

CHAPTER 5 Franchises and Communication Systems

**CHAPTER 5 Franchises and Communication Systems**

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**ARTICLE 1 Natural Gas**

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**Sec. 5-1-10. Legislative intent.**

The City Council does hereby find, determine and declare:

- (1) That the transportation, distribution and sale of gas within the City through pipelines, mains and other fixed facilities, whether using easements and rights-of-way granted by the City or otherwise, involve the use, availability and potential use of City personnel and facilities and create a potential for hazards that is similar to other utility services, and may require standby and active service by fire, police and other local safety agencies.
- (2) That the nature of companies transporting, distributing and selling gas, and otherwise operating within the City, including without limitation their demands on City agencies, the use of public and private easements, streets and rights-of-way, and the potential and actual hazards from the operations of such companies, has a substantial effect upon the health, safety and welfare of the citizens of this City, and upon the expenditures to be budgeted by the City.
- (3) That, upon review of all matters proper to be considered relating to the operations and hazards of gas companies, the classification of such gas companies as separate businesses and

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occupations is reasonable, proper, uniform and nondiscriminatory; and the taxable amount hereby levied is reasonable, proper, uniform, nondiscriminatory and necessary for a just and proper distribution of the tax burdens of the City.

- (4) That the potential for explosions of gas pipelines and explosions related to escaping gas within buildings indicates that there are potential dangers to the property and lives of the citizens of the City from the operation of gas companies within the City.
- (5) That the use by a gas company of the streets, alleys and public rights-of-way located within the City is a valuable and special privilege not provided to the public generally and for which the City is entitled to consideration.
- (6) That the occupation tax herein created and defined is imposed only upon the right of gas companies to do business within the City, as are other occupation taxes so created and imposed in the City pursuant to the authority of Section 31-15-501(1)(c), C.R.S.

(Prior code §16-1)

**Sec. 5-1-20. Definitions.**

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this Section:

*Gas or natural gas* refers to such gaseous fuels as natural, artificial, synthetic, liquefied natural, liquefied petroleum and manufactured, or any mixture thereof.

*Gas company* shall mean any person as defined in Section 1-2-10 of this Code that sells, provides, delivers, transports or distributes gas to end users located within the corporate limits of the City through pipelines, mains and other related facilities and appurtenances, whether located in whole or in part on easements and rights-of-way granted by the City or elsewhere, but shall exclude any such person granted a franchise by the City to conduct the same or a similar business in the City.

*Taxable amount* refers to the annual amount of the occupation tax levied upon a gas company by this Article.

*Taxable year* shall be the twelve-month period beginning on May 1 of any year and ending on April 30 of the next succeeding year.

(Prior code §16-2; Ord. 774-06)

**Sec. 5-1-30. Levy of tax.**

- (a) There is hereby levied upon every gas company that operates within the City an occupation tax.
- (b) The taxable amount shall be five thousand dollars (\$5,000.00) each taxable year.

(Prior code §16-3)

**Sec. 5-1-40. Time of payment of tax.**

- (a) The occupation tax levied by this Article shall accrue against each and every gas company and shall be payable annually on or before the first day of each taxable year.

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- (b) If any gas company begins operations in the City after May 1 of any year, the tax required to be paid under this Article shall be prorated on a monthly basis for the remaining portion of the taxable year; however, no refund shall be made to any gas company which discontinues operations during the taxable year. All taxes to be prorated under this Subsection shall be due and payable under the beginning of operations and shall be late ten (10) days thereafter and shall accrue interest as provided in Section 5-1-50 below.

(Prior code §16-4)

**Sec. 5-1-50. Interest on deficiency.**

Interest on any late payment of this tax shall accrue at the rate of one percent (1%) per month or any part thereof on any tax payment not paid by the tenth day of each taxable year.

(Prior code §16-5)

**Sec. 5-1-60. Failure to pay.**

If any gas company subject to the provisions of this Article shall fail to pay the taxes as herein provided, the full amount thereof, plus costs of collection including reasonable attorney's fees, shall be due and collected from such company and the sum thereof, together with an additional ten percent (10%) of the amount of taxes thereof, shall be and hereby is declared to be a debt due and owing from such company to the City. The computation of said ten percent (10%) shall be in addition to interest on the deficiency as set forth in Section 5-1-50 above. The City Attorney, upon direction of the City Council, shall commence and prosecute to final judgment and determination in any court of competent jurisdiction an action at law to collect said debt.

(Prior code §16-6)

**Sec. 5-1-70. Inspection of records; report.**

- (a) The City, its officers, agents or representatives, shall have the right at all reasonable hours and times to examine the books and records of the gas companies which are subject to the provisions of this Article and to make copies of the entries or contents thereof.
- (b) Each gas company which is subject to the provisions of this Chapter shall provide to the City on or before March 1 and September 1 of each year a report showing the following information for the proceeding twelve (12) months ended December 31 and June 30, respectively:
  - (1) The total gas volumes delivered to all customers located within the City; and
  - (2) A statement of the total dollar amount, if any, surcharged by the gas company as a result of this tax.

(Prior code §16-7)

**Sec. 5-1-80. Administrative hearing.**

Any gas company subject to the provisions of this Article may request a hearing on the levy of the occupation tax after receiving a notice of final determination, an assessment, demand for payment or denial of a claim for refund. Such hearing shall be conducted as follows:

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- (1) If a gas company disputes the reasonableness or applicability of the tax, it may seek review of the assessment by filing a protest with the City Administrator within thirty (30) days of the mailing of the accounting statement. If such a protest is filed, the gas company shall appear before the City Administrator on a date specified. The gas company shall be notified of this hearing date by certified mail, return receipt requested. At this hearing the gas company may present evidence regarding the reasonableness or applicability of the tax. The gas company shall bear the burden of the proof.
- (2) Said hearing shall be solely for the purpose of hearing protests as to the reasonableness and applicability of the tax.
- (3) At said hearing, the City Administrator shall have all powers necessary to ensure the fair and efficient conduct of the hearing, but shall not be bound by the Colorado Rules of Evidence. The hearing shall be open to the public.
- (4) Within sixty (60) days of such hearing, the City Administrator shall make such order in the manner as he or she deems just and proper and shall furnish a copy of such final order to the gas company and the City Council.

(Prior code §16-8)

**Sec. 5-1-90. Administration of occupation tax.**

The City Administrator shall administer the provisions of this Article and may promulgate rules and regulations to aid in the enforcement and administration of this Article, subject to the approval of the City Council.

(Prior code §16-9)

**Sec. 5-1-100. Local purpose.**

The tax provided in this Article is upon occupations and businesses in the performance of local functions and is not a tax upon functions relating to interstate commerce. It is expressly understood that none of the terms of this Chapter shall be construed to mean that any gas company subject to this tax is granted a franchise by the City.

(Prior code §16-10)

**Sec. 5-1-110. Reimbursement of costs.**

Any entity challenging the validity, legality, applicability or constitutionality of this Article or the tax levied hereby, if unsuccessful, shall reimburse the City for all costs incurred, including attorney's fees, in such litigation.

(Prior code §16-11)

**Sec. 5-1-120. Effective date and term.**

This Article shall become effective, as provided by law, on April 27, 1990, which date is thirty (30) days after publication following final passage of the ordinance codified herein; and the terms and

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conditions thereof shall remain in full force and effect for a period of twenty (20) years from and after said effective date.

(Prior code §16-12; Ord. 774-06)

**ARTICLE 2 Telephone Utility Tax**

[Sec. 5-2-10. Levy of tax.](#)

[Sec. 5-2-20. Payment of tax.](#)

[Sec. 5-2-30. Inspection of records.](#)

[Sec. 5-2-40. Local purpose.](#)

[Sec. 5-2-50. Failure to pay or file.](#)

[Sec. 5-2-60. Tax in lieu of other occupation taxes.](#)

**Sec. 5-2-10. Levy of tax.**

There is hereby levied against every telephone utility which is engaged in the business of furnishing local exchange telephone service within the City a tax on the privilege of engaging in such business. The amount of such tax shall be four dollars (\$4.00) annually for each telephone account for which local exchange telephone service is provided within the City, as provided in Section 5-2-20 below.

(Prior code §7-27; Ord. 774-06)

**Sec. 5-2-20. Payment of tax.**

- (a) The tax levied by this Article shall be due on the first day of January of each year. The tax shall be payable in twelve (12) equal monthly installments, each installment to be payable on the last business day of each calendar month.
- (b) Each telephone utility subject to the tax imposed herein shall file with the City Clerk, in such form as the City Clerk may require, a statement showing the total number of telephone accounts for which local exchange telephone service is provided within the City. Such statement shall be filed by January 15 showing the total number of such accounts as of January 1 of each year the telephone utility is subject to the tax.

(Prior code §7-28; Ord. 774-06)

**Sec. 5-2-30. Inspection of records.**

The City, its officers, agents or representatives shall have the right, at any reasonable time, to examine the books and records of any telephone utility which is subject to the tax imposed by this Article, and to make copies of the entries or contents thereof.

(Prior code §7-29)

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**Sec. 5-2-40. Local purpose.**

The tax provided herein is upon the affected occupations and businesses in their performance of local functions and is not a tax upon those functions relating to interstate commerce.

(Prior code §7-30)

**Sec. 5-2-50. Failure to pay or file.**

- (a) If any telephone utility subject to this Article fails to pay the taxes as provided herein, the full amount thereof shall be due and collected from such company, and the same, together with an addition of ten percent (10%) of the amount of taxes due, shall be and is hereby declared to be a debt due and owing from such utility to the City.
- (b) If any officer, agent or manager of a telephone utility which is subject to the provisions of this Article shall fail, neglect or refuse to file any statement required by this Article within the time herein prescribed, such officer, agent or manager shall be punished, on conviction thereof, in accordance with the provisions of Section 1-4-20 of this Code; provided that each day after such statement becomes delinquent during which such officer, agent or manager shall so fail, neglect or refuse to file such statement shall be considered a separate offense.

(Prior code §7-31; Ord. 774-06)

**Sec. 5-2-60. Tax in lieu of other occupation taxes.**

The tax herein provided shall be in lieu of all other occupation taxes, or taxes on the privilege of doing business within the City, on any telephone utility subject to the provisions of this Article.

