner Franchise Requirement	Windstream Proposed Franchise Requirement
Public Educational and Government Access	5 PEG channels required	4 PEG channels required
Public Access Capital Needs	\$600,000 (\$200,000 every 5 years)	\$4.00 per subscriber every five years
Public Access Studio	Required under franchise to maintain public access studio based on requirement to operate public access at same level as effective date of franchise.	No requirement to operate public access studio until 20,000 subscriber level; "commercially reasonable efforts to utilize existing Time Warner studio"
Government/Educational Grant	\$1.7 million one-time lump sum payment	No similar requirement
City Fiber Loop	\$750,000	\$400,000 to \$650,000, depending on subscribership
Service Area Requirement	Jurisdictional bounds of the City	80% of the City at year 15 (end of franchise) <u>if commercially reasonable</u>



RANDALL L. GOVETTE\*  
STEPHEN S. GEALY  
GAIL S. PERRY  
DALLAS D. JONES  
JILL GRADWOHL SCHLOEDER  
DAVID A. DUDLEY  
BRENDA S. SPILKER  
W. SCOTT DAVIS  
MARK A. HUNZEKER  
WILLIAM G. BLAKE  
PETER W. KATT

WILLIAM F. AUSTIN  
DARLA S. IDEUS  
JAMROD S. BOITNOTT  
TIMOTHY E. CLARKE\*  
ANDREW M. LOUDON  
CHRISTINA L. BALL\*\*  
JENNY L. PANKO  
CAROLINE M. WESTERHOLD\*  
JAMROD P. CROUSE  
ANDREA D. SNOWDEN  
DEREK C. ZIMMERMAN

PAUL T. BARTA\*  
COLIN A. MUES\*  
TORREY J. GERDES\*  
ROBERT B. SEYBERT\*  
BRETT E. EBERT  
NOAH J. HEFLIN\*  
SARA M. HUGHES\*  
STEPHEN J. SCHUTZ  
THOMAS B. SHIRES\*  
EMILY R. MOTTO\*

OF COUNSEL  
WALTER E. ZINK II  
DONALD R. WITT  
ROBERT T. GRIMM

ALSO ADMITTED IN:  
\*IOWA  
\*\*KANSAS  
\*IOWA ONLY

November 10, 2014

Steve Huggenberger  
Assistant City Attorney  
555 South 10<sup>th</sup> Street - Suite 300  
Lincoln, Nebraska 68508-3997

RE: Time Warner Issues with Proposed Windstream Franchise

Dear Steve:

Time Warner Cable (TWC) has reviewed the cable communication franchise application submitted by Windstream Nebraska, Inc. and compared it with the Franchise Agreement entered into between TWC and the City in 2005 (the "2005 Franchise Agreement."). TWC recognizes the value of competition. We also believe that the law and good public policy require that in granting cable franchises, a franchising authority must not tilt that competition in favor of one company or another but instead should establish a "level playing field." TWC, as a cable operator, is entitled to First Amendment protection, and cannot, under the United States Constitution, be subjected to discriminatory treatment for the sake of promoting competition. See *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (2012)

For the City of Lincoln, this is also a contractual obligation. Section 2.6 of the 2005 Franchise Agreement, in pertinent part, states that:

"Notwithstanding anything to the contrary, no such authorization or franchise granted to any other person (whether by the City, State or Federal Government) to operate a cable system shall be on terms or conditions more favorable or less burdensome when taken as a whole than those imposed herein. Specifically, any franchisee shall be subject to the same requirements pertaining to the service area, contributions to the city's fiber system and PEG access as are imposed under this agreement." (emphasis added)

There are a number of provisions in the Windstream proposal that raise concerns about competitive neutrality and fairness.

OMAHA OFFICE  
ONE PACIFIC PLACE  
1125 S. 103<sup>RD</sup> STREET SUITE 400 OMAHA, NE 68124  
PHONE 402.934.5468

LINCOLN MAIN OFFICE  
WELLS FARGO CENTER  
1248 O STREET SUITE 600 LINCOLN, NE 68508  
PHONE 402.475.1075 · FAX 402.475.9515

SYRACUSE OFFICE  
920 12TH STREET SYRACUSE, NE 68446  
PHONE 402.269.3200

These concerns are heightened by the fact that Windstream Nebraska is not your typical "new entrant." It is the incumbent local exchange company providing telephone service throughout the City of Lincoln. It is not rolling out a new fiber optic system, but instead has a well-developed system in place within the corporate limits of the City that is already providing voice and data services to its many customers. It will require nowhere near the capital infusion to provide cable television service that would otherwise be required of a true new entrant to the City of Lincoln.

