

## ORDINANCE 188

### AN ORDINANCE GRANTING A FRANCHISE TO TRIAX MIDWEST ASSOCIATES, L.P. TO CONSTRUCT AND MAINTAIN A CABLE TELEVISION SYSTEM IN THE CITY OF BIRD ISLAND; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE; PROVIDING FOR REGULATION AND USE OF THE SYSTEM; AND PRESCRIBING PENALTIES FOR THE VIOLATION OF ITS PROVISIONS

The City Council of the City of Bird Island ordains:

#### STATEMENT OF INTENT AND PURPOSE

The City intends, by the adoption of this Franchise, to bring about the development of a Cable Communications System, and the continued operation of it. Such a development can contribute significantly to the communication needs and desires of many. Further, the City may achieve better utilization and improvement of public services with the development and operation of a Cable Communication System.

Past studies by the City have led the way for organizing a means of procuring and securing of Cable Communications System which, in the judgment of the Council, is best suited to the City. This has resulted in the preparation and adoption of this Franchise.

#### FINDINGS

In the review of the Renewal Proposal and application of Triax Midwest Associates, L.P. ("Grantee"), and as a result of a public hearing, the City Council makes the following findings:

- 1) The Grantee's technical ability, financial condition, legal qualifications, and character were considered and approved in a full public proceeding after due notice and a reasonable opportunity to be heard;
- 2) Grantee's plans for constructing, upgrading, and operating the System were considered and found adequate and feasible in a full public proceeding after due notice and a reasonable opportunity to be heard;
- 3) The Franchise granted to Grantee by the City complies with the existing applicable Minnesota Statutes, federal laws and regulations; and
- 4) The Franchise granted to Grantee is nonexclusive.

#### SECTION 1.

##### SHORT TITLE AND DEFINITIONS

- 1) Short Title. This Franchise Ordinance shall be known and cited as the Cable Communications Ordinance.
- 2) Definitions. For the purposes of this Franchise, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory. The word "may" is directory and discretionary and not mandatory.
  - (a) "Basic Cable Service" means any service tier which includes the lawful retransmission of local television broadcast signals and any public, educational, and governmental access programming required by the franchise to be carried on the basic tier. Basic Cable Service as defined herein shall not be inconsistent with 47 U.S.C. 543(b)(7) (1993).
  - (b) "City" means City of Bird Island, a municipal corporation, in the State of Minnesota, acting by and through its City Council.
  - (c) "City Council" means the Bird Island, Minnesota City Council.
  - (d) "Cable Communications System" or "System" means a system of antennas, cables, wires, lines, towers, waveguides, or other conductors, Converters, equipment, or facilities located in City and designed and constructed for the purpose of producing, receiving, transmitting, amplifying, or distributing audio, video, and other forms of electronic signals in City. System as defined herein shall not be inconsistent with the definition as set for the in Minn. Stat. 238.02, subd. 3 (1990) and 47 U.S.C. 522(6) (1993).
  - (e) "Cable Programming Service" means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than:

- (1) Video programming carried on the Basic Service Tier;
- (2) Video programming offered on a pay-per-channel or pay-per-program basis; or
- (3) A combination of multiple channels of per-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service:
- (4) consists of commonly-identified video programming; and
- (5) is not bundled with any regulated tier of service.

Cable Programming Service as defined herein shall not be inconsistent with the definition as set forth in 47 U.S.C. 543(1)(2) (1993) and 47 C.F.R. 76.901 (b) (1993).

(f) "Cable Communications Service" means the provision of television reception, communications and/or entertainment services regulated pursuant to Minn. Stat. 238.01 et seq. as may be amended from time to time, or as otherwise provided by this Franchise Ordinance, and distributing the same over a Cable Communications System. This definition shall not include telephone services regulated pursuant to Minn. Stat. 237.01 et seq. as may be amended from time to time.

(g) "Class IV Cable Communications Channel" means a signaling path provided by a Cable Communications System to transmit signals of any type from a Subscriber terminal to another point in the System.

(h) "Converter" means an electronic device which converts signals to a frequency acceptable to a television receiver of a Subscriber and by an appropriate selector permits a Subscriber to view all Subscriber signals included in the service.

(i) "Drop" means the cable that connects the ground block on the Subscriber's residence to the nearest feeder cable of the System.

(j) "FCC" means the Federal Communications Commission and any legally appointed, designated or elected agent or successor.

(k) "Grantee" is Triax Midwest Associates, L.P., its agents and employees, lawful successors, transferees or assignees.

(l) "Gross Revenues" means all revenue received from Cable Communications Service, as defined, received directly by the Grantee from the operation of its System within City including but not limited to Basic Cable Service fees, Cable Programming Service fees, Pay Television fees, Installation and reconnection fees, upgrade and downgrade fees, Converter rental, Lockout Device fees, or other services. The term Gross Revenues shall not include franchise fees, Access Operating Fees, advertising revenues, any fees itemized and passed through as a result of franchise imposed requirements or any taxes or fees on services furnished by Grantee imposed directly on any Subscriber or user by any municipality, state, or other governmental unit and collected by Grantee for such governmental unit.