(Prior code §7-33)

**ARTICLE 3 Emergency Telephone Service**

[Sec. 5-3-10. Establishment of emergency telephone service.](#)

[Sec. 5-3-20. Imposition of emergency telephone charge.](#)

[Sec. 5-3-30. Effective date; repeal.](#)

**Sec. 5-3-10. Establishment of emergency telephone service.**

Pursuant to the provisions of the Intergovernmental Agreement of September 6, 1984, as amended or superseded from time to time, between the County and the City, the City Council hereby authorizes the Communications Board of the Morgan County Communications Center to implement an emergency "911" telephone service in the City utilizing the single three-digit 9-1-1 for reporting police, fire, medical or other emergency situations.

(Prior code §7-40)

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**Sec. 5-3-20. Imposition of emergency telephone charge.**

- (a) There is hereby imposed upon all telephone exchange access facilities and all wireless communications access facilities for such service users whose addresses are within the City an emergency telephone charge of seventy cents (\$0.70) per month per exchange access facility or wireless communications access facility.
- (b) At least once each calendar year, by September 1 of each year, beginning in 2006, to be effective with the first billing period of each customer on or following the next January 1, the City Council shall establish by resolution a rate of charge, not to exceed the amount authorized by action of the Morgan County Communications Board, that together with any surplus revenues carried forward will produce sufficient revenues to fund equipment costs, installation costs and monthly recurring charges billed by the service suppliers for the emergency telephone service provided in the City.
- (c) The telephone service suppliers in the City are hereby authorized and directed to collect the emergency telephone charge imposed by this Section under the authority of Section 29-11-102, C.R.S., and to remit said charges to the City pursuant to Section 29-11-103, C.R.S.

(Prior code §7-41; Ord. 767-05 §1)

**Sec. 5-3-30. Effective date; repeal.**

This Article shall become effective at the time all parties to the Intergovernmental Agreements of September 1984, relating to the Morgan County Communications Center have adopted similar measures pursuant to Section 29-11-101 et seq., C.R.S.

(Prior code §7-42; Ord. 774-06)

**ARTICLE 4 Cable Television Franchise**

Division 1. - Generally

Division 2. - Grant of Franchise

Division 3. - Standards of Service

Division 4. - Regulation by Franchising Authority

Division 5. - Compliance and Monitoring

Division 6. - Insurance, Indemnification and Bonds or Other Surety

Division 7. - Enforcement and Termination of Franchise

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Division 9. - Miscellaneous Provisions

**Division 1. Generally**

[Sec. 5-4-10. Definitions.](#)

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**Sec. 5-4-10. Definitions.**

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:

*Affiliate* means an entity which owns, controls, is owned or controlled by or is under common ownership with the Grantee.

*Basic cable* is the tier of service regularly provided to all subscribers that includes the retransmission of local broadcast television signals and public access channels in the City and such additional channels as required by federal rule or regulation.

*Cable Act* means the Cable Communications Policy Act of 1984 (Public Law 98-549), as amended by the Cable Television Consumer Protection Act of 1992 (Public Law 102-385) and any subsequent amendments thereto.

*Cable service* means (a) the transmission to subscribers of video programming or other service; and (b) subscriber interaction, if any, which is required for the selection of such video programming or any other lawful communication service.

*Cable system* means a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment or other communications equipment that is designed to provide cable service and other service to subscribers.

*FCC* means the Federal Communications Commission, or a successor governmental entity thereto.

*Franchise* means the initial authorization or renewal thereof issued by the Franchising Authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate or otherwise, which authorizes the construction and operation of the cable system for the purpose of offering cable service or other service to subscribers.

*Franchising Authority* means the City, the lawful successor, transferee or assignee thereof.

*Grantee* means TCI Cablevision of Colorado, Inc., a Colorado corporation, or the lawful successor, transferee or assignee thereof.

*Gross receipts* means the cable service revenues received by the Grantee from the operation of the cable system in the service area; provided, however, that such phrase shall not include: (a) revenues received from any national advertising carried on the cable system; or (b) any taxes on cable service which are imposed directly or indirectly on any subscriber thereof by any governmental unit or agency, and which are collected by the Grantee on behalf of such governmental unit or agency.

*Person* means an individual, partnership, association, joint stock company, trust, corporation or governmental entity.

*Public way* means the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, parkway, way, lane, public way, drive, circle or other public right-of-way, including, but not limited to public utility easements, dedicated utility strips or rights-of-way dedicated for compatible uses, and any temporary or permanent fixtures or improvements located thereon now or hereafter held by the Franchising Authority in the service area which, subject to and consistent with the terms, conditions and provisions pursuant to which the

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public way was created or dedicated, shall be available to the Franchising Authority and the Grantee to the proper use thereof for the purpose of installing, operating, repairing and maintaining the cable system. *Public way* shall also mean any easement now or hereafter held by the Franchising Authority within the service area for the purpose of public travel or for utility or public service use dedicated for compatible uses, and shall include other easements or rights-of-way as shall within their proper use and meaning be available to the Franchising Authority and the Grantee to the proper use thereof for the purposes of installing, operating, repairing and maintaining the cable system.

*Service area* means the present municipal boundaries of the Franchising Authority and shall include any additions thereto by annexation or other legal means.

*Subscriber* means a person or user of the cable system who lawfully receives cable services or other service therefrom with the Grantee's express permission.

*Video programming* means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

(Ord. 636-93 §1)

**Division 2. Grant of Franchise**

[Sec. 5-4-110. Grant.](#)

[Sec. 5-4-120. Term.](#)

[Sec. 5-4-130. Acceptance; effective date.](#)

[Sec. 5-4-140. Equal protection.](#)

[Sec. 5-4-150. Reserved rights.](#)

[Sec. 5-4-160. Nonexclusive franchise.](#)

**Sec. 5-4-110. Grant.**

The Franchising Authority hereby grants to the Grantee a nonexclusive franchise which authorizes the Grantee to construct and operate a cable system and offer cable service and other 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 and all extensions thereof and additions thereto, such poles, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments and other related property or equipment as may be necessary or appurtenant to the cable system, subject to the provisions of this franchise and applicable law.

(Ord. 636-93 §2)

**Sec. 5-4-120. Term.**

The franchise granted pursuant to the this Article shall be for a term of twenty (20) years from the effective date of the franchise as set forth in Section 5-4-130 below, unless otherwise lawfully terminated in accordance with the terms of this Article.

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(Ord. 636-93 §2)

**Sec. 5-4-130. Acceptance; effective date.**

The Grantee shall accept the franchise granted pursuant hereto by signing the ordinance codified herein and filing a signed original thereof with the City Clerk or other appropriate official of the Franchising Authority within sixty (60) days after the passage and final adoption of the ordinance. Subject to the acceptance by the Grantee, the effective date of the franchise shall be the sixtieth day after its passage and final adoption. Ordinance No. 506-85, finally adopted on April 22, 1985, granting a nonexclusive franchise to the Grantee's predecessor in interest, shall be of no further force and effect as of the effective date of this franchise, but except as otherwise agreed, shall remain in effect for purposes of matters or claims relating to acts or omissions occurring prior to the effective date of this franchise.

(Ord. 636-93 §2)

**Sec. 5-4-140. Equal protection.**

In the event the Franchising Authority enters into a franchise, permit, license, authorization or other agreement of any kind with any person other than the Grantee to enter into the Franchising Authority's public ways for the purpose of constructing or operating a cable system or providing cable service to any part of the service area, the material provisions thereof shall be reasonably comparable to those contained herein, in order that one (1) operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

(Ord. 636-93 §2)

**Sec. 5-4-150. Reserved rights.**

The Franchising Authority reserves all rights under its lawful police powers. The Franchising Authority, among other things, does not waive any rights it may have under Section 623 of the Cable Communications Policy Act of 1984, as amended, or any requirements of local law or regulations, as amended, including zoning codes, codes regarding building permits and fees or time or manner of construction, the City Specifications Manual and the other manuals governing the use of public ways.

(Ord. 636-93 §2)

**Sec. 5-4-160. Nonexclusive franchise.**

The rights herein granted to the Grantee for the purposes set forth herein shall be nonexclusive, and the Franchising Authority reserves the right to grant a similar franchise to any person at any time during the period of the franchise; provided, however, that nothing contained herein shall be deemed to require the granting of additional cable television franchises if, in the opinion of the Franchising Authority, it is in the public interest to restrict such franchise to one (1) or more.

(Ord. 636-93 §2)

**Division 3. Standards of Service**

[Sec. 5-4-210. Conditions of street occupancy.](#)

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[Sec. 5-4-220. Restoration of public ways.](#)

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**Sec. 5-4-210. Conditions of street occupancy.**

All transmission and distribution structures, poles, lines and equipment installed or erected 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 the public ways.

(Ord. 636-93 §3)

**Sec. 5-4-220. 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 or its agents or contractors, the Grantee shall, at its expense, replace and restore such public way to a condition reasonably comparable to the condition of the public way existing immediately prior to such disturbance.

(Ord. 636-93 §3)

**Sec. 5-4-230. Relocation at request of Franchising Authority.**

Upon its receipt of reasonable advance notice, not to be less than five (5) business days, then the Grantee shall, at its own expense, protect, support, temporarily disconnect, relocate in the public way or remove from the public way any property of the Grantee when lawfully required by the Franchising Authority 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 structures or improvements by the Franchising Authority; however, the Grantee shall in

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all cases have the right of abandonment of its property. If public funds are available to any company using such street, easement or right-of-way for the purpose of defraying the cost of any of the foregoing, such funds shall also be made available to the Grantee.

(Ord. 636-93 §3)

**Sec. 5-4-240. Relocation at request of third party.**

The Grantee shall, on the request of any person holding a building moving permit issued by the Franchising Authority or other authority, temporarily raise or lower its wires to permit the moving of such building, provided that:

- (1) The expense of such temporary raising or lowering of wires is paid by said person, including, if required by the Grantee, making such payment in advance; and
- (2) The Grantee is given not less than ten (10) business days' advance written notice to arrange for such temporary wire changes.

(Ord. 636-93 §3)

**Sec. 5-4-250. Trimming of trees and shrubbery.**

Subject to the provisions of Chapter 7, Article 6 of this Code, relating to trees, the Grantee, at its risk and expense, shall have the authority to trim trees or other natural growth overhanging any of its cable system in the service area so as to prevent branches from coming in contact with the Grantee's wires, cable or other equipment. The Grantee shall be permitted to charge persons who own or are responsible for such trees or natural growth for the cost of such trimming, provided that similar charges are assessed by and paid to the utilities of the Franchising Authority for such trimming. The Grantee shall reasonably compensate the Franchising Authority or property owner for any damages caused by such trimming or shall, in its sole discretion and at its own cost and expense, reasonably replace all trees or shrubs damaged as a result of any construction of the cable system undertaken by the Grantee. Such replacement shall satisfy any and all obligations the Grantee may have to the Franchising Authority or property owner pursuant to the terms of this Section.