With those thoughts in mind, we believe that the City should carefully scrutinize and consider revising the following provisions in the Windstream draft franchise:

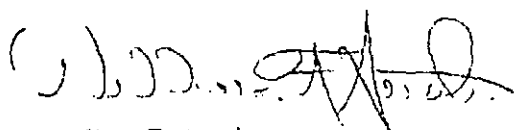
- In Section 9.1, Windstream is obligated to provide a maximum of only four PEG access channels as opposed to a maximum of five as required by TWC's franchise. TWC does not believe that it is competitively neutral to reduce the number of channels that Windstream can be required to provide for PEG access below the number that can be required of TWC.
- In Section 9.3, the requirement to provide a secured digital video stream for fire department training purposes and to provide the converters in the training rooms at the fire stations is only at the City's request. This is a mandatory provision in the TWC 2005 Franchise Agreement. Although TWC has presently discontinued this stream at the City's request, if it should be reinstated, there should be a requirement that both franchisees share equally in its cost.
- In Section 9.9 under Public Access, the requirement of Windstream to maintain a public access studio is only effective six months after Windstream has reported serving at least 20,000 subscribers. Until that time, Windstream's only obligation would be to make a commercially reasonable effort to interconnect with the Time Warner Public Access Studio, and upon failure to do so, Windstream is excused from performance with regard to delivery of Public Access content. TWC's obligation to maintain a studio and carry the access channels does not depend on reaching or maintaining any particular subscribership level. TWC could lose almost all its subscribers and still have the same obligations. Providing an excuse from performance and placing, to some extent, the onus upon TWC to make its studio available seems less than competitively neutral. The level playing field provision of TWC's franchise mandates that Windstream be required to either pay 50% of the cost of the existing Public Access Studio or be required to provide a studio on its own.
- Under Section 9.9 (D) relating to expenditures to support the capital needs of Public Access, Windstream is proposing \$4.00 per subscriber, which, even if it reaches 20,000 subscribers, would only be \$80,000 for the first five years, and similarly reduced amounts every five years thereafter. TWC was and is required to spend \$200,000 in the first five years, \$200,000 in the second five years and \$200,000 in the third five years of the franchise term. TWC's obligation is not based on subscribership. If the number of TWC subscriber declines, TWC's obligation remains the same. This section is not competitively neutral and is inconsistent with Section 2.6 of the 2005 Franchise Agreement, which requires the new franchisee to be "subject to the same requirements pertaining to ....contributions to the City's fiber system and PEG access...."

- Section 9.11 eliminates the one-time “lump sum” payment to the City in the amount of \$1.75 million imposed upon TWC. The \$1.75 million paid to the City was gradually reimbursed to TWC through the collection of a \$.41 per month customer charge as authorized under the 2005 Franchise Agreement, and upon full reimbursement, the \$.41 per customer charge continues to be paid to the City. Windstream is simply proposing to impose the charge on day 1 and pay any proceeds over to the City. This ignores the fact that the \$1.75 million grant was in essence an interest-free loan to the City that had substantial value in the range of six figures in foregone interest. This cost is not being imposed upon Windstream. Again, this is not competitively neutral and is inconsistent with the requirements of 2.6 of the 2005 Franchise Agreement.
- Under Section 9.13 relating to the City Fiber Grant, the amount proposed by Windstream is \$100,000 to \$150,000 less than required from TWC, depending upon Windstream’s subscription level by year 10. Once again, there appears to be no reasonable basis for reducing the fiber optic grant to a level below that required of TWC. This is not competitively neutral and again would appear to be contrary to Section 2.6 of the 2005 Franchise Agreement.
- Section 10.7 addresses right-of-way requirements for what Windstream calls “Mixed Use Facilities”. While this may not in and of itself have a non-competitive effect, we need some clarification as to how this provision would allow Windstream to occupy the public right-of-way in a manner different than as provided by the Cable Communications ordinance. If, in fact, the other ordinances or agreements referred to in Section 10.7 exempt Windstream from otherwise applicable and more onerous requirements for use of the public right-of-way under the Cable Communications ordinance, then this provision would not be competitively neutral, particularly since TWC also provides mixed use facilities.
- Section 13.1 provides for a limited service area, i.e. 40% of the City (as stated by Windstream). TWC is familiar with the FCC’s statements on buildout requirements in its Section 621 Franchising proceeding (MB Docket No. 05-311). However, providing service to only 80% of the City after 15 years “subject to marketplace success” does not seem to comport with the requirements of the City Code regarding the Franchise Area to be served. Nor does it comply with Section 2.6 of the 2005 Franchise Agreement that imposes an obligation on any new franchisee to be subject to the same service area requirement as TWC. Also Federal law forbids cable operators from denying service to potential residential subscribers based on the income levels in the area in which they reside. The City must insure that Windstream complies with this law.