(m) "Installation" means the connection of the System from feeder cable to the point of connection, including Standard Installations and custom installations.

(n) "Lockout Device" means an optional mechanical or electrical accessory to a Subscriber's terminal which inhibits the viewing of a certain program, certain channel, or certain channels provided by the way of the Cable Communication System.

(o) "Pay Television" means the delivery over the System of pay-per-channel or pay-per-program audio-visual signals to Subscribers for a fee or charge, in addition to the charge for Basic Cable Service or Cable Programming Services.

(p) "Person" is any person, firm, partnership, association, corporation, company, or other legal entity.

(q) "Standard Installation" means any residential installation which can be completed using a Drop of one hundred fifty (150) feet or less.

(r) "Street" means the surface of, and the space above and below, any public street, road, highway, freeway, lane, alley, path, court, sidewalk, or drive, or any easement or right-of-way now or hereafter held by City.

(s) "Subscriber" means any Person who lawfully receives Cable Television Service. In the case of multiple office buildings or multiple dwellings units, the "Subscriber" means the lessee, tenant or occupant.

## SECTION 2.

### GRANT OF AUTHORITY AND GENERAL PROVISIONS

1) Franchise Required. It shall be unlawful for any Person to construct, operate or maintain a Cable Communications System in the City unless such Person or the Person for whom such action is being taken shall have first obtained and shall currently hold a valid Franchise Ordinance. It shall also be unlawful for any Person to provide Cable Television Service in City unless such Person shall have first obtained and shall currently hold a valid Franchise Ordinance. All Cable Communications Franchises granted by City shall contain the same substantive terms and conditions.

2) Grant of Franchise. This Franchise is granted pursuant to the terms and conditions contained herein.

3) Grant of Nonexclusive Authority.

(a) The Grantee shall have the right and privilege to construct, erect, operate, and maintain, in, upon, along, across, above, over and under the Streets, alleys, public ways and public places now laid out or dedicated and all extensions thereof, and additions thereto in City, poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in City of a Cable Communications System as herein defined. The Cable Communications System constructed and maintained by Grantee or its agents shall not interfere with other uses of Streets. Grantee shall make use of existing poles and other facilities available to Grantee to the extent it is technically and economically feasible to do so.

(b) Notwithstanding the above grant to use Streets, no Street shall be used by Grantee if City, in its sole opinion, determines that such use is inconsistent with the terms, conditions, or provisions by which such Street was created or dedicated, or with the present use of the Street.

(c) This Franchise shall be nonexclusive, and City reserves the right to grant a similar use of said Streets, alleys, public ways and places, to any Person at any time during the period of this Franchise, provided, however, that any additional Cable Franchise grants shall be under the same substantive terms and conditions as the Franchise.

(d) Grantee shall have the authority to use City easements, public rights-of-way, Streets and other conduits for the distribution of Grantee's System. The City may require all developers of future subdivisions to allow and accommodate the construction of the System as part of any provisions for utilities to serve such subdivisions.

4) Franchise Term. This Franchise shall be in effect for a period of fifteen (15) years from the date of acceptance by Grantee, unless renewed, revoked or terminated sooner as herein provided.

5) Previous Franchises. Upon acceptance by Grantee as required by Section 13 herein, this Franchise shall supersede and replace any previous Ordinance or Agreement granting a Franchise to Grantee to own, operate and maintain a Cable Communications System within City. Ordinance No. \_\_\_\_\_ is hereby expressly repealed.

6) Compliance with applicable Laws, resolutions and Ordinances. The Grantee shall at all times during the life of this Franchise be subject to all lawful exercise of the police power, statutory rights and the right of eminent domain by City. This Franchise shall comply with the Minnesota franchise standards contained in Minn. Stat. 238.01 et seq.

7) Rules of Grantee. The Grantee shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable said Grantee to exercise its rights and perform its obligation under this Franchise and to assure uninterrupted service to each and all of its Subscribers; provided that such rules, regulations, terms and conditions shall not be in conflict with provisions hereto, the rules of the FCC, the laws of the State of Minnesota, City, or any other body having lawful jurisdiction thereof.

8) Territorial Area Involved. This Franchise is granted for the corporate boundaries of City, as it exists from time to time. In the event of annexation by City, or a development occurs, any new territory shall become part of the area covered, provided, however, that Grantee shall not be required to extend service beyond its present System boundaries unless there is a minimum of thirty-five (35) homes per cable mile as measured from the last fiber node or terminating amplifier. Access to cable service shall not be denied to any group of potential residential cable Subscribers because of the income of the residents of the area in which such group resides. Grantee shall be given a reasonable period of time to construct and activate cable plant to service annexed or newly developed areas.

