

ORDINANCE NO. 08-5472

AN ORDINANCE OF THE CITY OF BILLINGS, PROVIDING FOR THE REPEAL OF ARTICLE 7-900, SECTIONS 7-901 THROUGH 7-909 OF THE BILLINGS, MONTANA, CITY CODE, AND DECLARING SAME TO BE NULL AND VOID AND OF NO EFFECT; FURTHER PROVIDING THAT THE BILLINGS, MONTANA, CITY CODE BE AMENDED BY ADDING A NEW ARTICLE 7-900, SECTIONS 7-901 THROUGH 7-909, ESTABLISHING A NONEXCLUSIVE CABLE SYSTEM FRANCHISE AGREEMENT INCLUDING ALL TERMS AND CONDITIONS WITH BRESNAN COMMUNICATIONS, LLC

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

Section 1. That Article 7-900, Sections 7-901 through 7-909 inclusive, is hereby repealed and declared null and void and of no effect.

Section 2. That the Billings, Montana, City Code be amended by adding a new Article 7-900, to read as follows:

"ARTICLE 7-900. CABLE SYSTEM FRANCHISE

Sec. 7-901. Definition of terms.

For the purpose of this Article, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number.

- A. "Basic Cable Service" means any service tier which includes the retransmission of local television broadcast signals and any public, educational, and governmental access programming. "Cable Act" means Title VI of the Communications Act of 1934, as amended.
- B. "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:
 - (a) Video programming carried on the Basic Service Tier;
 - (b) Video programming offered on a pay-per-channel or pay-per-program basis; or

(c) A combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service:

- (1) consists of commonly-identified video programming; and
- (2) 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(l)(2) (1993) and 47 C.F.R. 76.901(b) (1993). "Cable Services" shall mean (1) the one-way transmission to Subscribers of (a) video programming, or (b) other programming service, and (2) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

C. "Cable System" shall mean a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes Video Programming and which is provided to multiple Subscribers within the Service Area, but such term does not include:

- (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations;
- (b) a facility that serves subscribers without using any public right-of-way;
- (c) a facility of a common carrier which is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201 et seq., except that such facility shall be considered a cable system (other than for purposes of 47 U.S.C. § 541 (c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;
- (d) an open video system that complies with 47 U.S.C. § 653.
- (e) any facilities of any electric utility used solely for operating its electric utility systems.

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

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

- E. "Drop" means the cable that connects the ground block on the Subscriber's residence to the nearest feeder cable of the System.
- F. "FCC" means the Federal Communications Commission, or successor governmental entity thereto.
- G. "Franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to 47 U.S.C. § 546) issued by a Grantor, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.
- H. "Grantor" means the City of Billings, Montana or any lawful successor or assign.
- I. "Grantee" means Bresnan Communications, LLC, or the lawful successor, transferee, or assignee thereof.
- J. "Gross Revenue" means revenue derived by Grantee, or any affiliate of Grantee from the operation of the Cable System to provide Cable Services, provided, however, that such phrase shall not include: unrecovered bad debt, to the extent reported as revenue on Grantee's books.
- K. "Person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.
- L. "Public Way" shall mean the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, parkway, way, lane, public way, drive, circle, or other public right-of-way, including, but not limited to, public utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses held by the Grantor in the Service Area and which by their nature entitle the Grantor and the Grantee to the use thereof for the purpose of installing, operating, repairing, and maintaining a Cable System.
- M. "Service Area" means the present boundaries of the Grantor, and shall include any additions thereto by annexation or other legal means, subject to the exceptions in subsection 3.9.
- N. "Standard Installation" is defined as any service installation that can be completed using a Drop of one hundred twenty five (125) feet or less.
- O. "Subscriber" means any Person who lawfully receives Cable Service of the Cable System.
- P. "Video Programming" means any programming provided by, or generally considered comparable to programming provided by a television broadcast station.

Sec. 7-902. Grant of franchise.

