

ORDINANCE NO. 1211

AN ORDINANCE TO CREATE AND ENACT CHAPTER 14-05 OF TITLE XIV OF THE REVISED ORDINANCES OF 1990 OF THE CITY OF WEST FARGO, NORTH DAKOTA, GRANTING TO DICKEY RURAL SERVICES, INC., A NORTH DAKOTA COOPERATIVE, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO CONSTRUCT, INSTALL, OPERATE, REPAIR, AND MAINTAIN FIBER OPTIC DATA SYSTEMS, COMMUNICATION SYSTEMS, AND TELEPHONE FACILITIES IN THE CITY OF WEST FARGO, NORTH DAKOTA, INCLUDING THE NECESSARY TOLL AND TRUCK LINES, CONDUITS, CABLES, POLES, WIRES, FIBERS, VOICE RADIO CIRCUITS, EXCHANGES, SWITCHES, BOARDS, AND ALL FIXTURES AND APPURTENANCES NECESSARY OR DESIRABLE FOR SUPPLYING DATA AND COMMUNICATIONS AND TELEPHONE SERVICES FOR PUBLIC AND PRIVATE USE THEREIN AND FOR THE TRANSMISSION OF DATA AND COMMUNICATION AND TELEPHONE SERVICE THROUGH AND BEYOND THE CITY OF WEST FARGO, AND TO USE THE PUBLIC WAYS AND PUBLIC GROUNDS OF THE CITY OF WEST FARGO FOR SUCH PURPOSES.

BE IT ORDAINED BY THE BOARD OF CITY COMMISSIONERS OF THE CITY OF WEST FARGO, NORTH DAKOTA:

SECTION 1. Chapter 14-05 of Title XIV of the Revised Ordinances of 1990 of the City of West Fargo, North Dakota, is hereby created and enacted to read as follows:

CHAPTER 14-05

DICKEY RURAL SERVICES, INC. - FIBER OPTIC DATA FRANCHISE

SECTIONS:

- 14-0501. Grant of Authority.
  - 14-0502. Installation of Facilities.
  - 14-0503. Obstruction of Roadways to be Minimized.
  - 14-0504. Underground Installation.
  - 14-0505. Relocating.
  - 14-0506. Property Restoration.
  - 14-0507. Removal of Abandoned Equipment.
  - 14-0508. Rights to Trim Trees.
  - 14-0509. Cooperative Subject to Police Power Regulations.
  - 14-0510. Eminent Domain Authority.
  - 14-0511. General Provisions.
  - 14-0512. Limitation of Liability.
  - 14-0513. Indemnification.
  - 14-0514. Effective Date.
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#### 14-0501. GRANT OF AUTHORITY.

1. The City of West Fargo (the “City”) hereby grants to Dickey Rural Services, Inc., its successors and assigns, including without limitation Dickey Rural Services, Inc., a North Dakota cooperative, (the “Cooperative”), a non-exclusive franchise for a period of twenty (20) years from and after the passage and approval of this franchise ordinance, subject to the conditions and requirements hereinafter set forth, which authorizes the Cooperative to construct or acquire, either or both, and, thereafter, to operate and maintain fiber-optic data systems and communications systems and telephone facilities consisting of, without limitation, exchange, toll, and truck lines, conduits, cables, poles, wires, fibers, voice radio circuits, exchanges, switches, boards, and all fixtures and appurtenances necessary or desirable for the proper construction, operation and maintenance of said system within the limits of the City of West Fargo, State of North Dakota, for the purpose of supplying data and communications and telephone service for public and private use therein and for the transmission of data and telephone service through and beyond the City.
2. Effective Date; Written Acceptance. This franchise agreement shall be in force and effect from and after passage of this Ordinance, its acceptance by Cooperative, and its publication as required by law. The City by resolution may revoke this franchise agreement if Cooperative does not file a written acceptance with the City within 90 days after publication.
3. Service and Rates. The service to be provided and the rates to be charged by Cooperative for fiber optic service in City are subject to the jurisdiction of the Commission.
4. Publication Expense. The expense of publication of this Ordinance will be paid by City and reimbursed to City by Cooperative.
5. Dispute Resolution. If either party asserts that the other party is in default in the performance of any obligation hereunder, the complaining party shall notify the other party of the default and the desired remedy. The notification shall be written. Representatives of the parties must promptly meet and attempt in good faith to negotiate a resolution of the dispute. If the dispute is not resolved within 30 days of the written notice, the parties may jointly select a mediator to facilitate further discussion. The parties will equally share the fees and expenses of this mediator. If a mediator is not used or if the parties are unable to resolve the dispute within 30 days after first meeting with the selected mediator, either party may commence an action in Cass County District Court to interpret and enforce this franchise or for such other relief as may be permitted by law or equity for breach of contract, or either party may take any other action permitted by law.