9) Written Notice. All notices, reports, or demands required to be given in writing under this Franchise shall be deemed to be given when delivered personally to any officer of Grantee or City's Administrator of this Franchise or forty-eight (48) hours after it is deposited in the United States mail in a sealed envelope, with registered or certified mail postage prepaid thereon, addressed to the party to whom notice is being given, as follows:

If to City: City of Bird Island  
PO Box 130  
Bird Island, MN 55310

Attention: Mayor Paul Heyl

If to Grantee: Triax Midwest Associates, L.P.  
14162 Commerce Avenue  
Prior Lake, Minnesota 55372  
Attention: Government Relations Manager

With copies to: Larkin, Hoffman, Daly & Lindgren, Ltd.  
1500 Norwest Financial Center  
7900 Xerxes Avenue South  
Bloomington, Minnesota 55431  
Attention: Jane E. Bremer, Esq.

Such addresses may be changed by either party upon notice to the other party given as provided in this Section.

10) Drops to Public Buildings. Grantees shall provide Installation of one (1) cable Drop, one (1) cable outlet and monthly Basic Cable Service without charge to the following institutions and such other public or educational institutions located within one hundred fifty (150) feet of the System which City may designate:

**PLEASE LIST**

No redistribution of the free Basic Cable Service provided pursuant to this Section shall be allowed. Additional Drops and/or outlets in any of the above locations will be provided by Grantee at the cost of Grantee's time and material. Alternatively, at the institution's request, said institution may add outlets at its own expense, as long as such installation meets Grantee's standards and provided that any fees for Cable Communications Services are paid. Nothing herein shall be construed as requiring Grantee to extend the System to serve additional institutions as may be designated by City. Grantee shall have one (1) year from the date of City Council designation of additional institution(s) to complete construction of the Drop and outlet.

**SECTION 3.**

**CONSTRUCTION STANDARDS**

1) Construction Standards. If the System, or subsequent rebuilds or extensions, proposed for the Franchise area consists of fewer than one hundred (100) plant miles of cable:

(a) Within ninety (90) days of the granting of the Franchise, the Grantee shall apply for the necessary governmental permits, licenses, certificates, and authorizations;

(b) The energized trunk cable must be extended substantially throughout the authorized area within one (1) year after receipt of the necessary governmental permits, licenses, certificates, and authorizations and the Persons along the route of the energized cable shall have individual Drops as desired during the same period of time; and

(c) The above-stated requirements may be waived by City only upon occurrence of acts beyond the reasonable control of Grantee or acts of God.

2) Construction Codes and Permits.

(a) Grantee shall obtain all required permits from City before commencing any construction upgrade or extension of the System, including the opening or disturbance of any Street, or private or public property within City. Grantee shall substantially comply with all state and local laws and building and zoning codes currently or hereafter applicable to construction, operation or maintenance of the System in City and give due consideration at all times to the aesthetics of the property.

(b) The City shall have the right to inspect all construction of installation work performed pursuant to the provisions of the Franchise and to make such tests at its own expenses as it shall find necessary to ensure compliance with the terms of the Franchise and applicable provisions of local, state and federal law.

3) Repair of Streets and Property. Any and all Streets or public property or private property, which are disturbed or damaged during the construction, repair, replacement, relocation, operation, maintenance or reconstruction of the System shall be promptly and fully restored by Grantee, at its expense, to a condition as good as that prevailing prior to Grantee's work, as approved by City in the case of Streets and other public property, which approval shall not be unreasonable withheld. Grantee shall not be required to repair portions of streets or public property not disturbed or damaged if repairing the disturbed or damaged portion returns the street or public property to the same condition as prevailing prior to Grantee's work. If Grantee shall fail to promptly perform the restoration required herein, City shall have the right to put the streets, public, or private property back into good condition. City reserves its rights to pursue reimbursement for such restoration from Grantee.

4) Conditions on Street Use.

(a) Nothing in this Franchise shall be construed to prevent City from construction, maintaining, repairing or relocating sewers; grading, paving, maintaining, repairing, relocating and/or altering any Street; constructing, laying down, repairing, maintaining or relocating any water mains; or constructing, maintaining, relocating, or repairing any sidewalk or other public work.

(b) All System transmission and distribution structures, lines and equipment erected by the Grantee within City shall be located so as not to obstruct or interfere with the proper use of Streets, alleys and other public ways and places, and to cause minimum interference with the rights of property owners who abut any of the said Streets, alleys and other public ways and places, and not to interfere with existing public utility installations. The Grantee shall furnish to a file with City Administrator the maps, plats, and permanent records of the location and character of all facilities constructed, including underground facilities, and Grantee shall file with City updates of such maps, plats and permanent records annually of changes have been made in the System.

(c) If at any time during the period of this Franchise City shall elect to alter, or change the grade or location of any Street, alley or other public way, the Grantee shall, at its own expense, upon reasonable notice by City, remove and relocate its poles, wires, cables, conduits, manholes and other fixtures of the System, and in each instance comply with the standards and specifications of City. If City reimburses other occupants of the Street, Grantee shall be likewise reimbursed.

(d) The Grantee shall not place poles, conduits, or other fixtures of System above or below ground where the same will interfere with any gas, electric, telephone, water or other utility fixtures and all such poles, conduits, or other fixtures placed in any Street shall be so placed as to comply with all requirements of City.