(a) *Grant.* The Grantor hereby grants to the Grantee a nonexclusive Franchise which authorizes the Grantee to construct and operate a Cable System to provide Cable Services in, along, among, upon, across, above, over, under, or in any manner connected with Public Ways within the Service Area, and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, or retain in, on, over, under, upon, across, or along any Public Way a Cable System for the purpose of providing Cable Service. This Grant is not in lieu of any other grant that the City or State may require in connection with the use or occupancy of the Public Ways to provide any other service.

(b) *Other Ordinances.*

This Franchise is subject to the laws and regulations of the City as now existing or as may hereafter be adopted. Provided that, neither party may unilaterally alter the express material rights and obligations set forth in this Franchise. In the event of a conflict between the express material rights of Grantee set forth in this Franchise and any ordinance adopted after the date hereof and this Franchise, the Franchise shall control, provided however that the Grantee agrees that it is subject to the lawful exercise of the police power of the Grantor. Provided further, the right to use the Public Ways is subject to the continuing regulation by the City, the grant of this Franchise is not in lieu of any permits or zoning approvals that may be required, or fees associated with the same; and the grant of the Franchise does not give Grantee the right to maintain its facilities at any particular location in the Public Ways, and instead the Grantee shall have the duty to relocate or remove the same from time to time, as provided in this Franchise or under laws or regulations now existing or hereafter adopted.

(c) Before issuing any other cable franchise or franchise to provide multi-channel video programming services, the City shall conduct a public hearing to determine whether an applicant's proposal meets the future cable-related needs and interests of the community and any impact on the existing provision of Cable Service, except where such a hearing would be inconsistent with applicable laws and regulations. Grantee shall be notified of that hearing, and shall be given an opportunity to appear at the hearing and address issues relevant to the issuance of the franchise, except that nothing in this paragraph requires the City to take any action that would result in a violation of applicable laws and regulations, or that prevent it from acting prior the expiration of any deadline.

(d) *Term.* The Franchise granted hereunder shall be for an initial term of five (5) years commencing on the effective date of the Franchise as set forth in subsection 7-909(g), unless otherwise lawfully terminated in accordance with the terms of this Franchise.

Sec. 7-903. Standards of Service.

- (a) *General.* This Section sets forth minimum standards for service, and does not affect the City's rights as reserved under Section 2. All acts a Grantee is required to perform are at its expense, and at no expense to the City.
- (b) *Conditions of occupancy.* The Cable System installed by the Grantee pursuant to the terms hereof shall be located so as to cause a minimum of interference with the proper use of Public Ways and with the rights and reasonable convenience of property owners who own property that adjoins any of such Public Ways.
- (c) *Restoration of public ways.* If during the course of the Grantee's construction, operation, or maintenance of the Cable System there occurs a disturbance of any Public Way by the Grantee, Grantee shall replace and restore such Public Way to a condition better than, or equal to, the condition of the Public Way existing immediately prior to such disturbance.
- (d) *Relocation for the Grantor.* Upon its receipt of reasonable advance written notice, to be not less than five (5) business days, the Grantee at its expense shall protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way, any property of the Grantee when required by the Grantor or any government entity by reason of traffic conditions, public safety, street abandonment, freeway and street construction, change or establishment of street grade, installation of sewers, drains, gas or water pipes, or any other type of public structures or improvements. The Grantee shall in all cases have the right of abandonment of its property, , provided that, if property is abandoned, Grantee upon request must provide Grantor title to the property, free and clear of encumbrances.
- (e) *Relocation for a third party.* The Grantee shall, on the request of any Person holding a lawful permit issued by the Grantor, protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way as necessary any property of the Grantee, provided: (A) the expense of such is paid by said Person benefiting from the relocation, including, if required by the Grantee, making such payment in advance; and (B) the Grantee is given reasonable advance written notice to prepare for such changes. For purposes of this subsection, "reasonable advance written notice" shall be no less than ten (10) business days in the event of a temporary relocation, and as promptly as possible for a permanent relocation, considering the work to be performed in connection with that relocation.
- (f) *Relocation for a Person Authorized to Place Facilities in Rights of Way.* Grantee shall promptly protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Public Way as necessary any property of the Grantee as required to enable another person authorized to place facilities in the rights of way (other than a person described in Sections 7-903(d)-(e) to construct, modify, repair or maintain such facilities, with the cost therefore to be borne in accordance with applicable law.

