

**ORDINANCE No. 843**

**MOUNTAIN WEST TECHNOLOGIES CORPORATION FRANCHISE AGREEMENT .**

**AN ORDINANCE GRANTING A FRANCHISE TO MOUNTAIN WEST TECHNOLOGIES, INC. ON BEHALF OF ITSELF AND ITS OPERATING AFFILIATES ("MOUNTAIN WEST") TO OPERATE AND MAINTAIN A HARDWIRE TELECOMMUNICATIONS SYSTEM ("SYSTEM" OR "THE SYSTEM") IN THE TOWN OF WHEATLAND, WYOMING ("TOWN" OR "THE TOWN").**

The Town hereby ordains that it is in the public interest to grant Mountain West a Franchise to operate a hardwire (not wireless) System pursuant to the terms and conditions contained herein.

**FINDINGS**

In review of Mountain West Technologies, the Town of Wheatland, Wyoming makes the following findings:

Mountain West's technical ability, financial condition, legal qualifications, and character were considered and approved in a full public proceeding after due notice and a reasonable opportunity to be heard;

Mountain West's plans for operating the System were considered and found adequate and feasible in a full public proceeding after due notice and a reasonable opportunity to be heard; and

The Franchise granted to Mountain West by the Town complies with the existing laws and regulations of the Town of Wheatland, Wyoming.

Section 1) Grant of Franchise. The Town hereby grants to Mountain West the non-exclusive right, privilege and authority to construct, maintain, operate, upgrade, adjust, protect, support, raise, lower, disconnect, remove and relocate its cables, poles, wires, conduits, conductors, pipes and related appurtenances ("Facilities") for its System in, under, along, over and across the present and future streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, rights of way and similar public areas of the Town ("Rights-of-Way"), for the purpose of providing telecommunications services to the Town's inhabitants, hereinafter "the Franchise" or "Franchise." The Franchise area is defined as the area within the legal boundaries of the Town.

Section 2) Acceptance by Mountain West. Within sixty (60) days after the passage of this Ordinance by the Town, Mountain West shall file a signed copy thereof with the Town clerk, otherwise the Ordinance and the rights granted herein shall be null and void.

Section 3) Term. The term of this Franchise commences upon the passage of this Ordinance and continues in full force and effect for fifteen (15) years ("Initial Term"). At least thirty (30) days prior to the expiration of the Initial Term, Mountain West shall notify Town of its intent to terminate the Franchise or it may elect to extend this Franchise for two (2) additional ten (10) year periods ("Renewal Term"). The Initial Term and Renewal Term may be collectively referred to as "Term." The Town will not unreasonably refuse to extend the Franchise for two (2) additional ten (10) year periods if Mountain West is in compliance with the terms of this Ordinance and applicable law, and the compensation terms are acceptable to both parties. The Term shall be specifically subject to the Provisions of Term (Section 20) set forth below.

Section 4) Franchise Fee. From and after the date of Mountain West's acceptance of this Ordinance and until its expiration, Mountain West will pay to the Town two percent (2%) of Mountain West's Gross Revenue (as defined in Appendix A hereto). Payment shall be made annually within sixty (60) days after the last day of the calendar year for which the payment applies during the Term of this Franchise.

Section 5) Records Inspection. Mountain West shall make available to the Town, upon reasonable advance written notice of no less than sixty (60) days, such information pertinent only to enforcing the terms of this Ordinance in such form and at such times as Mountain West can reasonable make

available. Subject to applicable laws, any information that is provided to the Town and/or that the Town reviews in camera is confidential and proprietary and shall not be disclosed or used for any purpose other than verifying compliance with the terms of this Ordinance. Any such information provided to the Town shall be immediately returned to Mountain West following review. The Town will not make copies of such information.

Section 6) Non-Exclusive Franchise. The right to use and occupy the Rights-of-Way of the Town shall be non-exclusive, and the Town reserves the right to use the Rights-of-Way for itself or any other entity. The Town, however, shall not unreasonably interfere with Mountain West's Facilities or the rights granted Mountain West herein.

Section 7) Town Regulatory Authority. The Town reserves the right to adopt such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties consistent with applicable Federal and State law.

Section 8) Indemnification. The Town shall not be liable for any property damage or loss or injury to or death of any person that occurs in the construction, operation or maintenance by Mountain West of its Facilities. Mountain West shall indemnify, defend and hold the Town harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of Mountain West's use of the Rights-of-Way. The Town shall: (1) give prompt written notice to Mountain West of any claim, demand, or lien with respect to which the Town seeks indemnification hereunder; and (b) permit Mountain West to assume the defense of such claim, demand, or lien. Mountain West shall not be subject to liability for any settlement made without its consent. Notwithstanding the other provisions contained herein, Mountain West shall in no event be required to indemnify the Town for any claims, demands, or liens arising from the negligence or wrongful actions or inactions of the Town, its officials, boards, commissions, agents, contractors and/or employees.