(e) The Grantee shall, on request of any Person holding a moving permit issued by City, temporarily move its wires or fixtures to permit the moving of buildings with the expense of such temporary removal to be paid by the Person requesting the same, and the Grantee shall be given not less than ten (10) days advance notice to arrange for such temporary changes.

(f) The Grantee shall have the authority to trim any trees upon and overhanging the Streets, alleys, sidewalks, or public easements of City so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee.

(g) Nothing contained in this Franchise shall relieve any Person from liability arising out of the failure to exercise reasonable care to avoid injuring Grantee's facilities.

5) Underground of Cable.

(a) In all areas of City where all other utility lines are placed underground, Grantee shall construct and install its cables, wires and other facilities underground. Amplifier boxes and pedestal mounted terminal boxes may be placed above ground if existing technology reasonably requires, but shall be of such size and design and shall be so located as not to be unsightly or unsafe.

(b) In any area of City where there are certain cables, wires and other like facilities of a public utility or public utility district underground and at least one operable cable, wire or like facility of a public utility or public utility district suspended above the ground from poles Grantee may construct and install its cables, wires and other facilities from the same pole with the consent of the owner of the pole.

(c) Grantee shall be granted access to any easements granted to a public utility, municipal utility or utility district in any areas annexed by City or new developments.

6) Erection, Removal and Joint Use of Poles. No poles, conduits, or other wire-holding structures shall be erected or installed by the Grantee without prior approval of City with regard to location, height, type and other pertinent aspects.

7) Safety Requirements.

(a) The Grantee shall at all times employ ordinary and reasonable care and shall install and maintain in use nothing less than commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injuries, or nuisances to the public.

(b) The Grantee shall install and maintain its System wires, cables, fixtures and other equipment in substantial compliance with the requirements of the National Electric Safety Code and all FCC, state and local regulations, and in such manner that they will not interfere with any installations of City or of any public utility serving City.

(c) All System structures and all System lines, equipment and connections in, over, under and upon the Streets, sidewalks, and alleys, and public ways and places of City, wherever situated or located, shall at all times be kept and maintained in good condition, order, and repair so that the same shall not menace or endanger the life or property of any Person.

#### SECTION 4.

##### DESIGN PROVISIONS

- 1) Operation and Maintenance of System. The Grantee shall render effective service, make repairs promptly, and interrupt service only for good cause and for the shortest time possible. Such interrupt service only for good cause and for the shortest time possible. Such interruption, to the extent feasible, shall be preceded by notice in accordance with Section 2.9 herein and shall occur during periods of minimum use of the System.
- 2) Technical Standards. The technical standards used in the operation of the System shall comply, at minimum, with the technical standards promulgated by the FCC relating to cable communications systems pursuant to the Federal Communications Commission's rules and regulations and found in Title 47, Section 76.601 to 76.617, as may be amended or modified from time to time, which regulations are expressly incorporated herein by reference.
- 3) Special Testing. City may require special testing of a location of locations within the System if there is a particular matter of controversy or resolved complaints pertaining to such location(s). Demand for such special tests may be made on the basis of complaints received or other evidence indicating an unresolved controversy or noncompliance. Such tests shall be limited to the particular matter in controversy or unresolved complaints. 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 caused by such testing. Before ordering such tests, Grantee shall be afforded thirty (30) days to 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, City wishes to commence special tests and the thirty (30) days have elapsed without correction of the matter in controversy or unresolved complaints, the tests shall be conducted by a qualified engineer selected by City. In the event that special testing is required by City to determine the source of technical difficulties, the cost of said testing shall be borne by the Grantee if the testing reveals the source of the technical difficulty to be within Grantee's reasonable control. If the testing reveals the difficulties to be caused by factors which are beyond Grantee's reasonable control then the cost of said test shall be borne by City.
- 4) FCC Reports. The results of tests required to be filed by Grantee with the FCC shall also be copied to City.
- 5) Novice Return Capability. Grantee is required to use cable having the technical capacity for nonvoice return communications.
6. Lockout Device. Upon the request of a Subscriber, Grantee shall provide by sale or lease a Lockout Device.

#### SECTION 5.

##### SERVICES PROVISIONS

###### 1) Regulation of Service Rates.

(a) The City may regulate rates for the provision of cable service, equipment, or any other communications service provided over the System to the extent allowed under federal or state law(s). In exercising its jurisdiction to regulate any such rates, City will adhere to regulations adopted by the Federal Communications Commission at 47 C.F.R., 76.900 et seq. as they may be amended from time to time.

(b) A list of Grantee's current subscriber rates and charges shall be maintained on file with City and shall be available for public inspection. Grantee shall give City and Subscribers written notice of any change in a rate or charge no less than thirty (30) days prior to the effective date of the change.

(c) In the event that City elects to exercise its jurisdiction over locally regulatable rates, it shall, after notice, hold a public hearing for the consideration of views of interested parties with respect to initial rates filed and any subsequent proposed changes in rates.

2) Sales Procedures. Grantee shall not exercise deceptive sales procedures when marketing its Cable Television Services within City. Grantee shall have the right to market its cable services door-to-door during reasonable hours consistent with local ordinances and regulation.