(g) *Trimming of Trees and Shrubbery.* The Grantee shall have the authority to trim trees or other natural growth in order to access and maintain the Cable System, subject to the supervision of the City. Nothing in this section relieves Grantee of any liability it may have to persons for damage caused to public or private property.

(h) *Safety Requirements.* Construction, operation, and maintenance of the Cable System shall be performed in an orderly and workmanlike manner. All such work shall be performed in substantial accordance with applicable federal, state, and local regulations and the National Electric Safety Code and the National Electrical Code. The Cable System shall not endanger or unreasonably interfere with the safety of Persons or property in the Service Area.

(i) *Underground Construction.* In those areas of the Service Area where all of the distribution facilities of the incumbent local exchange carrier or distribution lines of public utilities providing electric services are underground, the Grantee likewise shall construct, operate, and maintain its Cable System underground.

(j) *Required Extensions of the Cable System.* Whenever the Grantee receives a request for Cable Service from a Subscriber in a contiguous unserved area where there are at least ten (10) residential units that would be passed by an extension of 1320 cable-bearing strand feet (one-quarter cable mile) from the portion of the Grantee's trunk or distribution cable which is to be extended, it shall extend its Cable System to such Subscribers at no cost to said Subscribers for the Cable System extension, other than the published Standard/non-Standard Installation fees for drops charged to all Subscribers.

(k) *Subscriber Charges for Extensions of the Cable System.* No Subscriber shall be refused service arbitrarily. However, if an area does not meet the density requirements of subsection 7-903(j) above, the Grantee shall only be required to extend the Cable System to Subscriber(s) in that area if the Subscriber(s) are willing to share the capital costs of extending the Cable System. Specifically, the Grantee shall contribute a capital amount equal to the construction cost per mile, multiplied by a fraction whose numerator equals the actual number of residences per 1320 cable-bearing strand feet from the Grantee's trunk or distribution cable, and whose denominator equals ten (10). Subscribers who request service hereunder shall bear the remaining cost to extend the Cable System on a pro rata basis. The Grantee may require that payment of the capital contribution in aid of construction borne by such potential Subscribers be paid in advance. Subscribers shall also be responsible for any Standard and non-Standard Installation fees for drops.

(l) *Cable Service to Public Buildings.* The Grantee, shall maintain and continue to provide free services to all public buildings to which it was providing free service as of January 1, 2008, and upon request, shall provide without charge, a Standard Installation and one outlet of Basic Cable to those administrative buildings owned and occupied by the Grantor, fire station(s), police station(s), and K-12 public school(s) existing as of January 1, 2008. For such additional buildings as may be added after January 1, 2008, Grantee shall provide a free outlet of Basic Service upon request, provided that, if the

person requesting service is more than 350 feet from the Cable System, the company shall provide free service and an extension upon request, if the person requesting service agrees to pay the additional incremental cost of drop installation beyond the cost for the first three hundred and fifty (350) feet. The Cable Service provided shall not be used for commercial purposes, and such outlets shall not be located in areas open to, and used continuously by the general public (students are not treated as part of the general public for purposes of this paragraph).. The Grantor shall take reasonable precautions to prevent any use of the Grantee's Cable System in buildings owned or controlled by Grantor in any manner that results in the inappropriate use thereof or any loss or damage to the Cable System. Each building may extend the service from the free outlet to other locations, and Grantee shall provide power levels to the building to permit service to be so extended. If additional amplifiers are required in the building, the Grantee may charge its actual cost of the amplifier.