(Ord. 636-93 §3)

**Sec. 5-4-260. Use of Grantee's equipment by Franchising Authority.**

Subject to any applicable state or federal regulations or tariffs, the Franchising Authority shall have the right to make additional use for any public purpose of any poles or conduits controlled or maintained exclusively by or for the Grantee in any public way, provided that:

- (1) Such use by the Franchising Authority does not interfere with a current or future use by the Grantee;
- (2) The Franchising Authority holds the Grantee harmless against and from all claims, demands, costs or liabilities of every kind and nature whatsoever arising out of such use of said poles or conduits, including but not limited to reasonable attorney's fees and costs; and
- (3) At the Grantee's sole discretion, the Franchising Authority may be required either to pay a reasonable rental fee or otherwise reasonably compensate the Grantee for the use of such poles, conduits or equipment; provided however, that the Grantee agrees that such

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compensation or charges shall not exceed those paid by it to the public utilities pursuant to the applicable pole attachment agreement or other authorization relating to the service area.

(Ord. 636-93 §3)

**Sec. 5-4-270. Safety requirements.**

Construction, installation 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 FCC or other federal, state and local regulations. The cable system shall not unreasonably endanger or interfere with the safety of persons or property in the service area.

(Ord. 636-93 §3)

**Sec. 5-4-280. Aerial and underground construction.**

In those parts of the service area where all of the transmission or distribution facilities of the respective public utilities providing telephone communications and electric services are underground, the Grantee likewise shall construct, operate and maintain all of its transmission and distribution facilities underground; provided that such facilities are actually capable of receiving the Grantee's cable and other equipment without technical degradation of the cable system's signal quality. In those areas of the service area where the transmission or distribution facilities of the respective public utilities providing telephone communications and electric services are both aerial and underground, the Grantee shall have the sole discretion to construct, operate and maintain all of its transmission and distribution facilities or any part thereof, aerially or underground. Nothing contained in this Section shall require the Grantee to construct, operate or maintain underground any ground-mounted appurtenances such as subscriber taps, line extenders, system passive devices (splitters, directional couplers), amplifiers, power supplies, pedestals or other related equipment. Notwithstanding anything to the contrary contained in this Section, in the event that all of the transmission or distribution facilities of the respective public utilities providing telephone communications and electric services are placed underground after the effective date of this franchise, the Grantee shall only be required to construct, operate and maintain all of its transmission and distribution facilities underground if it is given reasonable notice and access to the public utilities' facilities at the time that such are placed underground. In no event shall the Grantee allow its cable to lie upon the ground except as may be necessary during actual construction or repair to the service line, and in no event shall it be allowed to remain upon the ground for more than thirty (30) days; provided that the Grantee is not required to bury its cable between October 15 and April 15 when the weather prevents it. Subject to the foregoing, in the event the Grantee fails to bury or suspend any cable within thirty (30) calendar days, then the Franchising Authority shall give the Grantee a written notice of violation and the Grantee shall respond in accordance with Division 7 of this Article.

(Ord. 636-93 §3)

**Sec. 5-4-290. Required extensions of service.**

The cable system, as constructed as of the effective date of this franchise, substantially complies with the material provisions hereof. The Grantee is hereby authorized to extend the cable system as necessary, as desirable or as required pursuant to the terms hereof within the service area. Whenever the Grantee shall receive a request for cable service from at least ten (10) new subscribers within one thousand three hundred twenty (1,320) cable-bearing strand feet (one-quarter [¼] cable mile) of its trunk or distribution cable, it shall extend its cable system to such subscribers at no cost to said subscribers for system extension, other than the usual connection fees for all subscribers.

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(Ord. 636-93 §3)

**Sec. 5-4-300. Subscriber charges for extensions of service.**

No subscriber shall be refused service arbitrarily. However, for unusual circumstances, such as a subscriber's request to locate his or her cable drop underground, the existence of more than one hundred fifty (150) feet of distance from the distribution cable to connection of service to subscriber's building or a density of less than ten (10) subscribers per one thousand three hundred twenty (1,320) cable-bearing strand feet (one-quarter [ $\frac{1}{4}$ ] cable mile) of trunk or distribution cable, cable service or other service may be made available on the basis of a capital contribution in aid of construction, including cost of material, labor and easements. For the purpose of determining the amount of capital contribution in aid of construction to be borne by the Grantee and subscribers in the area in which cable service may be expanded, the Grantee shall contribute an amount equal to the construction and other costs per mile, multiplied by a fraction whose numerator equals the actual number of potential subscribers per one thousand three hundred twenty (1,320) cable-bearing strand feet (one-quarter [ $\frac{1}{4}$ ] cable mile) of its trunks or distribution cable, and whose denominator equals ten (10) subscribers. Potential subscribers will bear the remainder of the construction and other costs on a pro rata basis. The Grantee may require that the payment of the capital contribution in aid of construction borne by such potential subscribers be paid in advance of such extension.

(Ord. 636-93 §3)

**Sec. 5-4-310. Service to public buildings.**

By June 30, 1994, the Grantee shall provide without charge one (1) outlet of basic service to each of the Franchising Authority's office buildings, fire stations and police stations, and to libraries and public school buildings in the franchise area that are passed by its cable system. The outlets of basic service shall not be used to sell cable services in or throughout such buildings. Users of such outlets shall hold the Grantee harmless from any and all liability or claims arising out of the use of such outlets, including but not limited to those arising from copyright liability. Notwithstanding anything to the contrary set forth in this Section, the Grantee shall not be required to provide an outlet to such buildings where the drop line from the feeder cable to said buildings or premises exceeds one hundred fifty (150) cable feet, unless it is technically feasible and so long as it will not adversely affect the operation, financial condition or market development of the cable system to do so or unless the appropriate governmental entity agrees to pay the incremental cost of such drop line in excess of one hundred fifty (150) cable feet.

(Ord. 636-93 §3)

**Sec. 5-4-320. Emergency override.**

In the case of any emergency or disaster, pending, threatened or actual, the Grantee shall make available its facilities for the Franchising Authority to provide emergency audio information and instructions during the emergency or disaster period. The Franchising Authority shall hold the Grantee, its agents, employees, officers and assigns hereunder harmless from any claims arising out of the emergency use of its facilities by the Franchising Authority, including but not limited to reasonable attorneys' fees and costs.

(Ord. 636-93 §3)

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**Sec. 5-4-330. Fiber links.**

Prior to June 30, 1994, the Grantee shall, at its expense, install and maintain a fiber optic link between the cable systems in the cities of Brush and Fort Morgan, Colorado, and fiber optic links between Brush High School, Fort Morgan High School and Morgan Community College, and providing access to the named schools for the sole purpose of implementing interactive learning between the three (3) named schools.

(Ord. 636-93 §3)

**Sec. 5-4-340. Governmental access use.**

- (a) The Grantee shall set aside one (1) channel for governmental use, to be activated by June 30, 1994. This governmental channel shall be provided as part of basic cable to all subscribers at no cost to the Franchising Authority.
- (b) The Grantee shall not be responsible for, nor shall the Franchising Authority hold the Grantee responsible for, any claim for injury or damage arising from the programming carried on said channel set aside for such use. It is intended by this Section that the Grantee is extended at least the protection recognized by 47 D.S.C. § 558 (Section 638 of the 1984 Cable Act). Additionally, the Franchising Authority agrees to indemnify, defend and hold harmless the Grantee from any claims or damages arising as a result of actions other than the acts or omissions of the Grantee or its affiliates which may be brought pursuant to 42 D.S.C. § 1983 or any other applicable law as a result of the use of such channel.
- (c) By June 30, 1994, the Grantee shall provide to the Franchising Authority the following new equipment and facilities: two (2) video cameras, one (1) video cassette recorder, two (2) monitors, one (1) character generator and related hook-up equipment and cables. At no cost to the Franchising Authority, the Grantee shall install and connect the equipment and provide initial training to the City thereon; thereafter, the Grantee shall not be responsible for operating, maintaining, replacing or providing additional access facilities, equipment or training.
- (d) The parties agree that any capital costs to the Grantee associated with providing access facilities under this franchise, including without limitation the equipment set forth in Subsection (c) above, are not part of the franchise fee and fall within one (1) or more of the exceptions to 47 D.S.C. § 542 (Section 622 of the 1984 Cable Act).

(Ord. 636-93 §3)

**Sec. 5-4-350. Standby power.**

By June 30, 1994, the Grantee shall install, maintain and operate equipment capable of providing standby powering for headend, distribution and trunk amplifiers for a minimum of two (2) hours.

(Ord. 636-93 §3)

***Division 4. Regulation by Franchising Authority***

[Sec. 5-4-410. Franchise fee.](#)

[Sec. 5-4-420. Rates and charges.](#)

[Sec. 5-4-430. Renewal of franchise.](#)

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[Sec. 5-4-440. Conditions of transfer.](#)

[Sec. 5-4-450. Transfer of franchise.](#)

**Sec. 5-4-410. Franchise fee.**

- (a) The Grantee shall pay to the Franchising Authority a franchise fee equal to five percent (5%) of gross receipts (as defined in Section 5-4-10 of this Article) received by the Grantee from the operation of the cable system. The franchise fee payment shall be due and payable semiannually, not later than March 15 and September 15 for the preceding half-year ending, respectively, December 31 and June 30. Each payment shall be accompanied by a written report from a representative of the Grantee, showing the basis for the computation and identifying the sources and amounts of gross receipts received by the Grantee during the half-year for which payment is made, as well as by service tier and type of all revenues. No acceptance of any payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim which the Franchising Authority may have for further or additional sums payable under the provisions of this Section.
- (b) The period of limitation for recovery of any franchise fee payable hereunder shall be five (5) years from the date on which payment by the Grantee is due. Unless, within five (5) years from and after said payment due date, the Franchising Authority initiates a lawsuit for recovery of such franchise fees in a court of competent jurisdiction, such recovery shall be barred and the Franchising Authority shall be estopped from asserting any claims whatsoever against the Grantee relating to any such alleged deficiencies.
- (c) Any franchise fees which remain unpaid after the due date specified above shall be delinquent and shall thereafter accrue interest at the rate of eight percent (8%) per annum, compounded annually.
- (d) The Grantee shall annually provide the Franchising Authority with a certification of an authorized officer of the Grantee, reasonably acceptable to the Franchising Authority, certifying the accuracy of the franchise fee payments made in the last calendar year.