Steve Huggenberger  
November 10, 2014  
Page 4

The above are the concerns and issues that TWC has identified and that hopefully will be addressed by the City in its negotiations with Windstream. The City Council should be presented with a competitively neutral franchise document, and, if so, TWC looks forward to competing with Windstream in the City of Lincoln.

Sincerely,

A handwritten signature in black ink, appearing to read 'William F. Austin', with a stylized flourish at the end.

William F. Austin  
For the Firm  
[waustin@baylorevenn.com](mailto:waustin@baylorevenn.com)

cc: Mayor Chris Beutler  
Doug Emery, City Council Chair  
Edward F. Hoffman, Telecommunications/Cable Board Chair

1045527



ORDINANCE NO. 20127

**AN ORDINANCE** Approving a cable television franchise agreement for a 15 year term between the City of Lincoln and Windstream Nebraska, Inc. to provide cable television services and products to the citizens of Lincoln.

Read First Time December 8, 2014  
Read Second Time DEC 15 2014  
Read Third Time JAN 05 2015  
Passed JAN 05 2015  
Published in Lincoln Journal Star  
on January 16<sup>th</sup>, 2015

CERTIFICATE

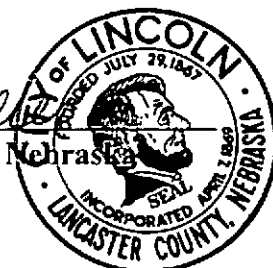
State of Nebraska                    )  
  ) ss  
County of Lancaster                )

I, the undersigned, City Clerk of the City of Lincoln, Nebraska, do hereby certify that the within ordinance is the original Ordinance No. 20127 as passed by the City Council of said City, as indicated above, and as approved by the Mayor of said City and as the same appears of record in my office and is now in my charge remaining as City Clerk aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand officially and affixed the seal of the City of Lincoln, Nebraska this 8<sup>th</sup> day of

January, 2015.

Teresa J. Melton  
City Clerk of Lincoln, Nebraska





# CERTIFICATE OF LIABILITY INSURANCE

7/17/2016

DATE (MM/DD/YYYY)  
7/10/2015

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Lockton Companies 444 W. 47th Street, Suite 900 Kansas City MO 64112-1906 (816) 960-9000	CONTACT NAME: PHONE (A/C, No, Ext): FAX (A/C, No): E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE INSURER A: ACE AMERICAN INSURANCE COMPANY INSURER B: Agri General Insurance Company INSURER C: ACE Property & Casualty Insurance Co INSURER D: ACE Fire Underwriters Insurance Company INSURER E: Indemnity Insurance Co of North America INSURER F:	
INSURED 1075959 WINDSTREAM SERVICES, LLC 4001 RODNEY PARHAM ROAD LITTLE ROCK AR 72212-2442	NAIC # 42757 20699 20702 43575	