Section 9) Insurance Requirements. Mountain West will maintain in full force and effect for the Term of the Franchise, at Mountain West's expense, a comprehensive liability insurance policy written by a company authorized to do business in the state of Wyoming, or will provide self-insurance reasonably satisfactory to the Town, protecting it against liability for loss, personal injury, and property damage occasioned by the operation of the Facilities by Mountain West. Such insurance will be in an amount not less than \$1,000,000 per occurrence. Mountain West will also maintain Workers' Compensation coverage throughout the Term of this Franchise as required by state law. Mountain West shall issue a certificate of insurance to the Town annually upon its renewal.

Section 10. Plan, Design, Construction and Installation of Mountain West's Facilities.

10.1 All Facilities under authority of this Ordinance shall be used, constructed, and maintained in accordance with applicable law.

10.2 Maps. Mountain West shall file as-built maps and/or drawings with the Town, in a form reasonably prescribed by the Town, including electronic formats that can be imported into the Town's Geographical Information System ("GIS"). Mountain West shall provide as-built maps and/or drawings to Town staff, when specifically requested, that are accurate to within three (3) feet. Initial Facilities plans shall be filed within thirty (30) days of the effective date of this Ordinance and shall be updated upon completion of any significant additions to Mountain West's Facilities in the Town. Information, if confidential, shall be marked as such and maintained as confidential as permitted under applicable law.

10.3 Mountain West shall, prior to commencing new construction or major reconstruction work in Rights-of-Way or other public places, apply for a permit from the Town, which permit shall not be unreasonably withheld, conditioned or delayed, and for which all required permit fees shall be imposed. Mountain West will abide by all applicable ordinances and reasonable rules, regulations

and requirements of the Town consistent with applicable law, and the Town may inspect the manner of such work and require remedies as may be reasonably necessary to assure compliance. Notwithstanding the foregoing, Mountain West shall not be obligated to obtain a permit to perform emergency repairs to its Facilities.

10.4 To the extent practical and consistent with any permit issued by the Town, all Facilities shall be located so as to cause minimum interference with the Rights-of-Way and shall be constructed, installed, maintained, renovated or replaced in accordance with applicable rules, ordinances and regulations of the Town.

10.5 If, during the course of work on its Facilities, Mountain West causes damage to or alters the Rights-of-Way or other public property, Mountain West shall replace and restore such Rights-of-Way or public property at Mountain West's sole cost and expense to the condition that existed immediately prior to such damage or alteration and to the satisfaction of the Town of Wheatland. In addition, any asphalt that is replaced cannot be bagged pothole mix. In the event the Town is required to repair the damage Mountain West shall pay all costs incurred including, but not limited to, the wages of the Town's employees.

10.6 Mountain West shall have the right to excavate the Rights-of-Way subject to reasonable conditions and requirements of the Town. Before installation of new underground facilities or replacing existing underground facilities, each shall first notify the other party of such work and allow the other party, at its own expense, to share the trench for laying of its own facilities therein, provided that such action will not unreasonably delay project completion.

10.7 Nothing in this Ordinance shall be construed to prevent the Town from constructing, maintaining, repairing, or relocating its sewers, streets, water mains, sidewalks, or other public property. However, before commencing any work within a Rights-of-Way that may affect Mountain West's Facilities, the Town shall give written notice to Mountain West, and all such work shall be done, insofar as practicable, in such a manner as not to obstruct, injure, or prevent the free use and operation of Mountain West's Facilities.

10.8 In areas where all other utility lines are placed underground Mountain West shall construct and install its Facilities underground. In areas where one or more public utilities are aerial, Mountain West may construct and install its Facilities aerially, or above ground Mountain West shall notify the Town at least five (5) working days before construction or installation starts.

10.9 Mountain West shall not attach to, or otherwise use or commit to use, any pole owned by the Town until a separate pole attachment agreement has been executed by the parties.

#### Section I 1. Relocation of Facilities.

11.1 Relocation for the Town. Mountain West shall, upon receipt of advance written notice of not less than one hundred and twenty (120) days, protect, support, adjust, raise, lower, temporarily disconnect, relocate, or remove any Mountain West property located in Rights-of-Way when required by the Town consistent with its police powers. Mountain West shall be responsible for any costs associated with these obligations to the extent required under applicable federal or state law.