(Ord. 636-93 §4)

**Sec. 5-4-420. Rates and charges.**

The Franchising Authority expressly reserves the right to regulate the rates which the Grantee charges its subscribers for basic service and the rates for such other services as the Franchising Authority may hereafter be permitted to regulate by law, including the Cable Act. The Grantee agrees to abide by provisions of the Cable Act and related FCC rules and regulations concerning rates charged to subscribers for cable service.

(Ord. 636-93 §4)

**Sec. 5-4-430. Renewal of franchise.**

The Franchising Authority and the Grantee agree that any proceedings undertaken by the Franchising Authority that relate to the renewal of the Grantee's franchise shall be governed by and comply with the provisions of 47 U.S.C. § 546 (Section 626 of the Cable Act), unless the procedures and substantive protection set forth therein shall be deemed to be preempted and superseded by the

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provisions of any subsequent provision of federal or state law. In addition to the procedures set forth in said Section 546(a), the Franchising Authority agrees to notify the Grantee of its preliminary assessments regarding the identity of future cable-related community needs and interests, as well as the past performance of the Grantee under the then-current franchise term. The Franchising Authority further agrees that such a preliminary assessment shall be provided to the Grantee prior to the time that the four (4) month period referred to in Subsection (c) of Section 546 is considered to begin. Notwithstanding anything to the contrary set forth in this Section, the Grantee and Franchising Authority agree that, at any time during the term of the then-current franchise, while affording the public appropriate notice and opportunity to comment, the Franchising Authority and the Grantee may agree to undertake and finalize negotiation regarding renewal of the then-current franchise, and the Franchising Authority may grant a renewal thereof. The Grantee and the Franchising Authority consider the terms set forth in this Section to be consistent with the express provisions of said Section 546.

(Ord. 636-93 §4)

**Sec. 5-4-440. Conditions of transfer.**

- (a) Except to the extent expressly required by federal or state law, if a renewal or extension of the Grantee's franchise is denied or the franchise is lawfully terminated and the Franchising Authority either lawfully acquires ownership of the cable system or by its actions lawfully effects a transfer of ownership of the cable system to another party, any such acquisition or transfer shall be at a fair market value, determined on the basis of the cable system valued as a going concern, but with no value allocated to the franchise itself.
- (b) The Grantee and the Franchising Authority agree that, in the case of a lawful revocation of the franchise, the Grantee shall be given, at the Grantee's request, which shall be made in its sole discretion, a reasonable opportunity to effectuate a transfer of its cable system to a qualified third party. The Franchising Authority further agrees that, during such a period of time, it shall authorize the Grantee to continue to operate the cable system pursuant to the terms of its prior franchise; however, in no event shall such authorization exceed a period of time greater than six (6) months from the effective date of such revocation. If, at the end of that time, the Grantee is unsuccessful in procuring a qualified transferee or assignee of its cable system which is reasonably acceptable to the Franchising Authority, the Grantee and the Franchising Authority may avail themselves of any rights they may have pursuant to federal or state law; it being further agreed that the Grantee's continued operation of its cable system during the six-month period shall not be deemed to be a waiver nor an extinguishment of any rights of either the Franchising Authority or the Grantee. Notwithstanding anything to the contrary set forth in this Section, neither the Franchising Authority nor the Grantee shall be required to violate federal or state law.

(Ord. 636-93 §4)

**Sec. 5-4-450. Transfer of franchise.**

- (a) The Grantee's rights, title or interest in the franchise shall not be sold, transferred, assigned or otherwise encumbered, other than to an affiliate, without the prior consent of the Franchising Authority. 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. The proposed transferee or assignee must show technical ability, financial capability, legal qualifications and general character qualifications as reasonably determined by the Franchising Authority and must agree to comply with all provisions of this franchise subject to applicable law. The Franchising Authority shall be deemed to have granted a proposed transfer or assignment in the event that its consent is not communicated in writing to the

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Grantee within one hundred twenty (120) days following receipt of written notice of the proposed transfer or assignment and such information as may be required by FCC regulation or reasonably requested by the Franchising Authority, which must be requested within thirty (30) days of the Franchising Authority's receipt of the notice.

- (b) The Grantee shall promptly notify the Franchising Authority of any actual change in, transfer of or acquisition by any other party of control of the Grantee, except as regards affiliates. The word *control* as used herein is not limited to major stockholders, but includes actual working control in whatever manner exercised. Every change, transfer or acquisition of control of the Grantee, except to an affiliate of the Grantee, shall make the franchise subject to cancellation unless and until the Franchising Authority shall have consented thereto. For the purpose of determining whether it shall consent to such change, transfer or acquisition of control, the Franchising Authority may inquire into the qualifications of the prospective controlling party and the Grantee shall assist the Franchising Authority in any such inquiry and compensate the Franchising Authority for reasonable costs associated therewith.
- (c) A rebuttable presumption that a transfer of control has occurred shall arise upon the acquisition or accumulation by any person or group of persons of fifty percent (50%) of the voting interest of the Grantee, except as regards affiliates.
- (d) The consent or approval of the Franchising Authority to any transfer of the franchise shall not constitute a waiver or release of the rights of the Franchising Authority in and to the public ways, and any transfer shall by its terms be expressly subordinate to the terms and conditions of this franchise.
- (e) Any sale, transfer, assignment, lease or sublease of whatever kind or nature made in violation of the provisions of this Section shall be void.

(Ord. 636-93 §4)

**Division 5. Compliance and Monitoring**

[Sec. 5-4-510. Testing for compliance.](#)

[Sec. 5-4-520. Books and records.](#)

[Sec. 5-4-530. Periodic review.](#)

[Sec. 5-4-540. Survey.](#)

**Sec. 5-4-510. Testing for compliance.**

The Franchising Authority may perform technical tests of the cable system during reasonable times and in a manner that does not unreasonably interfere with the normal business operations of the Grantee or the cable system in order to determine whether or not the Grantee is in compliance with the terms hereof and applicable state and federal laws. Except in emergency circumstances, such tests may be undertaken only after giving the Grantee reasonable notice thereof, not to be less than two (2) business days, and providing a representative of the Grantee an opportunity to be present during such tests. In the event that such testing demonstrates that the Grantee has substantially failed to comply with a material requirement hereof, the reasonable costs of such tests shall be borne by the Grantee. In the event that such testing demonstrates that the Grantee has substantially complied with such material provisions hereof, the cost of such testing shall be borne by the Franchising Authority. Except in emergency circumstances, the Franchising Authority agrees that such testing shall be undertaken no more than two

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(2) times per year in the aggregate, and that the results thereof shall be made available to the Grantee upon the Grantee's request.

(Ord. 636-93 §5)

**Sec. 5-4-520. Books and records.**

The Grantee agrees that the Franchising Authority may review such of its books and records during normal business hours and on a nondisruptive basis as is reasonably necessary to monitor compliance with the terms hereof. Such records shall include, but shall not be limited to, any public records required to be kept by the Grantee pursuant to the rules and regulations of the FCC. Notwithstanding anything to the contrary set forth herein, the Grantee shall not be required to disclose information which is reasonably considered in the trade to be proprietary or confidential in nature. The Franchising Authority agrees to treat any information disclosed by the Grantee to it as confidential, and only to disclose it to employees, representatives and agents thereof that have a need to know or in order to enforce the provisions hereof.

(Ord. 636-93 §5)

**Sec. 5-4-530. Periodic review.**

During the years which commence on the fifth, tenth and fifteenth anniversaries of the effective date of the franchise, the Franchising Authority may commence a review of the cable system to review the technological and economic feasibility of incorporating new technology; to review customer service standards; to review governmental use of its access channels; and to review such technical standards as may be necessary. The Franchising Authority shall conduct public hearings to provide the Grantee and the public the opportunity to comment on the issues which may be considered in the fifth-year, tenth-year and fifteenth-year reviews. If, pursuant to such hearings, the Franchising Authority determines in the public interest that a material change in the Grantee's obligations under this franchise is needed, subject to the condition that such a change is technically and economically feasible, the Grantee and the Franchising Authority shall enter into good faith negotiations to resolve the determination and to amend the franchise as may be mutually agreed upon by the parties under the provisions of Section 5-4-950 of this Article.

(Ord. 636-93 §5)

**Sec. 5-4-540. Survey.**

The Grantee shall conduct annually a general survey of a statistically valid sample of its subscribers within the general area served by the cable system to identify future cable-related community needs, taking into consideration the cost of providing the same and community perceptions of the Grantee's responsiveness to customer service. The Grantee shall provide to the Franchising Authority a summary report of the results of the Grantee's survey by March 15 of each year.

(Ord. 636-93 §5)

***Division 6. Insurance, Indemnification and Bonds or Other Surety***

[Sec. 5-4-610. Insurance requirements.](#)

[Sec. 5-4-620. Indemnification.](#)

[Sec. 5-4-630. Bonds and other surety.](#)

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[Sec. 5-4-640. No waiver of immunities.](#)

**Sec. 5-4-610. Insurance requirements.**

The Grantee shall maintain in full force and effect, at its own cost and expense during the term of the franchise, comprehensive general liability insurance in the amount of one million dollars (\$1,000,000.00) combined single limit for bodily injury and property damage. Said insurance shall designate the Franchising Authority as an additional insured and shall be noncancellable except upon thirty (30) days' prior written notice to the Franchising Authority. The Grantee shall provide the Franchising Authority, on the effective date of this franchise and thereafter annually, a certificate of insurance.

(Ord. 636-93 §6)

**Sec. 5-4-620. Indemnification.**

The Grantee agrees to indemnify, save, hold harmless and defend the Franchising Authority, its officers, Council members, boards and employees, from and against any liability for damages and for any liability or claims resulting from property damage or bodily injury (including accidental death), which arise out of the Grantee's construction, operation or maintenance of its cable system, including but not limited to reasonable attorneys' fees and costs.