3) Subscriber Inquiry and Complaint Procedures.

(a) Grantee shall have a publicity listed toll-free telephone number and be operated so as to receive Subscriber complaint and requests on a twenty-four (24) hour-a-day, seven (7) days-a-week basis.

(b) Grantee shall maintain adequate numbers of telephone lines and personnel to respond in a timely manner to schedule service calls and answer Subscriber complaints or inquiries in a manner consistent with regulations adopted by the Federal Communications Commission at 46 C.F.R. 76.309.

(c) Subscriber requests for repairs shall be performed, to the extent possible, within twenty-four (24) hours of the request unless conditions beyond the control of Grantee prevent such performance.

(d) Subject to the privacy provisions of 47 U.S.C. 521 et seq. (1993), City and Grantee shall prepare and maintain written records of all complaints made to them and the resolution of such complaints, including the date of such resolution. Such written records shall be on file at the office of Grantee. Grantee shall provide City with a written summary of such complaints and their resolution on a bi-annual basis.

4) Subscriber Contracts. Grantee shall submit any Subscriber contact utilized to City. If no written contract exists, Grantee shall file with the City Clerk a document completely and concisely stating the terms of the residential Subscriber contract offered to customers, specifically including the length of the Subscriber contract. The length and terms of any Subscriber contract shall be available for public inspection during normal business hours.

5) Refund Policy. In the event a Subscriber established or terminates service and receives less than a full month's service, Grantee shall prorate the monthly rate on the basis of the number of days in the period for which service was rendered to the number of days in the billing.

## SECTION 6.

### PUBLIC ACCESS PROVISIONS

1) Public, Educational and Government Access.

(a) City or its designee is hereby designated to operate, administer, promote, and manage access (public, education, and government programming) (hereinafter "PEG access") to the cable system established pursuant to this Section 6. Grantee shall have no responsibility whatsoever for PEG access except as expressly stated in this Section 6.

(b) Upon request of the City, Grantee shall dedicate one (1) channel for PEG access use as follows: public access, educational access, and government access. All residential Subscribers who receive all or any part of the total services offered on the System shall be eligible to receive all of said access channel at no additional charge.

(c) Pursuant to Section 6.1(b) herein, Grantee shall provide to each of its Subscribers who receive all, or part of, the total services offered on the System, reception on at least one (1) specially designated access channel available for use by the general public on a first-come, first-served, nondiscriminatory basis. The specially designated access channel may be used by local education authorities and local government on a first-come, first served, nondiscriminatory basis during those hours when the channel is not in use by the general public. During those hours that the specially designated access channel is not being used by the general public, local educational authorities or local government, the Grantee shall lease time to commercial or noncommercial users on a first-come, first-served, nondiscriminatory basis if the demand for that time arises. The Grantee may also use the specially designated access channel for local origination during those hours when the channel is not in use by the general public, local educational authorities, local government or commercial or noncommercial users who have leased time. The VHF spectrum must be used for the first specially designated access channel required in the section. Grantee shall designate the channel locations of any other access channels.

2) Charges for Use. Channel time and playback of prerecorded programming on the specially designated access channel must be provided without charge to the general public, except that personnel, equipment and production costs may be assessed for live

studio presentations exceeding five (5) minutes in length. Charges for production costs must be consistent with the goal of affording the public a low-cost means of television access.

3) Access Rules.

(a) City shall implement rules for use of any specially designated access channels. The initial access rules and any amendments thereto shall be maintained on file with City and available for public inspection during normal business hours.

(b) Prior to the cablecast of any program on any PEG access channel established herein, City shall require any Person who requests access (public, education, and government) to the System to provide written certification in a form and substance acceptable to Grantee and City which releases, indemnifies, and holds harmless City, Grantee and their respective employees, offices, agents, and assigns from any liability, cost, damages and expenses, including reasonable expenses for legal fees, arising or connected in any way with said program.

## SECTION 7.

### OPERATION AND ADMINISTRATION PROVISIONS

1) Franchise Fee.

(a) Grantee shall pay to City a Franchise Fee in an annual amount equal to three percent (3%) of its annual Gross Revenues; provided, however, that in the event Grantee becomes subject to "effective competition" as that term is defined in 47 U.S.C. 521.01 et seq., as amended from time to time, and specifically including Open Video Systems (OVS), as defined from time to time by the FCC, and/or Grantee experiences a decrease in the number of Expanded Basic Subscribers in any one year period calculated upon a yearly comparison of the number of Subscribers on December 31<sup>st</sup> of each year, the Franchise Fee shall, following ninety (90) days written notice to City, be reduced to the level of expenditure at which the competitive provider, if any, is obligated.

(b) Payments due City under this provision shall be payable annually. The payment shall be made within ninety (90) days of the end of each fiscal year together with a brief report showing the basis for the computation.

(c) All amounts paid shall be subject to audit and recomputation by City and acceptance of any payment shall not be construed as an accord that the amount paid is in fact the correct amount.