1 1.2. Relocation for a Third Party. Mountain West shall, at the request of any person holding a lawful permit issued by the Town, protect, support, adjust, raise, lower, temporarily disconnect, relocate or remove any Mountain West property located in the Rights-of-Way, provided that the cost of such action is borne by the third party requesting it, and Mountain West is given advance written notice of not less than one hundred and twenty (120) days. In said situation, Mountain West will require advance payment of the costs.

11.3 Alternatives to Relocation. Mountain West may, after receipt of written notice requesting a relocation of Facilities, submit to the Town written alternatives to such relocation. Such alternatives shall include the use and operation of temporary transmitting facilities in adjacent Rights-of-Way.

The Town shall promptly evaluate such alternatives and advise Mountain West in writing if one or more of the alternatives are suitable. If requested by the Town, Mountain West shall promptly submit additional information to assist the Town in such evaluation. The Town shall give each alternative proposed by Mountain West full and fair consideration. In the event the Town determines there is no reasonable alternative, Mountain West shall relocate the components of the System as otherwise provided herein. Notwithstanding the foregoing, Mountain West shall in all cases have the right to abandon the Facilities.

Section 12. Vegetation Management. Mountain West shall have the authority, but not the obligation, to trim trees and other natural growth in the Rights-of-Way in order to access and maintain its Facilities in compliance with applicable law and industry standards. This right shall in no way impose a duty on Mountain West; instead, this right gives permission to Mountain West should Mountain West elect to conduct such activities from time-to-time in order to access and maintain its Facilities. Mountain West shall follow the notification procedure set out in Wheatland Town Code 13.40.110.

Section 13. Renewal. At least one hundred twenty (120) days prior to the expiration of this Ordinance, Mountain West and the Town shall either agree to extend the Term or use best faith efforts to renegotiate a replacement Franchise agreement.

Section 14. Revocation of Franchise for Non-Compliance.

14.1 In the event the Town believes that Mountain West has not complied with the terms of this Ordinance, the Town shall informally discuss the matter with Mountain West. If these discussions do not lead to resolution of the problem, the Town shall Mountain West in writing of the exact nature of the alleged noncompliance.

14.2 Mountain West shall have (30) days from receipt of the written notice described in subsection 14.1 to either respond to the Town, contesting the assertion of non-compliance, or otherwise initiate reasonable steps to remedy the asserted non-compliance issue, notifying the Town of the steps being taken and the projected date that the steps will be completed.

14.3 In the event that Mountain West does not comply with subsection 14.2, above, the Town shall schedule a public hearing to address the asserted non-compliance issue. The Town shall provide Mountain West at least ten (10) days prior written notice of and the opportunity to be heard at the hearing.

14.4 Subject to applicable federal and state law, in the event the Town, after the hearing set forth in subsection 14.3, determines that Mountain West is non-compliant with this Ordinance, the Town may:

- A) Seek specific performance of any provision which reasonably lends itself to such remedy, as an alternative to damages; or
- B) Commence an action at law for monetary damages or equitable relief; or
- C) In the case of substantial non-compliance with a material provision of the Ordinance, seek to revoke the Franchise in accordance with subsection 14.5, below.

14.5 Should the Town seek to revoke the Franchise after following the procedures set forth above the Town shall give written notice to Mountain West. Mountain West shall have ninety (90) days from receipt of such notice to object in writing and state its reason(s) for such objection.

Thereafter, the Town may seek revocation of the Franchise at a public hearing. The Town shall cause to be served upon Mountain West, at least thirty (30) days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke the Franchise. At the designated hearing, the Town shall give Mountain West an opportunity to state its position on the matter, after which the Town shall determine whether or not the Franchise shall be revoked. Mountain West may appeal the Town's determination to an appropriate court, which shall have the power to review the decision of the Town de novo. Such appeal must be taken

within sixty (60) days of the issuance of the Town's determination. The Town may, at its sole discretion, take any lawful action which it deems appropriate to enforce its rights under this Ordinance in lieu of revocation.

14.6 Notwithstanding the foregoing provisions in this Section 15, Mountain West does not waive any of its rights under applicable law.

Section 15. No Waiver of Rights. Neither the Town nor Mountain West shall be excused from complying with any of the terms and conditions contained herein by any failure of the other, or any of its officers, employees or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions. Each party expressly reserves any and all rights, remedies, and arguments it may have at law or equity, without limitation, and to argue, assert, and/or take any position as to the legality or appropriateness of any provision in this Ordinance that is inconsistent with federal or state law, as may be amended.