(Ord. 636-93 §6)

**Sec. 5-4-630. Bonds and other surety.**

Except as expressly provided herein, the Grantee shall not be required to obtain or maintain bonds or other surety as a condition of being awarded the franchise or continuing its existence. The Franchising Authority acknowledges that the legal, financial and technical qualifications of the Grantee are sufficient as of the effective date of this franchise to afford compliance with the terms of the franchise and the enforcement thereof. The Grantee and Franchising Authority recognize that the costs associated with bonds and other surety may ultimately be borne by the subscribers in the form of increased rates for cable services. In order to minimize such costs, the Franchising Authority agrees to require bonds and other surety only in such amounts and during such times as there is a reasonably demonstrated need therefor. The Franchising Authority agrees that in no event, however, shall it require a bond or other related surety in an aggregate amount greater than ten thousand dollars (\$10,000.00), conditioned upon the substantial performance of the material terms, covenants and conditions of this franchise. Upon the effective date of this franchise, no bond or other surety shall be required. In the event that one is required in the future, the Franchising Authority agrees to give the Grantee at least sixty (60) days' prior written notice thereof, stating the exact reason for the requirement. Such reason must demonstrate a change in the Grantee's legal, financial or technical qualifications which would materially impair or prohibit its ability to comply with the terms of the franchise or afford compliance therewith.

(Ord. 636-93 §6)

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**Sec. 5-4-640. No waiver of immunities.**

Notwithstanding the above, nothing in this franchise shall be read to constitute or to require a waiver of any rights of the Franchising Authority under the doctrine of sovereign immunity.

(Ord. 636-93 §6)

***Division 7. Enforcement and Termination of Franchise***

[Sec. 5-4-710. Notice of violation.](#)

[Sec. 5-4-720. Grantee's right to cure or respond.](#)

[Sec. 5-4-730. Public hearing.](#)

[Sec. 5-4-740. Enforcement.](#)

[Sec. 5-4-750. Acts of God.](#)

[Sec. 5-4-760. Civil penalties.](#)

[Sec. 5-4-770. Remedies cumulative.](#)

**Sec. 5-4-710. Notice of violation.**

In the event that the Franchising Authority believes that the Grantee has not complied with the terms of the franchise, it shall notify the Grantee in writing of the exact nature of the alleged noncompliance.

(Ord. 636-93 §7)

**Sec. 5-4-720. Grantee's right to cure or respond.**

The Grantee shall have thirty (30) days from receipt of the notice described in Section 5-4-710, above:

- (1) To respond to the Franchising Authority contesting the assertion of noncompliance;
- (2) To cure such default; or
- (3) In the event that, by the nature of default, such default cannot be cured within the thirty-day period, to initiate reasonable steps to remedy such default and to notify the Franchising Authority of the steps being taken and the projected date that the default will be cured.

(Ord. 636-93 §7)

**Sec. 5-4-730. Public hearing.**

In the event that the Grantee fails to respond to the notice described in Section 5-4-710 above pursuant to the procedures set forth in Section 5-4-720, or in the event that the alleged default is not remedied within sixty (60) days after the Grantee is notified of the alleged default pursuant to this Division, the Franchising Authority shall schedule a public hearing to investigate the default. Such public hearing shall be held at the next regularly scheduled meeting of the Franchising Authority which is

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scheduled at a time no less than five (5) business days therefrom. The Franchising Authority shall notify the Grantee of the time and place of such hearing and provide the Grantee with an opportunity to be heard.

(Ord. 636-93 §7)

**Sec. 5-4-740. Enforcement.**

Subject to applicable federal and state law, in the event the Franchising Authority, after such hearing, determines that the Grantee is in default of any provision of the franchise, the Franchising Authority may:

- (1) Foreclose on all or any part of any security provided under this franchise, if any, including without limitation, any bonds or other surety; provided, however that the foreclosure shall only be in such a manner and in such amount as the Franchising Authority reasonably determines is necessary to remedy the default;
- (2) Commence an action at law for monetary damages or seek other equitable relief;
- (3) In the case of a substantial material default of a provision of the franchise, declare the Agreement to be revoked; or
- (4) Seek specific performance of any provision which reasonably lends itself to such remedy as an alternative to damages, or seek injunctive relief.

(Ord. 636-93 §7)

**Sec. 5-4-750. Acts of God.**

The Grantee shall not be held in default or noncompliance with the provisions of this franchise, nor suffer any enforcement or penalty relating thereto, where such noncompliance or alleged defaults are caused by strikes, acts of God, power outages or other events reasonably beyond its ability to control.

(Ord. 636-93 §7)

**Sec. 5-4-760. Civil penalties.**

- (a) For the violation of any of the following provisions of this franchise, the Franchising Authority may assess the following civil penalties against the Grantee after providing the Grantee with the notice and opportunity to cure as provided in Sections 5-4-710 and 5-4-720 above:
  - (1) For substantial failure to provide data, documents, reports or information required under this franchise, or to otherwise fail to cooperate with the Franchising Authority during a renewal or extension proceeding, a rate review, a system review or a periodic review, the Grantee shall pay fifty dollars (\$50.00) for each day on which such violation occurs or continues.
  - (2) For substantial failure to test, analyze and report on the performance of the cable system following a request pursuant to Section 5-4-510 of this Article, the Grantee shall pay fifty dollars (\$50.00) per day for each day that such noncompliance continues.
  - (3) For substantial failure to comply with operational or maintenance standards, the Grantee shall pay one hundred dollars (\$100.00) per day for each day that such noncompliance continues.

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- (4) For substantial failure to comply with the requirements of Sections 5-4-310 through 5-4-350 of this Article, the Grantee shall pay two hundred dollars (\$200.00) per day for each day such noncompliance continues.
- (b) All civil penalties assessed by the Franchising Authority against the Grantee shall be set out in a resolution duly adopted by the City Council of the Franchising Authority. The Grantee shall have thirty (30) days from the date of adoption of the resolution to pay said fine or request an opportunity to be heard at a public hearing as provided in Section 5-4-730 of this Division.

(Ord. 636-93 §7)

**Sec. 5-4-770. Remedies cumulative.**

Except as otherwise expressly provided herein, the remedies provided herein are cumulative and in addition to other rights either party may have at law or equity or under this franchise, the exercise of one (1) remedy shall not foreclose the exercise of others, nor shall it relieve either party of its obligation to comply with any provision of this franchise.

(Ord. 636-93 §7)

**Division 8. Unauthorized Reception**

[Sec. 5-4-810. Misdemeanor.](#)

**Sec. 5-4-810. Misdemeanor.**

In addition to those criminal and civil remedies provided by state and federal law, it shall be a misdemeanor for any person to make use of any unauthorized connection, whether physically, electrically, acoustically or otherwise, with any part of the cable system without the express consent of the Grantee. Further, without the express consent of the Grantee, it shall be a misdemeanor for any person to tamper with, remove or injure any property, equipment or part of the cable system or any means of receiving cable service or other services provided thereto. Subject to applicable federal and state law, the Franchising Authority shall incorporate into its criminal code, if not presently a part thereof, a criminal misdemeanor law which will enforce the intent of this Section.

(Ord. 636-93 §8)

**Division 9. Miscellaneous Provisions**

[Sec. 5-4-910. Documents incorporated and made a part hereof.](#)

[Sec. 5-4-920. Preemption.](#)

[Sec. 5-4-930. Actions of parties.](#)

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[Sec. 5-4-980. Severability.](#)

**Sec. 5-4-910. Documents incorporated and made a part hereof.**

Any enabling ordinance in existence on the adoption date of the ordinance codified herein shall be incorporated herein by this reference to the extent that the provisions are not inconsistent with or do not substantially alter the provisions or intent of this franchise.

(Ord. 636-93 §9)

**Sec. 5-4-920. Preemption.**

If the FCC or any other federal or state body or agency shall now or hereafter exercise any paramount jurisdiction over the subject matter of this franchise, then to the extent such jurisdiction shall preempt and supersede or preclude the exercise of the like jurisdiction by the Franchising Authority, the jurisdiction of the Franchising Authority shall cease and no longer exist.

(Ord. 636-93 §9)

**Sec. 5-4-930. Actions of parties.**

In any action by a party to this franchise, or a representative thereof, 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.

(Ord. 636-93 §9)

**Sec. 5-4-940. Renewal costs.**

The Grantee shall assume the cost of the Franchising Authority's cost of publication (as such publication is required by law) related to the granting of this franchise, and such costs shall be payable within thirty (30) days of the Grantee's receiving a statement for the same from the Franchising Authority.

(Ord. 636-93 §9)

**Sec. 5-4-950. Amendment of franchise.**

At any time during the term of this franchise, the Franchising Authority or the Grantee may propose amendments of this franchise by giving thirty (30) days' written notice to the other party of the proposed amendments desired; and both parties thereafter, through their designated representatives, shall negotiate in good faith in an effort to agree on mutually satisfactory terms of amendment. Amendments to this franchise which may be agreed upon by the parties shall be implemented by the Franchising Authority through the enactment of an ordinance or the passing of a resolution, as determined by its governing body, adopting such amendments.

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(Ord. 636-93 §9)

**Sec. 5-4-960. Notice.**

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

The notice or response to the Franchising Authority shall be addressed as follows:

City of Brush  
PO Box 363  
Brush, CO 80723

The notice or response to the Grantee shall be addressed as follows:

TCI Cablevision of Colorado, Inc.  
PO Box 1458  
Fort Morgan, CO 80701

With a copy to:

TCI Cablevision of Colorado, Inc.  
Attn: Legal Department  
PO Box 5630  
Denver, CO 80217

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

(Ord. 636-93 §9)

**Sec. 5-4-970. Descriptive headings.**

The captions to sections contained herein are intended solely to facilitate the reading thereof. Such captions shall not affect the meaning or interpretation of the text herein.

(Ord. 636-93 §9)

**Sec. 5-4-980. Severability.**

If any section, 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, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the franchise, or any renewal or renewals thereof.

(Ord. 636-93 §9)

**ARTICLE 5 Gas and Electric Franchise**

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**Sec. 5-5-10. Preface.**

For the purpose of this franchise agreement, the following words and phrases shall have the meaning given in this Article. When not inconsistent with 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. The word *shall* is mandatory and *may* is permissive. Words not defined in this Article shall be given their common and ordinary meaning.

(Ord. 762-04 §1)

**Sec. 5-5-15. City.**

*City* refers to and is the municipal corporation and statutory city designated as the City of Brush, Morgan County, Colorado.