2) Access to Records. The City shall have the right to inspect, upon reasonable notice, at any time during normal business hours, those records maintained by Grantee which relate to System operations and to Gross Revenues, subject to the privacy provisions of 47 U.S.C. 521 et seq., ("Cable Act").

3) Reports to be Filed with City. Grantee shall prepare and furnish to City, at the times and in the form prescribed, such reports with respect to the operations, affairs, transactions or property, as they relate to the System, which Grantee and City may agree upon.

## SECTION 8.

### GENERAL FINANCIAL AND INSURANCE PROVISIONS

1) Performance Bond.

(a) At the time the Franchise becomes effective and at all times thereafter, until the Grantee has liquidated all of its obligations with City, the Grantee shall furnish a bond to City in the amount of Ten Thousand Dollars (\$10,000) in a form and with such sureties as reasonably acceptable to City. This bond will be conditioned upon the faithful performance of the Grantee according to the terms of the Franchise and upon the further condition that in the event the Grantee shall fail to comply with any law, ordinance or regulation governing the Franchise, there shall be recoverable jointly and severally from the principal and surety of the bond any damages or loss suffered by City as a result, including the full amount of any compensation, indemnification or cost of removal or abandonment of any property of the Grantee, plus a reasonable allowance for attorneys' fees and costs, up to the full amount of the bond, and further guaranteeing payment by the Grantee of claims, liens and taxes due City which arise by reason of the construction, operation, or maintenance of the System. The rights reserved by City with respect to the bond are in addition to all other rights City may have under the Franchise or any other law. City may, from year to year, in its sole discretion, reduce the amount of the bond.

(b) The time for Grantee to correct any violation or liability, shall be extended by City if the necessary action to correct such violation or liability is of such a nature or character as to require more than thirty (30) days within which to perform, provided Grantee provides written notice that it requires more than thirty (30) days to correct such violations or liability, commences the corrective action within the thirty (30) days period and thereafter uses reasonable diligence to correct the violation or liability.

(c) In the event this Franchise is canceled by reason of default of Grantee or revoked, City shall be entitled to collect from the performance bond that amount which is attributable to any damages sustained by City pursuant to said default or revocation. Grantee, however, shall be entitled to the return of such performance bond, or portion thereof, as remains at the expiration of the term of the Franchise.

(d) The rights reserved to City with respect to the performance bond are in addition to all other rights of City whether reserved by this Franchise or authorized by law, and no action, proceeding or exercise of a right with respect to the performance bond shall affect any other right City may have.

2) Indemnification of City.

(a) City, its officers, boards, committees, commissions, elected officials, employees and agents shall not be liable for any loss or damage to any real or personal property of any Person, or for any injury to or death of any Person, arising out of or in connection with the construction, operation, maintenance, repair or removal of, or other action or event with respect to the System.

(b) Grantee shall indemnify, defend, and hold harmless City, its officers, boards, committees, commissions, elected officials, employees and agents, from and against all liability, damages, and penalties which they may legally be required to pay as a result of the exercise of the Franchise, except claims because of City's own programming.

(c) Nothing in this Franchise relieves a Person from liability arising out of the failure to exercise reasonable care to avoid injuring the Grantee's facilities while performing work connected with grading, regarding, or changing the line of a Street or public place or with the construction or reconstruction of a sewer or water system.

(d) In order for City to assert its rights to be indemnified, defended, and held harmless, City must with respect to each claim:

(1) Promptly notify Grantee in writing of any claim or legal proceeding which gives rise to such right;

(2) Afford Grantee the opportunity to participate in and fully control any compromise, settlement or other resolution or disposition of any claim or proceeding; and

(3) Fully cooperate with reasonable requests of Grantee, at Grantee's expense, in its participation in, and control, compromise, settlement or resolution or other disposition of such claim or proceeding subject to paragraph two (2) above.

3) Insurance.

(a) As a part of the indemnification provided in Section 8.2, but without limiting the foregoing, Grantee shall file with its acceptance of this Franchise, and at all times thereafter maintain in full force and effect at its sole expense, a comprehensive general liability insurance policy, including contractual liability coverage, in protection of City in its capacity as such, its officers, elected officials, boards, commissions, agents and employees. The policy or policies shall name as additional insured City, and their capacity as such, their officers, agents and employees. The policies of insurance shall be in the sum of not less than Three Hundred Thousand Dollars (\$300,000) for person injury or death of any one Person, and One Million Dollars (\$1,000,000) for personal injury or death of two or more Persons in any one occurrence, Three Hundred Thousand Dollars (\$300,000) for property damage to any one person and One Million Dollars (\$1,000,000) for property damage resulting from any one act or occurrence.

## SECTION 9.

### SALE, ABANDONMENT, TRANSFER AND REVOCATION OF FRANCHISE

1) City's Right to Revoke.

(a) In addition to all other rights which City has pursuant to law or equity, City reserves the right to revoke, terminate or cancel this Franchise, and all rights and privileges pertaining thereto, if after the hearing required by Section 9.2(b) herein, it is determined that:

(1) Grantee has violated any material provision of this Franchise; or

(2) Grantee has attempted to evade any of the material provisions of the Franchise; or

(3) Grantee has practiced fraud or deceit upon City or Subscriber.