COVERAGES WINCO07

CERTIFICATE NUMBER: 13381988

REVISION NUMBER: XXXXXXXX

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> 2MIL AGG PER LOC <input checked="" type="checkbox"/> 2MIL AGG PER PROJECT GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC <input type="checkbox"/> OTHER	Y	N	HD0G27394255	7/17/2015	7/17/2016	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 100,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 2,000,000 GENERAL AGGREGATE \$ 10,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000
A	<input checked="" type="checkbox"/> AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> NON-OWNED AUTOS	Y	N	ISA1108857635	7/17/2015	7/17/2016	COMBINED SINGLE LIMIT (Ea accident) \$ 4,000,000 BODILY INJURY (Per person) \$ XXXXXXXX BODILY INJURY (Per accident) \$ XXXXXXXX PROPERTY DAMAGE (Per accident) \$ XXXXXXXX
C	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> DED <input type="checkbox"/> RETENTION \$	Y	N	XOOG27836045	7/17/2015	7/17/2016	EACH OCCURRENCE \$ 5,000,000 AGGREGATE \$ 5,000,000 \$ XXXXXXXX
A B D E	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N N	N/A	WLRC48152077(AZ,CA,MA) WLRC48152089(TN) SCFC48152107(WI) WLRC48152065(AOS)	7/17/2015 7/17/2015 7/17/2015 7/17/2015	7/17/2016 7/17/2016 7/17/2016 7/17/2016	<input checked="" type="checkbox"/> PER STATUTE <input type="checkbox"/> OTH-ER E L EACH ACCIDENT \$ 1,000,000 E L DISEASE - EA EMPLOYEE \$ 1,000,000 E L DISEASE - POLICY LIMIT \$ 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CITY OF LINCOLN, NEBRASKA CABLE TELEVISION FRANCHISE AGREEMENT WITH WINDSTREAM NEBRASKA INC ENTERED INTO EFFECTIVE JANUARY 8, 2015. WINDSTREAM NEBRASKA INC IS A NAMED INSURED UNDER ALL WINDSTREAM POLICIES. THE CITY OF LINCOLN NEBRASKA; ITS OFFICERS, OFFICIALS, BOARDS, COMMISSIONS, EMPLOYEES AND AGENTS; ARE ADDITIONAL INSUREDS FOR GENERAL LIABILITY, AUTO AND UMBRELLA IF REQUIRED BY WRITTEN CONTRACT, SUBJECT TO POLICY TERMS, CONDITIONS, EXCLUSIONS AND LIMITATIONS.

## CERTIFICATE HOLDER

## CANCELLATION

13381988

CITY OF LINCOLN NEBRASKA  
555 SOUTH 10TH STREET  
ROOM 103  
LINCOLN NE 68508

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE



# CERTIFICATE OF LIABILITY INSURANCE

7/17/2018

DATE (MM/DD/YYYY)  
6/30/2017

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

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PRODUCER Lockton Companies  
444 W. 47th Street, Suite 900  
Kansas City MO 64112-1906  
(816) 960-9000

## CONTACT

NAME:

PHONE

(A/C, No, Ext):

FAX  
(A/C, No):

E-MAIL

ADDRESS:

## INSURER(S) AFFORDING COVERAGE

NAIC #

INSURER A: ACE American Insurance Company

22667

INSURER B: Agri General Insurance Company

42757

INSURER C: ACE Property &amp; Casualty Insurance Co

20699

INSURER D: ACE Fire Underwriters Insurance Company

20702

INSURER E: Indemnity Insurance Co of North America

43575

INSURER F:

INSURED WINDSTREAM SERVICES, LLC  
1075959 4001 RODNEY PARHAM ROAD  
LITTLE ROCK AR 72212-2442

COVERAGES WINCO07

CERTIFICATE NUMBER: 13381988

REVISION NUMBER: XXXXXXXX

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A	<input checked="" type="checkbox"/> AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> OWNED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS ONLY <input type="checkbox"/> NON-OWNED AUTOS ONLY	Y	N	ISAH09061381	7/17/2017	7/17/2018	COMBINED SINGLE LIMIT (Ea accident) \$ 4,000,000 BODILY INJURY (Per person) \$ XXXXXXXX BODILY INJURY (Per accident) \$ XXXXXXXX PROPERTY DAMAGE (Per accident) \$ XXXXXXXX \$ XXXXXXXX
C	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED RETENTION \$	Y	N	XOOG28134800002	7/17/2017	7/17/2018	EACH OCCURRENCE \$ 5,000,000 AGGREGATE \$ 5,000,000 \$ XXXXXXXX
A B D E	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N N	N/A	WLRC64413995(AZ,CA,MA) WLRC64414008(TN) SCFC64414021(WI) WLRC64413983 (AOS)	7/17/2017 7/17/2017 7/17/2017 7/17/2017	7/17/2018 7/17/2018 7/17/2018 7/17/2018	<input checked="" type="checkbox"/> PER STATUTE <input type="checkbox"/> OTHER E L EACH ACCIDENT \$ 1,000,000 E L DISEASE - EA EMPLOYEE \$ 1,000,000 E L DISEASE - POLICY LIMIT \$ 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

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## CERTIFICATE HOLDER

## CANCELLATION

13381988

CITY OF LINCOLN NEBRASKA  
555 SOUTH 10TH STREET  
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AUTHORIZED REPRESENTATIVE