(Ord. 762-04 §1)

**Sec. 5-5-20. Company.**

*Company* refers to and is the Public Service Company of Colorado, its successors and assigns.

(Ord. 762-04 §1)

**Sec. 5-5-25. Council or City Council.**

*Council* or *City Council* refers to and is the governing body of the City of Brush, Morgan County, Colorado.

(Ord. 762-04 §1)

**Sec. 5-5-30. Effective dates.**

*Effective date* is the date this franchise becomes effective after adoption and approval by the parties.

(Ord. 762-04 §1)

**Sec. 5-5-35. Electric revenues.**

*Electric revenues* refers to and is that portion of revenues which the Company receives from the sale of electricity.

(Ord. 762-04 §1)

**Sec. 5-5-40. Facilities.**

*Facilities* refers to and is all apparatuses reasonably necessary for the Company to provide gas and electric service into, within and through the City, including but not limited to plants, works, systems,

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substations, transmission and distribution structures, lines, equipment, pipes, mains, conduit, transformers, underground lines, gas compressors, meters, meter reading devices, communication and data transfer equipment, control equipment, gas regulator stations, street lights, wires, cables and poles.

(Ord. 762-04 §1)

**Sec. 5-5-45. Party or parties.**

*Party or parties* refers to and includes the Company and the City, either singly or collectively as the context requires.

(Ord. 762-04 §1)

**Sec. 5-5-50. Public Utilities Commission.**

*Public Utilities Commission* or *PUC* refers to and is the Public Utilities Commission of the State of Colorado, or other state agency succeeding to the regulatory powers of the Public Utilities Commission.

(Ord. 762-04 §1)

**Sec. 5-5-55. Residents.**

*Residents* refers to and includes all persons, businesses, industries, governmental agencies and any other entities whatsoever, presently located or hereinafter to be located, in whole or in part, within the territorial boundaries of the City.

(Ord. 762-04 §1)

**Sec. 5-5-60. Revenues.**

*Revenues* refers to and is those amounts of money which the Company receives from the sale of gas and electricity to its customers within the City under rates authorized by the Public Utilities Commission, as well as from the transportation of gas to residents within the City, and represents amounts billed under such rates as adjusted for refunds, net write-off of uncollectible accounts, corrections or regulatory adjustments. Regulatory adjustments refer to, by way of explanation, but not limitation, credits, surcharges, refunds and pro-forma adjustments pursuant to federal or state regulation.

(Ord. 762-04 §1)

**Sec. 5-5-65. Streets.**

*Streets* refers to and is the streets, alleys, viaducts, bridges, roads, lanes and other public rights-of-way in the City, excluding any easements the terms of which do not permit the use thereof by the Company. *Streets* shall also include other public places within the City that are suitable locations for the placement of facilities as specifically approved by the City in writing for the Company's use, at the sole determination of the City.

(Ord. 762-04 §1)

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**Division 2. Grant of Franchise**

[Sec. 5-5-110. Grant of franchise.](#)

[Sec. 5-5-115. Term of franchise.](#)

**Sec. 5-5-110. Grant of franchise.**

- (a) The City hereby grants to the Company the right to use the streets within the City to furnish, sell, transmit, transport and distribute gas and electricity to the City and to all residents of the City. The City also hereby grants to the Company the right to acquire, construct, install, locate, maintain, operate and extend into, within and through the City all facilities reasonably necessary to furnish, sell, transmit, transport and distribute gas and electricity within and through the City. The rights granted in this franchise encompass the right to provide street lighting service to the City. These rights shall extend to all areas of the City as it is now constituted and to additional areas as the City may increase in size by annexation or otherwise.
- (b) If the boundaries of the City are expanded during the term of this franchise, the Company shall extend service to residents in the expanded area at the earliest practicable time and in accordance with the Company's extension policy. Service to the expanded area shall be in accordance with requirements of the PUC and the terms of this franchise, including payment of franchise fees.
- (c) The rights granted by this franchise are not, and shall not be deemed to be, granted exclusively to the Company, and the City reserves the right to make or grant a similar franchise to any other person, firm or corporation.
- (d) Except as otherwise specifically provided herein, the City retains the right through the exercise of its police power to use, control and regulate the use of the streets, and the space above and beneath the streets. The City retains the right to impose such other regulations as may be determined by the City to be necessary in the reasonable exercise of its police power to protect the health, safety and welfare of the public.

(Ord. 762-04 §2)

**Sec. 5-5-115. Term of franchise.**

This franchise shall take effect upon the effective date of the ordinance codified herein and shall supersede any prior franchise grants and extensions thereof to the Company by the City. The term of this franchise shall be twenty (20) years, beginning on the effective date.

(Ord. 762-04 §2)

**Division 3. Franchise Fee**

[Sec. 5-5-150. Franchise fee.](#)

[Sec. 5-5-155. Surcharge of franchise fees.](#)

[Sec. 5-5-160. Remittance schedule.](#)

[Sec. 5-5-165. Audit rights; protection of confidential information.](#)

[Sec. 5-5-170. Enforcement of City sales and use tax laws.](#)

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[Sec. 5-5-175. Franchise fee payment in lieu of certain taxes and other fees.](#)

[Sec. 5-5-180. Share of joint use payments.](#)

[Sec. 5-5-185. Maintenance of franchise income.](#)

**Sec. 5-5-150. Franchise fee.**

As consideration for the franchise rights granted herein, and in recognition of the fact that the grant to the Company of the right to use the City's streets is a valuable right, the Company shall pay the City a sum equal to three percent (3%) of all revenues, excluding revenues received from the City for the sale of gas and electricity (including street lighting) to the City.

(Ord. 762-04 §3)

**Sec. 5-5-155. Surcharge of franchise fees.**

The Company shall be permitted to surcharge to residents the franchise fee payments it makes to City. The Company shall be permitted to surcharge to residents any other payments it makes to the City only to the extent and in the manner permitted by law or as otherwise ordered by the PUC. No franchise fee shall be charged to the City for street lighting service or for electric or gas service provided to the City for its own consumption.

(Ord. 762-04 §3)

**Sec. 5-5-160. Remittance schedule.**

Franchise fees that are collected from residents shall be remitted by the Company to the City in monthly installments not more than thirty (30) days following the close of each month. All payments shall be made to the City Clerk. In the event that either the City or the Company discovers that there has been an error in the calculation of the franchise fee payment to the City, the error shall be corrected in the next monthly payment, subject to the following provisions:

- (1) In the event an error by the Company results in an overpayment of the franchise fee to the City in excess of five thousand dollars (\$5,000.00), credit for the overpayment shall be spread over the same period the error was undiscovered;
- (2) If the overpayment is five thousand dollars (\$5,000.00) or less, credit shall be taken against the next payment; and
- (3) Any underpayment shall be corrected and paid in the next monthly payment.

In no event shall either party be required to refund any overpayment or underpayment more than three (3) years from the date of the overpayment or underpayment.

(Ord. 762-04 §3)

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**Sec. 5-5-165. Audit rights; protection of confidential information.**

The City shall have access to the metering and billing records of the Company during normal business hours upon reasonable notice for the purpose of auditing to ascertain that the franchise fee has been correctly computed and paid. Except as provided in Section 5-5-170 below, all information obtained by the City during a franchise fee audit shall be kept confidential and shall be utilized for the sole purpose of verifying that the franchise fee has been correctly computed and paid.

(Ord. 762-04 §3)

**Sec. 5-5-170. Enforcement of City sales and use tax laws.**

The City may use the meter and billing information obtained from franchise fee audits for the purpose of enforcing its sales and use tax laws. Upon request by the City, the Company shall supply the City with a list of all other suppliers of electricity and/or gas that utilize the facilities within the streets to sell electricity and/or gas to residents.

(Ord. 762-04 §3)

**Sec. 5-5-175. Franchise fee payment in lieu of certain taxes and other fees.**

The City accepts payment of the franchise fee by the Company in lieu of any occupation tax, occupancy tax, license tax or similar tax or fee the City might charge the Company or its subcontractors for the privilege of doing business in the City, for the use or occupation of the streets, or for the installation, operation and maintenance of facilities. Payment of the franchise fee does not exempt the Company from any lawful taxation or fee, including any fee for an excavation permit, street cut permit or similar requirement imposed by lawful ordinance upon its property, or from any other tax not related to this franchise or the occupation or use of the streets, including the payment of head taxes, sales taxes or other fees or taxes assessed generally upon businesses.

(Ord. 762-04 §3)

**Sec. 5-5-180. Share of joint use payments.**

Within ninety (90) days following the close of each year, the Company shall pay the City a sum equal to three percent (3%) of all revenues received from others for the placement of wires or other equipment on Company distribution poles and distribution conduit located in the streets.

(Ord. 762-04 §3)

**Sec. 5-5-185. Maintenance of franchise income.**

Conversion of Franchise Fee. The City and the Company recognize that the utility service industries may be the subject of restructuring initiatives by legislative and regulatory authorities, and may also experience other changes as a result of mergers, acquisitions and reorganizations. Some of such initiatives and changes have or may have an adverse effect upon the franchise fee revenues provided for herein. In recognition of the length of the term of the present franchise, the Company agrees in the event such initiative or change occurs in Colorado, or if at any time during the term of this franchise, the Company agrees to pay any Colorado municipality a franchise fee measured against the total

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consumption of electricity and/or gas in each month by each resident, the Company shall notify the City of such change within a reasonable time (not to exceed two [2] months after such change). If requested by the City, the Company shall supply the City with all relevant information that the parties agree is necessary to assist the City in its evaluation of the consumption-based franchise calculation. If the City elects to convert to a consumption-based franchise fee, the City shall provide written notice of such election to the Company. The Company shall begin paying franchise fees to the City on the same basis on which it pays consumption-based franchise fees to any other Colorado municipality. The change in payment of franchise fees under this provision shall begin within a reasonable time after the City's notice of election to change the payment of franchise fees (not to exceed two [2] months after the date of such election). The change to a consumption-based franchise fee shall be implemented by amendment to Section 5-5-150 of this Article, as set forth in Section 5-5-710. The change to the consumption-based franchise fees (for either gas or electric service or both) shall be structured to assure that the Company collects and the City receives an amount in franchise fees or some other form of compensation that is at least the same amount paid in franchise fees by the Company as of the date of such modification of this franchise agreement, irrespective of what entity in the future is involved in supplying gas and electric utility service to the City and its residents.