(4) City may revoke this Franchise without the hearing required by section 9.2(b) herein if Grantee is adjusted bankrupt.

2) Procedures for Revocation.

(a) City shall provide Grantee with written notice of a cause for revocation and the intent to revoke and shall allow Grantee sixty (60) days subsequent to receipt of the notice in which to correct the violation or to provide adequate assurance of performance in compliance with the Franchise. Together with the notice required herein, City shall provide Grantee with written findings of fact which are the basis of the revocation.

(b) Grantee shall be provided the right to a public hearing affording due process before the City Council prior to revocation, which public hearing shall follow the sixty (60) day notice provided in paragraph (a) above. City shall provide Grantee with written notice of its decision together with written findings of fact supplementing said decision.

(c) After the public hearing and upon written determination by City to revoke the Franchise, Grantee may appeal said decision with an appropriate state or federal court or agency.

(d) During the appeal period, the Franchise shall remain in full force and effect unless the term thereof sooner expires.

(e) Upon satisfactory correction by Grantee of the violation upon which said notice was given as determined in the City's sole discretion, the initial notice shall become void.

3) Abandonment of Service. Grantee may not abandon the System or any portion thereof without having first given three (3) months written notice to City. Grantee may not abandon the System or any portion thereof without compensating City for damages resulting from the abandonment.

4) Sale or Transfer of Franchise.

(a) No sale, transfer, or "fundamental corporate change", as defined in Minn. Stat. 238.083, of this Franchise shall take place until the parties to the sale, transfer, or fundamental corporate change files a written request with City for its approval, provided, however, that said approval shall not be required where Grantee grants a security interest in its Franchise and assets to secure an indebtedness.

(b) City shall have thirty (30) days from the time of the request to reply in writing and indicate approval of the request or its determination that a public hearing is necessary due to potential adverse affect on Grantee's Subscribers resulting from the sale or transfer. Such approval or determination shall be expressed by Council Resolution within thirty (30) days of receipt of said request, or the request shall be deemed approved as a matter of law.

(c) If a public hearing is deemed necessary pursuant to (b) above, such hearing shall be commenced within thirty (30) days of such determination and notice of any such hearing shall be given in accordance with local law or fourteen (14) days prior to the hearing by publishing notice thereof once in a newspaper of general circulation in City. The notice shall contain the date, time and place of the hearing and shall briefly state the substance of the action to be considered by City. Said hearing may be continued only with Grantee's written consent.

(d) Within thirty (30) days after the closing of the public hearing, City shall approve or deny in writing the sale or transfer request. City shall set forth in writing with particularity its reason(s) for denying approval. City shall not unreasonably withhold its approval.

(e) The parties to the sale or transfer of the Franchise only, without the inclusion of the System in which substantial construction has commenced, shall establish that the sale or transfer of only the Franchise will be in the public interest.

(f) Any sale or transfer of stock in Grantee so as to create a new controlling interest in the System shall be subject to the requirements of this Section 9.4. The term "controlling interest" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

(g) In no event shall a transfer or assignment of ownership or control be approved without the transferee becoming a signatory to this Franchise and assuming all rights and obligations thereunder, and assuming all other rights and obligations of the transferor to the City.

(h) In the event of any proposed sale or assignment pursuant to paragraph (a) of this Section, City shall have the right of first refusal of any bona fide offer to purchase the System. Bona fide offer, as used in this Section, means an offer received by the

Grantee which it intends to accept subject to City's rights under this Section. This written offer must be conveyed to City along with the Grantee's written acceptance of the offer contingent upon the rights of City provided for in this Section.

City shall be deemed to have waived its rights under this Section in the following circumstances:

- (1) If it does not indicate to Grantee in writing, within 30 days of notice of a proposed sale or assignment, its intention to exercise its right of purchase; or
- (2) It approves the assignment or sale of the Franchise as provided within this Section.

## SECTION 10.

### PROTECTION OF INDIVIDUAL RIGHTS

1) Discriminatory Practices Prohibited. Grantee shall not deny service, deny access, or otherwise discriminate against Subscribers or general citizens on the basis of race, color, religion, national origin, sex or age. Grantee shall comply at all times with all other applicable federal, state, and city laws, and all executive and administrative orders relating to nondiscrimination.

2) Subscriber Privacy.

(a) No signals including signals of a Class IV Channel may be transmitted from a Subscriber terminal for purposes of monitoring individual viewing patterns or practices without the express written permission of the Subscriber. The request for such permission shall be contained in a separate document with a prominent statement that the Subscriber is authorizing the permission in full knowledge of its provisions. Such written permission shall be for a limited period of time not to exceed one (1) year which shall be renewed at the option of the Subscriber. No penalty shall be invoked for a Subscriber's failure to provide or renew such authorization. The authorization shall be revocable at any time by the Subscriber without penalty of any kind whatsoever. Such permission shall be required for each type or classification of Class IV Channel activity planned for the purpose of monitoring individual viewing patterns or practices.