#### 14-0502. INSTALLATION OF FACILITIES.

1. Cooperative is authorized to construct, reconstruct, maintain, and operate the data and telephone systems and lines with all necessary appurtenances, including, without limitation, exchanges, switches, poles, wires, fibers, anchors, anchor rods, conduits, cables, and all fixtures and appurtenances necessary or advisable for the operation of

the data and telephone systems in, on, over, under, across, and through public streets, roads, alleys, or other public ways of the City. The data and telephone systems shall be constructed, operated, and maintained in a proper workmanlike manner so as to afford all reasonable safeguards to the public.

2. The Cooperative will not open or disturb any public way for any purpose without first having obtained a permit from the City, if required by a separate ordinance, for which the City may impose a reasonable fee. Permit conditions imposed on the Cooperative must not be more burdensome than those imposed on other utilities for similar facilities or work. The Cooperative may, however, open and disturb any public way without permission from the City where an emergency exists requiring the immediate repair of the Cooperative's facilities. In such event the Cooperative will notify the City Auditor by telephone as soon as practicable. Not later than the second working day thereafter, the Cooperative will obtain any required permits and pay any required fees.
3. Whenever the Cooperative is erecting, constructing, or maintaining poles, wires, fibers, anchors, anchor rods, or other appurtenances and disturbs any pavement, sidewalk, crossing, or curb on any street, alley, bridge, or public way in the City or makes any excavations thereon, such disturbed area or excavations must be refilled and the pavement, sidewalk, crossing, or curb replaced under the direction of the City. Any excavation must be properly lighted at night during construction, and in case of the failure to do so on the part of the Cooperative, then the City may do the same at the expense of the Cooperative and the Cooperative agrees to pay the City for the reasonable cost or value of the work. The Cooperative is liable for all loss or damage caused by the negligence of the Cooperative, which may result to persons or property within the City, caused by it, or its agents, servants, employees, or subcontractors in erecting, operating, and maintaining the fiber-optic data systems, communications systems, and telephone facilities.

14-0503. **OBSTRUCTION OF ROADWAYS TO BE MINIMIZED.** All exchanges, switches, poles, wires, fibers, anchors, anchor rods, conduits, cables, and all fixtures and appurtenances installed by virtue of this franchise ordinance must be erected in such places and in such a manner as not to unnecessarily encroach upon streets, alleys, bridges, or public ways of the City, and so as not to unnecessarily obstruct the use thereof for the ordinary purpose of travel thereon, and the erection thereof is subject to the reasonable supervision and direction of the City. Whenever practicable, all poles shall be set in alleys. Poles now in position upon or along streets, whenever practicable, will be removed and the location of said poles shall be located in alleys or underground.

Poles set in alleys must be set at or near the boundary line of the property and where set in streets must be located at such distances as directed by the City from the property line of the abutting owner and placed so as not to interfere with the construction or placing of any water pipes, sewers, drains, or the flow of water therefrom which has been or may be placed by authority of the City. In the event that the Cooperative makes any unnecessary obstructions of streets, alleys, bridges, public ways, or places not designated by the City, the City may cause the removal of such obstructions and charge and collect from the Cooperative the actual cost of such removals.

**14-0504. UNDERGROUND INSTALLATION.**

1. All new wires, fibers, and new services, and any other equipment installed by the Cooperative must be buried underground in the following areas:
  - (a) Any new district zoned residential.
  - (b) Any new district zoned commercial.
2. In a district zoned residential and/or commercial, whenever the Cooperative undertakes any major replacement of any line, fiber, or other equipment, such replacement equipment will be buried underground. A major replacement is defined as five hundred feet (500') of line or fiber in an undeveloped property area or one (1) City block if in a developed property area.
3. Whenever the Cooperative relocates any of its existing equipment, such equipment capable of the same will be placed underground at the new location.
4. In districts zoned industrial, new lines and fiber do not have to be buried or placed underground.
5. The Cooperative may seek the permission of the City Auditor to waive the requirements contained in this section, or his/her designee who is granted the discretion to grant exceptions, upon good cause shown.