(m) *Emergency Use.* If the Grantee provides an Emergency Alert System ("EAS"), then the Grantor shall permit only appropriately trained and authorized Persons to operate the EAS equipment and shall take reasonable precautions to prevent any use of the Grantee's Cable System in any manner that results in inappropriate use thereof, or any loss or damage to the Cable System.

Sec. 7-904. Regulation by the Grantor

(a) *Franchise Fee.*

- A. The Grantee shall pay to the Grantor an annual franchise fee of five percent (5%) of annual Gross Revenue (as defined in subsection 7-901(J) of this Franchise). Each payment shall be accompanied by a report prepared by a representative of the Grantee showing the basis for the computation, containing such information as the City may require to determine whether fees are being paid as required, and attested to as accurate by an officer of the grantee.
- B. *Limitation on Franchise Fee Actions.* The period of limitation for recovery of any franchise fee payable hereunder shall be three (3) years from the date on which payment by the Grantee is due.
- C. Grantor shall have the right to review and copy the books and records of the Grantee, and any person receiving revenues subject to the franchise fee hereunder, and Grantee shall be responsible for obtaining and providing such books and records to the City for its review at City Hall in the City of Billings, or such other location as the parties may agree.
- D. No acceptance of any payment by the City shall be construed as a release or an accord and satisfaction of any claim the City may have for further or additional sums payable as a Franchise fee or for the performance of any other obligation of Franchisee.

(b) *Rates and Charges.* The Grantor may regulate rates and charges except to the extent preempted from doing so by federal or state law.

(c) *Transfer of Franchise.* The Grantee's right, title, or interest in the Franchise shall not be sold, transferred, assigned, or otherwise encumbered, other than to an entity controlling, controlled by, or under common control with the Grantee as of the Effective Date, without the prior consent of the Grantor, such consent not to be unreasonably withheld. A change of control of Grantee or entities controlling Grantee shall be treated as a transfer. No such consent shall be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Grantee in the Franchise or Cable System in order to secure indebtedness, provided that no such instrument permits any person to succeed to the ownership or control of the system without the approval of the City. Without limiting the other provisions of this Franchise, Grantor and Grantee shall comply with any federal regulations governing transfer of cable systems. In deciding whether to grant or deny a request for transfer, the City may consider any factors it may consider under applicable law, including without limitation the financial, technical and legal qualifications of the transferee, whether the Grantee is in compliance with its obligations, and the effect of the transfer on the City or subscribers. City may deny a transfer application for failure of Grantee or Transferee to respond to reasonable requests for information regarding the transfer. A request for approval of a transfer will not be unreasonably withheld.

Sec. 7-905. Books and Records

(a) The Grantee agrees that the Grantor, upon thirty (30) days written notice to the Grantee, may review and copy such of its books and records at the Grantee's business office, during normal business hours and on a nondisruptive basis, as is reasonably necessary to ensure compliance with the terms of this Franchise, or applicable law, or to carry out any of the City's obligations under the same. Such notice shall reference the Section of the Franchise or applicable law giving rise to the request, so that the Grantee may organize the necessary books and records for easy access by the Grantor. The Grantee shall not be required to maintain any books and records for Franchise compliance purposes longer than three (3) years, , other than revenue information, which must be maintained for at least five (5) years. Grantor agrees that it will not disclose information provided to it which is marked as confidential or proprietary, except as required to do so by Montana public records statutes or by court order. The Grantee shall not be required to provide Subscriber information in violation of Section 631 of the Cable Act, and shall redact any such information.

(b) Upon request, Grantee shall provide the City with maps of its system as built, in hard copy or, if the City requests it, in an electronic format compatible with the City's mapping systems.

(c) Grantor may require Grantee to produce reports reasonably necessary to ensure compliance with the terms of this Franchise, or applicable law, or to carry out any of the City's obligations under the same.