(b) No information or data obtained by monitoring transmission of a signal from a Subscriber terminal, or any other means, including but not limited to lists of the names and addresses of such Subscribers or any lists that identify the viewing habits of Subscribers shall be sold or otherwise made available to any party other than to Grantee and its employees for internal business use, and also to the Subscriber subject of that information, unless Grantee has received specific written authorization from the Subscriber to make such data available.

(c) Written permission from the Subscriber shall not be required for the conducting of System wide or individually addressed electronic sweeps for the purpose of verifying System integrity or monitoring for the purpose of billing. Confidentiality of such information shall be subject to the provision set forth in paragraph (b) of this Section.

## SECTION 11.

### UNAUTHORIZED CONNECTIONS AND MODIFICATIONS

1) Unauthorized Connections or Modifications Prohibited. It shall be unlawful for any firm, Person, group, company, corporation, or governmental body or agency, without the express consent of the Grantee, to make or possess, or assist anybody in making or possessing, any connection, extension, or division, whether physically, acoustically, inductively, electronically or otherwise, with or to any segment of the System.

2) Removal or Destruction Prohibited. It shall be unlawful for any firm, Person, group, company, corporation, or government body or agency to willfully interfere, tamper, remove, obstruct, or damage, or assist thereof, any part or segment of the System for any purpose whatsoever.

3) Penalty. Any firm, Person, group, company, corporation or government body or agency found guilty of violating this section may be fined not less than Twenty Dollars (\$20.00) and the costs of the action no more than Five Hundred Dollars (\$500.00) and the costs of the action for each and every subsequent offense. Each continuing day of the violation shall be considered a separate occurrence.

## SECTION 12.

### MISCELLANEOUS PROVISIONS

1) Franchise Renewal. Any renewal of this Franchise shall be done in accordance with applicable federal, state and local laws and regulations.

2) Amendment of Franchise Ordinance. Grantee and City may agree, from time to time, to amend this Franchise. Such written amendments may be made subsequent to a review session pursuant to Section 12.7 or at any other time if City and Grantee agree that such an amendment will be in the public interest or if such an amendment is required due to changes in federal, state or local laws. City shall act pursuant to local law pertaining to the ordinance amendment process.

3) Compliance with Federal, State and Local Laws.

(a) If any federal or state law or regulation shall require or permit City of 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, then as soon as possible following knowledge thereof, 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 rules regarding cable communications not later than one year after they become effective, unless otherwise stated, and to conform to federal laws and regulations regarding cable as they become effective.

(b) 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 the terms, provisions and conditions hereof shall, in all other respects, continue to be effective and complied with provided the loss of the invalid or unenforceable clause does not substantially alter the agreement between the parties. In the event such law, rule 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, rules and regulations then in effect, said provision shall thereupon return to full force and effect and shall thereafter be binding on Grantee and City.

4) Nonenforcement by City. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure or delay of City to enforce prompt compliance. Any waiver by City of a breach of violation of any provision of this Franchise shall not operate as or be construed to be a waiver of any subsequent breach or violation.

5) Administration of Franchise. The City Administrator or other City designee shall have continuing regulatory jurisdiction and supervision over the System and the Grantee's operation under the Franchise. The City may issue such reasonable rules and regulations concerning the construction, operation and maintenance of the System as are consistent with the provisions of the Franchise and law.

6) Rights Cumulative. All rights and remedies given to City by this Franchise 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.

7) Grantee Acknowledgement 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 to make the terms and conditions contained in this Franchise.

## SECTION 13.

### PUBLICATION EFFECTIVE DATE; ACCEPTANCE AND EXHIBITS

1) Publication; Effective Date. This Franchise shall be published in accordance with applicable Minnesota law. The effective date of this Franchise shall be the date of acceptance by Grantee in accordance with the provisions of Section 13.2.

2) Acceptance.

(a) Grantee shall accept this Franchise by executing same. Such acceptance by the Grantee shall be deemed the grant of this Franchise for all purposes.

(b) Upon acceptance of this Franchise, Grantee shall be bound by all terms and conditions contained herein.

(c) Grantee shall accept this Franchise in the following manner:

(1) This Franchise will be properly executed and acknowledged by Grantee and delivered to City.

(2) Grantee shall have continuing responsibility for this Franchise, and if Grantee be a subsidiary or wholly-owned corporate entity or a parent corporation, performance of this Franchise shall be secured by a written guarantee of the parent corporation in a form and substance acceptable to City, which shall be delivered with the executed Franchise.

With this acceptance, Grantee shall also deliver any grant payments, performance bond and insurance certificates required herein that have not previously been delivered.

Passed and adopted this 12 day of July, 1999.

ATTEST:

CITYOF BIRD ISLAND

\_\_\_\_\_  
Deb Lingl, City Clerk

\_\_\_\_\_  
Mayor Paul Heyl

ACCEPTED: This Franchise is accepted and we agree to be bound by its terms and conditions.

TRIAx MIDWEST ASSOCIATES, L.P.

Triax Midwest General Partner, L.P.  
Managing General Partner  
Triax Midwest, L.L.C.,  
Sole General Partner