**14-0505. RELOCATING.**

1. Relocation of Fiber Optic Cables in Public Ways. If the City determines to vacate a Public Way for a City improvement project, or at City's cost to grade, regrade, or change the line of any Public Way, or construct or reconstruct any City Utility System in any Public Way, it may order Cooperative to relocate its fiber optic cables located therein if relocation is reasonably necessary to accomplish the City's proposed public improvement. Except as provided in paragraph 3 below, Cooperative shall relocate its fiber optic cables at its own expense. The City shall give Cooperative reasonable notice of plans to vacate for a City improvement project, or to grade, regrade, or change the line of any Public Way or to construct or reconstruct any City Utility System. If a relocation is ordered within five years of a prior relocation of the same fiber optic cables, which was made at Cooperative expense, the City shall reimburse Cooperative for non-betterment costs on a time and material basis, provided that if a subsequent relocation is required because of the extension of a City Utility System to a previously unserved area, Cooperative may be required to make the subsequent relocation at its expense. Nothing in this Ordinance requires Cooperative to relocate, remove, replace or reconstruct at its own expense its fiber optic cables where such relocation, removal, replacement or reconstruction is solely for the convenience of the City and is not reasonably necessary for the construction or reconstruction of a Public Way or City Utility System or other City improvement.
2. Relocation of Fiber Optic Cables in Public Ground. City may require Cooperative at Cooperative's expense to relocate or remove its fiber optic cables from Public Ground

upon a finding by City that the fiber optic cables have become or will become a substantial impairment to the existing or proposed public use of the Public Ground.

3. **Projects with Federal Funding.** Relocation, removal, or rearrangement of any Cooperative fiber optic cables made necessary because of the extension into or through City of a federally-aided highway project shall be governed by the provisions of North Dakota Century Code, Chapter 24-01-41, as supplemented or amended. It is understood that the right herein granted to Cooperative is a valuable right. City shall not order Cooperative to remove or relocate its fiber optic cables when a Public Way is vacated, improved or realigned because of a renewal or a redevelopment plan which is financially subsidized in whole or in part by the Federal Government or any agency thereof, unless the reasonable non-betterment costs of such relocation and the loss and expense resulting therefrom are first paid to Cooperative, but the City need not pay those portions of such for which reimbursement to it is not available.
4. **No Waiver.** The provisions of this franchise apply only to facilities constructed in reliance on a franchise from the City and shall not be construed to waive or modify any rights obtained by Cooperative for installations within a Cooperative right-of-way acquired by easement or prescriptive right before the applicable Public Way or Public Ground was established, or Cooperative's rights under state or county permit.
5. **Failure to Relocate.** Upon Cooperative's receipt of notice from City to relocate its fiber optic cables, Cooperative must respond to City regarding said notice within sixty (60) days and work with City on said relocation. Failure by Cooperative to respond to the notice and work with City regarding relocation is punishable as an infraction. Each day following the sixty (60) day response requirement will constitute a separate violation.

14-0506. **PROPERTY RESTORATION.** After undertaking any work requiring the opening of any public way, the Cooperative must restore the same, including paving and its foundation, to as good a condition as formerly existed, and will maintain any paved surface in good condition for two (2) years thereafter. The work must be completed as promptly as weather permits, and if the Cooperative does not promptly perform and complete the work, remove all dirt, rubbish, equipment, and material, and put the public way in the same condition as existed before the work was completed, the City has, after demand to the Cooperative to cure and the passage of a reasonable period of time following the demand, but not to exceed five (5) days, the right to make the restoration at the expense of the Cooperative. The Cooperative must pay to the City the cost of such work done for or performed by the City. This remedy is in addition to any other remedy available to the City for noncompliance with this section, but the City hereby waives any requirement for the Cooperative to post a construction performance bond, certificate of insurance, letter of credit, or any other form of security or assurance that may be required, under a separate existing or future ordinance of the City, of a person or entity obtaining the City's permission to install, replace, or maintain facilities in a public way.