Sec. 7-906. Insurance and Indemnification

(a) *Insurance Requirements.* The Grantee shall maintain in full force and effect, at its own cost and expense, during the term of the Franchise, Commercial General Liability Insurance in the amount of \$1,500,000 combined single limit for bodily injury and property damage. The Grantor shall be designated as an additional insured. Such insurance shall be noncancellable except upon thirty (30) days prior written notice to the Grantor. The Grantee shall provide a Certificate of Insurance showing evidence of the coverage required by this subsection.

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

Sec. 7-907. Enforcement and Termination of Franchise

(a) *Violation.* In the event that the Grantor believes that the Grantee has not complied with the terms of the Franchise, or applicable law, the City may commence a proceeding in any court or agency of competent jurisdiction, and take such other actions as are permitted under this section, or other applicable law.

(b) *Liquidated Damages.* Franchisee and City agree to the following liquidated damages for the following violations. The parties agree that the liquidated damage amounts are in 2008 dollars and, upon notice from City, may be increased once every three (3) years by the increase in the U.S. City Average of the Consumer Price Index. Damages accrue from the date of the violation; provided that, nothing herein prevents Franchisee from raising a defense to the imposition of liquidated damages from the date of violation based upon laches, waiver, statute of limitations, or any other similar defense.

- A. For transferring this Franchise without required approval: One Thousand Dollars (\$1,000.00)/day for each violation for each day the violation continues.
- B. For failure to comply with requirements for PEG use of the System for which damages to the City are not readily ascertainable: Two Hundred Fifty Dollars (\$250.00)/day for each violation for each day the violation continues.

- C. For violation of customer service standards: One Hundred Dollars (\$100.00) per violation, except that for violations of customer service standards, such as telephone answering standards, where the operator's compliance is not measured in terms of its response to individual customers, One Thousand Five Hundred Dollars (\$1,500.00) a month for any period during which Franchisee fails to meet applicable performance standards; and
- D. For all other material violations of this Franchise for which actual damages may not be ascertainable: Two Hundred Fifty Dollars (\$250.00)/day for each violation for each day the violation continues.

(c) *Imposition of Liquidated Damages.* The City may impose liquidated damages in accordance with the procedures in this Section. The City shall provide Franchisee written notice describing with reasonable specificity the alleged noncompliance, and provide Franchisee with an opportunity to be heard at a public meeting, to show either that a violation has not occurred or that damages should not be imposed. The written notice shall be provided at least sixty (60) days prior to any hearing on the alleged noncompliance.

(d) *Nature of Liquidated Damages.* These sums are agreed upon as reasonable liquidated damages, developed in accordance with Montana law, and are not penalties.

(e) *Revocation of Franchise.* The City shall have the right to terminate, revoke or shorten the term of this Franchise for the reasons specified in the Cable Ordinance as of the effective date of this Franchise, pursuant to the procedures specified in the Cable Ordinance. Provided that, any amendments to the Cable Ordinance shall provide the same level of due process as is provided under the procedures provided for under the Cable Ordinance as the same existed on the effective date of this Franchise.

(f) *Force Majeure.* Franchisee shall not be deemed in default with provisions of this Franchise where performance was rendered impossible by war or riots, civil disturbances, floods, natural catastrophes, or other events beyond Franchisee's control, provided that Franchisee takes immediate and diligent steps to comply as soon as possible under the circumstances with this Franchise without unduly endangering the health, safety and integrity of Franchisee's employees or property, or the health, safety and integrity of the public, public rights-of-way, public property, or private property.

Sec. 7-908. Public, Educational and Governmental Use

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

(b) *Preservation of Existing Benefits.* Grantee shall continue to provide and maintain pathways and equipment associated with carrying the PEG channels that it was providing prior to and upon the effective date of this Franchise until and unless the City notifies Grantee that such support is no longer necessary.

(c) *Provision of Channel Capacity for PEG Use.* In the event that the Grantee Cable system would transition to an "All Digital" cable network, upon request Grantee shall provide up to one (1) additional digital channel for public, educational or government use on the basic service tier, when the usage triggers described in 7-908(n) are satisfied.