(Ord. 762-04 §3)

**Division 4. Supply, Construction and Design**

[Sec. 5-5-210. Status reports concerning interruptions.](#)

[Sec. 5-5-215. Obligations regarding Company facilities.](#)

[Sec. 5-5-220. Coordination with City on construction.](#)

[Sec. 5-5-225. Excavation and construction.](#)

[Sec. 5-5-230. Damage.](#)

[Sec. 5-5-235. Inspection.](#)

[Sec. 5-5-240. Relocation of Company facilities.](#)

[Sec. 5-5-245. City not required to advance funds.](#)

**Sec. 5-5-210. Status reports concerning interruptions.**

The Company shall provide to the City a telephone number whereby the City will be able to obtain status reports from the Company on a twenty-four-hour basis concerning interruptions of the supply of gas or electricity in any portion of the City.

(Ord. 762-04 §4)

**Sec. 5-5-215. Obligations regarding Company facilities.**

The Company shall install, maintain, repair, renovate and replace its facilities with due diligence in a good and workmanlike manner. The facilities shall not interfere with the City's water mains, sewer mains or other uses of the streets, or delay the commencement or completion of any City construction project within the streets. The Company shall construct and maintain its facilities in such a way as to minimize interference with existing improvements, trees and other natural features. The Company shall install

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underground all gas pipelines and all newly constructed electric distribution lines serving new residential areas. All other facilities may be installed aboveground unless the City or affected residents pay to the Company the additional costs incurred by the Company to construct, operate and maintain the facilities underground, or as provided in Division 9 herein. The Company shall make best efforts to coordinate its activities within the streets with the activities and facilities of other franchised or permitted users of the streets, or those whose use of the streets is permitted by statute.

(Ord. 762-04 §4)

**Sec. 5-5-220. Coordination with City on construction.**

Up to twice each year upon request of the City, the City and the Company shall meet to coordinate with the City's capital improvement projects the design and construction of the Company's new facilities that will be located within the City.

(Ord. 762-04 §4)

**Sec. 5-5-225. Excavation and construction.**

All excavation and construction work performed by the Company shall be done in a manner that minimizes inconvenience to the public. All property disturbed by the Company's excavation or construction activities shall be restored by the Company at its expense to substantially its former condition in accord with all ordinances, regulations and standards of the City.

(Ord. 762-04 §4)

**Sec. 5-5-230. Damage.**

The Company shall promptly repair all damage to the streets or property in the streets and eliminate any dangerous condition in the streets caused by the Company's activities or facilities. If such damage poses an immediate hazard to the health or safety of the public, the City shall provide notice of the situation to the Company immediately, or as soon as practicable under the circumstances, and may take reasonable action to abate such hazard, and the Company shall reimburse the City for such reasonable action; provided however, that the Company shall not be liable for costs incurred by the City for providing emergency police or fire services generally made available to the public. In all other instances of damage to the streets or property in the streets or dangerous conditions in the streets caused by the Company's activities or facilities, the City shall give notice to the Company of the damage or condition and allow the Company a reasonable time to repair said damage or eliminate such condition. If the Company fails to repair the damage or eliminate the condition within a reasonable time after notice, the City may repair the damage or eliminate the condition, but shall not perform any work on the Company's facilities.

(Ord. 762-04 §4)

**Sec. 5-5-235. Inspection.**

All work on the Company's facilities in the streets is subject to inspection by the City to ensure that such work has been performed in accordance with all City ordinances and regulations applicable to all franchised, licensed or permitted users of the streets. The Company shall promptly perform reasonable remedial action required by the City pursuant to any such inspection.

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(Ord. 762-04 §4)

**Sec. 5-5-240. Relocation of Company facilities.**

Upon the City's request, the Company shall relocate, at its expense, any facilities in the streets that interfere with a public project undertaken (1) by the City with public funds, or (2) by a developer, but only if such relocation is necessitated by the City's oversizing requirements pursuant to lawfully enacted regulatory standards whereby the developer agrees to build facilities larger than required for its particular development and the City agrees to reimburse the developer for the proportional cost thereof. The City shall provide at its expense sufficient right-of-way for the Company to relocate its facilities. The Company shall relocate its facilities at the request of the City or other person to avoid interference with other non-publicly financed projects, but the expense of the relocation and the new right-of-way shall be paid in advance by the City or by the person conducting the project and requesting the relocation. All relocations shall be completed within a reasonable time after such request and authorization for billing and construction (if applicable), but in no event more than six (6) months after the Company is provided with the construction plans necessitating the relocation, unless the Company's delay in completing the project is the result of conditions not under its control. In the event that the City requests the Company to relocate the same facilities within two (2) years of completion of a prior relocation, the subsequent relocation shall be at the City's expense unless the relocation is necessary to remedy public health and safety concerns not reasonably foreseeable by the City at the time of the prior relocation. Underground facilities shall be relocated underground. Aboveground facilities may be relocated aboveground, unless the City pays the additional cost of relocating aboveground facilities underground, or as provided in Division 9 below.

(Ord. 762-04 §4)

**Sec. 5-5-245. City not required to advance funds.**

Upon receipt of the City's authorization for billing and construction, the Company shall extend its facilities to provide gas and/or electricity to the City for municipal uses within the Company's certificated service area, without requiring the City to advance funds prior to construction. Nothing in this Section shall release the City from the obligation to pay for the extension of facilities once complete, in accord with the Company's gas and electric tariffs on file with the PUC.

(Ord. 762-04 §4)

***Division 5. Compliance***

[Sec. 5-5-270. Compliance with applicable laws.](#)

[Sec. 5-5-275. Compliance with City requirements.](#)

**Sec. 5-5-270. Compliance with applicable laws.**

The Company and all of its contractors shall comply with all applicable City ordinances, regulations and standards. The Company shall require its contractors working in the streets to hold the necessary licenses and permits required by the City.

(Ord. 762-04 §5)

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**Sec. 5-5-275. Compliance with City requirements.**

The Company shall comply with all the City's building and zoning codes and requirements regarding curb and pavement cuts, excavating, digging, compaction and related construction activities.

(Ord. 762-04 §5)

**Division 6. Public Utilities Commission Regulation**

[Sec. 5-5-310. Compliance with orders by Public Utilities Commission.](#)

[Sec. 5-5-315. Certificates to exercise franchise rights.](#)

**Sec. 5-5-310. Compliance with orders by Public Utilities Commission.**

The provision of electric and gas service by the Company is regulated in whole or in part by regulatory agencies, including the PUC. The Company is obligated by law to and shall comply with all PUC orders, rules and regulations. The City shall impose no obligation on the Company that interferes with the Company's ability to comply with such regulatory orders, rules and regulations.

(Ord. 762-04 §6)

**Sec. 5-5-315. Certificates to exercise franchise rights.**

The City agrees to assist the Company, if necessary, in obtaining PUC approval of a certificate to exercise the franchise rights conferred under this franchise, including negotiating a change to any provision of this franchise agreement which the PUC may require in order to obtain the certificate.

(Ord. 762-04 §6)

**Division 7. City Use of Company Facilities**

[Sec. 5-5-350. City use of distribution poles.](#)

[Sec. 5-5-355. Trenches available for City use.](#)

**Sec. 5-5-350. City use of distribution poles.**

The City shall have the right to attach, without paying a pole attachment fee, City-owned police, fire and traffic control equipment, as long as such equipment is not used to produce revenue for any third party, to Company distribution poles within the City in a manner that complies with the National Electric Safety Code, and all other applicable laws, rules and regulations. All other attachments must be pre-screened and approved by the Company, and the Company reserves the right to charge a reasonable fee for such attachments. The City shall hold harmless and indemnify the Company for all liability associated with the City's facilities on the Company's poles, including the payment of the Company's reasonable attorney and expert witness fees, if applicable. The City's use of the Company's poles shall be in such a

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manner as not to constitute a safety hazard or to interfere with the Company's use of the poles. Any construction or reconfiguration that may, in the sole judgment of the Company, be required because of the City's attachment of equipment to Company distribution poles shall be paid for by the City.

(Ord. 762-04 §7)

**Sec. 5-5-355. Trenches available for City use.**

If the Company opens a trench to install its facilities, the Company shall provide advance notice to the City to permit the City to install City facilities in the same trench at the City's expense. The City's installation of its facilities shall not interfere with the Company's facilities or delay the commencement or completion of the Company's construction project within the streets.

(Ord. 762-04§7)

***Division 8. Indemnification of City***

[Sec. 5-5-410. City held harmless and indemnified.](#)

[Sec. 5-5-415. Payment of ordinance expenses.](#)

**Sec. 5-5-410. City held harmless and indemnified.**

The Company shall indemnify, defend and hold the City harmless from and against all liability or damage and all claims or demands, including the payment of the City's attorney fees and expert witness fees, arising out of the Company's operations within the City pursuant to this franchise. The City shall provide prompt written notice to the Company of the pendency of any claim or action against the City arising out of the exercise by the Company of its franchise rights. The Company shall be permitted, at its own expense, to appear and defend or to assist in defense of such claim. The Company shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any intentional or negligent act of or failure to act by the City or any of its officials, agents or employees, or to the extent that any claim, demand or lien arises out of or in connection with the use of City facilities.

(Ord. 762-04 §8)

**Sec. 5-5-415. Payment of ordinance expenses.**

The Company shall reimburse the City for actual out-of-pocket expenses incurred in publishing notices and ordinances and conducting elections related to this franchise, within thirty (30) days of the City's submission of a statement for such costs.

(Ord. 762-04 §8)

***Division 9. Underground Conversion of Overhead Electric Facilities***

[Sec. 5-5-450. Underground conversion at expense of Company.](#)

[Sec. 5-5-455. Relocation expenses not charged against remaining balances.](#)

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[Sec. 5-5-460. System-wide undergrounding costs.](#)

[Sec. 5-5-465. Review of undergrounding projects.](#)

[Sec. 5-5-470. Cooperation with other utilities.](#)

**Sec. 5-5-450. Underground conversion at expense of Company.**

The Company shall allocate an annual amount, equivalent to one percent (1%) of the preceding year's electric revenues derived by the Company from the distribution of electricity to residents within the City, for the purpose of undergrounding its overhead electric distribution facilities in the City; provided that the undergrounding shall extend for a minimum distance of one (1) block or seven hundred fifty (750) feet, whichever is less, or as may be mutually agreed by the parties. No relocation expenses which the Company is required to expend pursuant to Section 5-5-240 of this Article shall be charged to this allocation. Any unexpended portion of the one percent (1%) set aside of electric revenues shall be carried over to succeeding years (including succeeding terms of a franchise to the Company) and, in addition, upon request by the City, the Company agrees to anticipate amounts to be available under this Section for up to three (3) years in advance. Any amounts so advanced shall be charged against otherwise available amounts which would have been expended in succeeding years until such advance is eliminated. The final decision as to which projects are selected for undergrounding rests with the City, subject to the provisions of this Article. The specific scheduling of such projects rests with the Company, which shall make every reasonable effort to complete such projects within the time requested by the City.