Section 16. Transfer of Franchise. Mountain West's right, title or interest in the Franchise shall not be sold, transferred or assigned, or otherwise encumbered without notice to the Town, except when said sale, transfer, assignment, or encumbrance is to an entity controlling, controlled by, or under common control with Mountain West, or for transfers in trust, by mortgage, by other hypothecation, or by assignment of any rights, title or interest of Mountain West in the Franchise or Facilities to secure indebtedness. Provided the Town before any sale, transfer or assignment must consent. The Town cannot unreasonably withhold its consent.

Section 17. Amendment. At any time during the Term of the Franchise, the Town, through its governing body, or Mountain West, may propose an amendment or addendum to this Franchise by giving thirty (30) days written notice to the other of the proposed amendment or addendum desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment. No amendment may be adopted without mutual written agreement of the Parties.

Section 18. Force Majeure. Mountain West shall not be held in default under, or in non-compliance with, the provisions of this Ordinance, nor suffer any enforcement or penalty relating to non-compliance or default (including revocation of the Franchise), where such non-compliance or alleged faults occurred or were caused by riot, war, earthquake, flood, unusually severe rain or snow storm, tornado or other catastrophic act of nature or judicial order or regulation or fiber cut or other damage or event that is reasonably beyond Mountain West's ability to anticipate or control. This provision also covers work delays caused by waiting for utility providers to service or monitor its utility poles on which Mountain West's Facilities and/or equipment is attached, as well as unavailability of materials and/or qualified labor to perform the work necessary and delays caused by limited access to easements, poles or streets.

Section 19. Provisions of Term. If, after the effective date of this Ordinance, should there be any enactment or promulgation of any federal or state law, regulation or order, or a decision of a court of competent jurisdiction that significantly changes Mountain West's or the Town's rights or obligations under this Ordinance, or that pertains to any of the terms or provisions herein, including, but not limited to, the imposition, payment, collection or treatment of the franchise fees payable hereunder, then Mountain West and the Town, by providing written notice to the other party, each shall have the right to request that affected portions of this Ordinance be amended or that there be an addendum hereto. The parties shall commence good-faith negotiations within sixty (60) days of such notice and endeavor to conclude such negotiations within ninety (90) days. Any amendment or addendum agreed to by the parties shall become effective upon the passage and acceptance of such amendment or addendum. In the event that an amendment or addendum cannot be agreed upon pursuant to the terms of this section, either the Town or Mountain West may file an action with any court or agency with competent jurisdiction to conform the Franchise to the new law, regulation or order.

Section 20. Notices. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within two (2) business days after such notice is deposited with the United States Postal Service, postage prepaid, certified, and addressed to the parties as set forth below:

The Town of Wheatland  
600 9<sup>th</sup> Street  
Wheatland, WY 82201

Mountain West Technologies, Fiber Administrator  
400 E. 1<sup>st</sup> Street, Suite 307  
Casper, WY 82601

Section 21 Publication Costs: Mountain West shall pay all publication costs associated with the adoption of this ordinance.

Section 22. Severability. If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority, including any federal or state regulatory authority having jurisdiction thereof, or unconstitutional, illegal or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and 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.

Passed and approved this 8th day of May 2023, on first reading.

Passed and approved this 12<sup>th</sup> day of June 2023, on second reading.

Passed and approved this 10th day of July 2023, on third and final reading.

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Brandon Graves, Mayor

Attest:

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Candy Wright Clerk/Treasurer

## APPENDIX A

### CALCULATION OF FRANCHISE FEE

The following telecommunications products would be subject to the Franchise fee:

Hosted Voice Services:

- Business Local Access, Flat Rate
- Residential Local Access, Flat Rate
- Local Access Trunks
- Session Initiated Protocol Trunking

Internet Access

Private Line Services with the exception of Platte County School District #1

The following is a listing of revenue categories not representing the retail sale of local access services and therefore excluded from the definition of Gross Revenues and, therefore, are not included in the calculation of Franchise fees:

- Bad debt write-offs and customer credits;
- Installation, upgrade, disconnection or late fees, including non-sufficient funds charges;
- Fees for the leasing or sale of equipment;
- Any amounts collected for taxes, fees, or surcharges and paid to the federal, state or local governments;
- Any amounts collected from customers that are to be remitted to a federal or state agency as part of a Universal Service Fund or other government program;
- Any franchise fees that are not chargeable per federal or state law;
- Revenues from any carrier purchased for resale.