(d) *Management of Channels.* The City shall designate who is responsible for managing the PEG channels provided under this Franchise.

(e) *Availability.*

A. PEG channels, other than on demand channels provided under Section 7-908(k) shall be viewable by any Subscriber without the need for obtaining any equipment other than the equipment required to receive broadcast channels; and shall be provided as part of basic service tier, or if there is no basic service tier, as part of the service provided to any Subscriber.

B. Other PEG channel capacity shall be useable by any Subscriber who is able to use any comparable commercial service, without any additional charges (for example, a Subscriber who is able to order commercial programming on demand shall also be able to obtain the PEG programming on demand).

(f) *Menus.* To the extent technically feasible, PEG programming choices shall be displayed on menus in a manner equivalent to the manner commercial programming choices are displayed. It is the responsibility of the entity that is responsible for managing a PEG channel to timely provide information that it wishes to have displayed on the menu.

(g) *Format.* PEG channel capacity (other than on-demand capacity) shall be provided in analog format until such time as Grantee digitizes all other channels on the basic service tier. PEG links and channels must be designed so that there is no noticeable deterioration in signal quality or programming as received from the PEG programmer. Once Grantee digitizes all other signals on the basic service tier, it shall provide all PEG channels in a digital format, including cablecasting in high definition format any PEG programming provided in high definition format. Channels used should be of a quality equivalent to other channels that were carried on the basic service tier.

(h) *Grantee's Responsibilities.*

A. In addition to providing and maintaining the links that were in place as of the Effective Date of this Franchise, Grantee shall provide and maintain links to any location listed in its prior Franchise. The Grantee shall also provide and maintain links to the new program origination locations in accordance with the following. The links shall be designed to serve as a program origination point, and as a playback center for programming on any PEG channel.

1. to one additional location at its cost, so long as the location is within 2640 cable bearing strand feet of the then-existing cable distribution network and any required land-owner permission is obtained,
2. to additional locations where the Grantee's then-existing cable distribution network is already in place (Dehler Field being such a location)
3. at the incremental cost of extending the nearest available fiber to the location, where (1) and (2) do not apply.

The obligations under this Section include the responsibility to provide equipment necessary to place the signal on the system, and to route signals to the appropriate PEG channel, all without any noticeable PEG signal deterioration. Grantee is not responsible for any production equipment.

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

(i) *Other Capital Support for PEG.*

A. Grantee may be required to pay up to \$0.85 per subscriber per month for such support, beginning sixty (60) days after adoption of a resolution adopted by the City after at a public meeting. A separate resolution from this ordinance must be adopted to invoke this fee. This charge would be passed through to subscribers as a PEG fee, at Grantee's option.

B. Grantee shall provide a lump sum amount of \$50,000, with one-half due within thirty (30) days of the effective date of this Agreement, and one-half due on the anniversary of the effective date.

(j) *Channel Location.* Grantee agrees to use reasonable efforts to locate PEG channels so that they are grouped with the majority of channels a Subscriber receives

as part of the lowest level of service offered on the System. Grantee shall pay reasonable expenses associated with a change in the PEG channel positions, up to Three Thousand Dollars (\$3000.00) per change. Grantee shall also provide up to two (2) 15-second slots per day, on the channel previously occupied by a PEG channel, mixed over morning, afternoon, evening and late night time slots, for thirty (30) days after a change in channel positions, subject to restrictions on ad inserts in Grantee's contract with the applicable programmer. Grantee shall not change the channel position for the government channel designated by the City, without the City's consent unless the change is required by federal law. City consent will not be unreasonably withheld or delayed.

(k) *Video on demand.* As of the adoption of this resolution, Grantee has only recently begun to offer local video on demand content. Grantee is willing to make Billings a test bed for local video on demand programming, and Grantor agrees to use its best efforts to implement PEG video on demand in Billings. Grantor agrees to work cooperatively with Grantee in this effort, and to explore and develop operational and technical procedures for submitting, storing, adding, removing and tagging such programming, in a manner that is financially and technically feasible for both parties.