(Ord. 762-04 §9)

**Sec. 5-5-455. Relocation expenses not charged against remaining balances.**

No relocation expenses which the Company is required to expend pursuant to Section 5-5-240 of this Article shall be charged against the balance remaining in the existing underground fund, nor shall the City be responsible for such costs.

(Ord. 762-04 §9)

**Sec. 5-5-460. System-wide undergrounding costs.**

If the PUC requires a system-wide program or programs of undergrounding electric distribution facilities at the Company's expense, the City shall not be responsible for paying the costs of any undergrounding pursuant to such program.

(Ord. 762-04 §9)

**Sec. 5-5-465. Review of undergrounding projects.**

The City and the Company shall mutually plan in advance the scheduling of approved undergrounding projects to be undertaken according to this Article as part of the review and planning for other Company construction projects. The City and the Company agree to meet, as required, to review the progress of the current undergrounding projects designated by the City and to review planned future undergrounding projects. The Company need not approve an undergrounding project if it would create a

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significant risk to safety or operational integrity, but it shall provide to the City written notification of any such nonapproval and the basis for nonapproval.

(Ord. 762-04 §9)

**Sec. 5-5-470. Cooperation with other utilities.**

When undertaking a project of undergrounding, the City and the Company shall work with other utilities or companies which have overhead lines to attempt to underground all such lines as part of the same project. When other utilities or companies are placing their lines underground, the Company shall cooperate with those utilities and companies and undertake to place underground its facilities as part of the same project where financially, technically and operationally feasible. Notwithstanding the foregoing, nothing in this Section shall require the Company to pay for undergrounding of its distribution lines except as required by Section 5-5-240 of this Article.

(Ord. 762-04 §9)

**Division 10. Transfer of Franchise**

[Sec. 5-5-510. Consent of City required.](#)

[Sec. 5-5-515. Transfer fee.](#)

**Sec. 5-5-510. Consent of City required.**

The Company shall not transfer or assign any rights under this franchise to an unaffiliated third party, except by merger with such third party, or except when the transfer is made in response to legislation or regulatory orders, unless the City shall approve in writing such transfer or assignment. Approval of the transfer or assignment shall not be unreasonably withheld.

(Ord. 762-04 §10)

**Sec. 5-5-515. Transfer fee.**

In order that the City may share in the value this franchise adds to the Company's operations, any transfer or assignment of rights under this franchise requiring the approval of the City under Section 5-5-510 above shall be subject to the condition that the transferee shall promptly pay to the City a transfer fee, which shall be calculated by multiplying one million dollars (\$1,000,000.00) by a fraction, the numerator of which equals the then population of the City which is served by the Company, and the denominator of which equals the then population of the City and County of Denver. Such transfer fee shall not be recovered from a surcharge placed only on the rates of residents.

(Ord. 762-04 §10)

**Division 11. Municipalization**

[Sec. 5-5-550. City's right to condemn.](#)

[Sec. 5-5-555. Operation of a municipal utility or competing distributors.](#)

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**Sec. 5-5-550. City's right to condemn.**

During the term of this franchise, the City shall have the right to condemn the facilities of the Company only as provided by applicable law.

(Ord. 762-04 §11)

**Sec. 5-5-555. Operation of a municipal utility or competing distributors.**

If, during the term of this franchise, the City issues to another entity a franchise to use the streets for the placement of electric and or/gas facilities, the Company shall no longer be required to collect and pay franchise fees under Division 3 of this Article unless substantially the same terms and conditions apply to the service provided by the other entity. In addition, the following sections of this franchise shall no longer apply to the Company unless substantially the same provisions are applicable to all other electric and gas distributors: Sections 5-5-160, 5-5-165, 5-5-170, 5-5-210, 5-5-215, 5-5-220, 5-5-225, 5-5-230, 5-5-235, 5-5-240, 5-5-270, 5-5-275, 5-5-350, 5-5-510 and 5-5-515.

(Ord. 762-04 §11)

**Division 12. Uncontrollable Forces**

[Sec. 5-5-610. Uncontrollable forces.](#)

**Sec. 5-5-610. Uncontrollable forces.**

Neither the City nor the Company shall be in breach of this franchise agreement if a failure to perform any of the duties under this franchise is due to uncontrollable forces, which shall include but not be limited to accidents, breakdowns of equipment, shortages of materials, acts of God, floods, storms, fires, sabotage, terrorist acts, strikes, riots, war, labor disputes, forces of nature, the authority and orders of government and other causes or contingencies of whatever nature beyond the reasonable control of the party affected which could not reasonably have been anticipated and avoided.

(Ord. 762-04 §12)

**Division 13. Breach**

[Sec. 5-5-650. Breach.](#)

[Sec. 5-5-655. Judicial review.](#)

[Sec. 5-5-660. Continued obligations.](#)

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**Sec. 5-5-650. Breach.**

If the Company fails to perform any of the terms and conditions of this franchise and such failure is within the Company's control, the City may notify the Company of the specific failure and shall allow the Company a reasonable time within which to remedy the failure. If the Company does not remedy the failure and the failure is of a substantial nature, the City Council may terminate this franchise after a full evidentiary hearing before the City Council. Termination of the franchise shall be by ordinance enacted by no less than an affirmative vote of two-thirds (?) of all members of the City Council. In addition to termination, the City shall have any other remedy provided at law or equity for the enforcement of contracts, including without limitation specific performance to the extent such remedy may be ordered by a court of competent jurisdiction.

(Ord. 762-04 §13)

**Sec. 5-5-655. Judicial review.**

Any such termination of the franchise shall be subject to judicial review under C.R.C.P. 106(a)(4) in the District Court of Morgan County, Colorado.

(Ord. 762-04 §13)

**Sec. 5-5-660. Continued obligations.**

Upon termination of this franchise, the Company's obligation to provide service to the City and its residents shall be controlled by lawful orders of the PUC.

(Ord. 762-04 §13)

**Division 14. Amendments**

[Sec. 5-5-710. Amendments to franchise.](#)

**Sec. 5-5-710. Amendments to franchise.**

This franchise agreement may be amended only by a writing signed by both the Company and the City, which is approved in the same manner as is required of the ordinance adopting this franchise.

(Ord. 762-04 §14)

**Division 15. Miscellaneous**

[Sec. 5-5-750. Successors and assigns.](#)

[Sec. 5-5-755. Third parties.](#)

[Sec. 5-5-760. Representatives.](#)

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**Sec. 5-5-750. Successors and assigns.**

The rights, privileges, franchises and obligations, in whole or in part, granted and contained in this franchise agreement shall inure to the benefit of and be binding upon the Company, its successors and assigns.

(Ord. 762-04 §15)

**Sec. 5-5-755. Third parties.**

Nothing contained in this franchise shall be construed to provide rights to third parties.

(Ord. 762-0 §154)

**Sec. 5-5-760. Representatives.**

Both parties shall, from time to time, designate in writing representatives for the Company and the City to whom notices shall be sent regarding any action to be taken under this franchise. Written notice shall be delivered in person or by certified mail to the persons and addresses hereinafter stated, unless the persons and addresses are changed at the written request of either party. Until any such change shall be made, notices shall be sent as follows:

To the City:

City Administrator  
City of Brush  
P. O. Box 363  
Brush, CO 80723

To the Company:

Assistant Corporate Secretary  
Public Service Company of Colorado  
P.O. Box 840  
Denver, CO 80201

(Ord. 762-04 §15)

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**Sec. 5-5-765. Severability.**

Should any one (1) or more provisions of this franchise be determined to be illegal or unenforceable, all other provisions nevertheless shall remain effective; provided, however, that the parties shall forthwith enter into good faith negotiations and proceed with due diligence to draft a substitute term that will achieve the original intent of the parties hereunder.

(Ord. 762-04 §15)

**Sec. 5-5-770. Entire agreement.**

This franchise constitutes the entire agreement of the parties with respect to the matters contained herein and supersedes any and all prior written or oral agreements, negotiations, correspondence, understandings and communications with respect to this franchise.

(Ord. 762-04 §15)

**Sec. 5-5-775. Headings for reference only.**

The headings in this agreement are for reference only and convey no substantive rights or impose no substantive obligations on the parties.

(Ord. 762-04 §15)

**Sec. 5-5-780. Responsibility for language.**

The City and the Company hereby acknowledge that each bears co-extensive and identical responsibility for the language in this franchise. In case of ambiguity, there shall be no presumptions based upon responsibility for drafting this franchise.

(Ord. 762-04 §15)

**Sec. 5-5-785. Applicable law.**

The laws of the State shall apply to the construction and enforcement of this franchise, except as otherwise provided under federal law. The parties agree that litigation arising out of this franchise shall be decided by the District Court of the County, except for any action brought in or removed to the jurisdiction of the federal courts, which action shall be brought in any venue appropriate under federal law.

(Ord. 762-04 §15)

**Sec. 5-5-790. No waiver of rights.**

Neither the City nor the Company waives any rights under the statutes and Constitutions of the State or of the United States except as otherwise specifically set forth herein.

(Ord. 762-04 §15)

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**Sec. 5-5-795. Prevailing.**

In any judicial or administrative action to enforce any of the terms or conditions of this franchise, the prevailing party shall be entitled to recover its costs and expenses incurred in such action, including reasonable attorney fees.

(Ord. 762-04 §15)

**Sec. 5-5-800. Approval of franchise.**

The Company shall promptly file, in writing, its acceptance of this franchise and of any amendment of this franchise following the City's final approval thereof. The failure to file such an acceptance within forty-five (45) days of said final adoption shall be deemed an acceptance of such franchise or amendment thereof.

(Ord. 762-04 §15)