(l) *No Charge for Use.* The facilities, equipment and channel capacity provided for PEG Use shall be available at no charge from Grantee to users, to the City or to any entity responsible for managing a PEG channel. In the event separate resolution is enacted per Section 7-908(i)A above, the City recognizes that Grantee intends to pass those costs on to users, at its discretion. (m) *Support Not A Franchise Fee.* The parties agree that any cost to the Company associated with providing any support for PEG use required under this Franchise shall not constitute a Franchise fee within the meaning of 47 U.S.C. § 542, and shall be deemed to fall within one or more of the exceptions listed in 47 U.S.C. § 542(g)(2).

(n). Satisfying any one of the following triggers shall entitle the City to the additional channel provided for in this section.

- A. If all PEG channels are being programmed at least eighty (80) hours per week over a consecutive sixteen (16) week period.
- B. If all channels designated for a particular use (*e.g., educational use*) are being programmed at least eighty (80) hours per week over a consecutive sixteen (16) week period, an additional channel shall be provided for that particular use upon request by the City.
- C. If the City desires a governmental channel and there is no designated governmental channel, the City can show that there is a regular conflict over a consecutive sixteen (16) week period between programming it would carry and programming being carried on PEG channels.

The term "repeat program" means the running time of any program to the extent that it is shown more than four (4) times during the test period. Repeat programs are

counted only to a maximum of twenty-five percent (25%) of total hours for purposes of the tests in paragraphs 1 and 2 above.

Sec. 7-909. Miscellaneous Provisions

(a) *Actions of Parties.* In any action by the Grantor or the Grantee that is mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious, and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

(b) *Entire Agreement.* This Franchise constitutes the entire agreement between the Grantee and the Grantor. Amendments to this Franchise shall be mutually agreed to in writing by the parties.

(c) *Governing Law.* This Agreement shall be governed by the laws of the State of Montana unless expressly preempted by federal law. Venue for any litigation shall be in Yellowstone County, Montana.

(d) *Notice.* Unless expressly otherwise agreed between the parties, every notice or response required by this Franchise to be served upon the Grantor or the Grantee shall be in writing, and shall be deemed to have been duly given to the required party when placed in a properly sealed and correctly addressed envelope: a) upon receipt when hand delivered with receipt/acknowledgment, b) upon receipt when sent certified, registered mail, or c) within five (5) business days after having been posted in the regular mail.

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

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

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

Sean O'Donnell
Regional Vice President and General Manager, Montana
Operations
Bresnan Communications
1860 Monad Road
Billings, Montana 59102
(406) 238-7710

with a copy to: Robert Bresnan
Senior Vice President
Bresnan Communications, LLC
One Manhattanville Road
Purchase, NY 10577

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

(e) *Descriptive Headings.* The captions to Sections and subsections contained herein are intended solely to facilitate the reading thereof. Such captions shall not affect the meaning or interpretation of the text herein.

(f) *Severability.* If any non-material Section, subsection, sentence, paragraph, term, or provision hereof is determined to be illegal, invalid, or unconstitutional, by any court of competent jurisdiction or by any state or federal regulatory authority having jurisdiction thereof, such determination shall have no effect on the validity of any other Section, subsection, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise."

Section 3. EFFECTIVE DATE. This ordinance shall be effective thirty (30) days after second reading and final adoption as provided by law.

Section 4. REPEALER. All resolutions, ordinances, and sections of the City Code inconsistent herewith are hereby repealed.

Section 5. SEVERABILITY. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provisions or application, and, to this end, the provisions of this ordinance are declared to be severable.

PASSED by the City Council on first reading this 27th day of May, 2008.

PASSED, ADOPTED and APPROVED on second reading this 9th day of June, 2008.



THE CITY OF BILLINGS:

BY: [Signature]
Ron Tussing, Mayor

ATTEST:

BY: [Signature]
Cari Martin, City Clerk