14-0507. **REMOVAL OF ABANDONED EQUIPMENT.** Whenever the Cooperative abandons any site or any equipment, including but not limited to its poles, wires, fibers, anchors, anchor rods, and other appurtenances; such equipment must be completely removed by the Cooperative and the site cleaned of any remaining or residual equipment or Cooperative property.

14-0508. **RIGHTS TO TRIM TREES.** There is granted to the Cooperative, its successors and assigns, during the term of this franchise ordinance, permission and authority to trim all trees in streets, alleys, bridges, and public ways of the City so as to remove all parts of the trees interfering with the proper erection, maintenance, and operation of poles, wires, fibers, anchors, anchor rods, and other appurtenances installed or to be installed pursuant to authority granted by this franchise ordinance.

14-0509. **COOPERATIVE SUBJECT TO POLICE POWER REGULATIONS.** The City reserves the right to make and adopt, and the rights and privileges hereby granted will at all times be and remain subject to such reasonable regulations of a police nature as it may deem necessary for the best interests of the City, but the City will not by any such regulations or by acts of its own or agents do anything to prevent or interfere with the Cooperative carrying on its business in accordance with the franchise hereby granted by this franchise ordinance.

14-0510. **EMINENT DOMAIN AUTHORITY.** The granting of the franchise will in no way be construed to limit or restrict the right of the City to exercise the powers of eminent domain as set forth in Chapter 32-15 of the North Dakota Century Code and any other applicable laws of the State of North Dakota.

14-0511. **GENERAL PROVISIONS.**

1. Severability. Every section, provision, or part of this franchise ordinance is declared separate from every other section, provision, or part; and if any section, provision, or part is held invalid, it will not affect any other section, provision, or part. Where a provision of any other City ordinance conflicts with the provisions of this franchise ordinance, the provisions of this franchise ordinance prevail.
2. Limitation on Applicability. This franchise ordinance constitutes a franchise between the City and the Cooperative as the only parties and no provision of this franchise ordinance will in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person as a third party beneficiary of the agreement or of any one (1) or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.
3. Force Majeure. The service rendered by the Cooperative shall be continuous except that the Cooperative shall not be held accountable for a failure of service which is caused by floods, Acts of God, strikes, weather, or other causes beyond the control of the Cooperative.
4. Amendments. The City or the Cooperative may at any time propose that this franchise ordinance be amended to address a subject of concern and the other party will consider whether it agrees that the amendment is mutually appropriate.
5. Publication Expense. The expense of publication of this franchise ordinance will be paid by the City and reimbursed to the City by the Cooperative.
6. Management Costs. Any management costs incurred by City related to this Franchise shall be paid by Cooperative, as allowed by N.D.C.C. § 49-21-26.

7. Change in Form of Government. Any change in the form of government of the City will not affect the validity of this franchise ordinance. Any governmental unit succeeding the City shall, without the consent of the Cooperative, succeed to all of the rights and obligations of the City provided in this franchise ordinance.

14-0512. **LIMITATION OF LIABILITY.** The Cooperative will use due diligence and care in supplying data and communications and telephone service as herein provided but will not be liable for any loss or damage which may arise from failure of the service, either partial or total, but this will not be construed to exempt the Cooperative from liability for negligence caused by it, or its agents, servants, employees, or subcontractors.

14-0513. **INDEMNIFICATION.** The Cooperative will indemnify, keep, and hold the City free and harmless from any and all liability on account of injury to persons or damage to property occasioned by the construction, maintenance, repair, or operations of the Cooperative's data and communications and telephone service facilities located in, on, over, under, across, or through the public ways and public grounds of the City, unless such injury or damage results from the negligence of the City, its employees or agents. In the event a suit is brought against the City under circumstances where the above agreements to indemnify applies, the Cooperative at its sole cost and expense agrees to defend the City in such suit if written notice thereof is promptly given to the Cooperative within a period wherein the Cooperative is not prejudiced by lack of such notice. If such notice is not reasonably given as hereinbefore provided, the Cooperative will have no duty to either indemnify or defend. If the Cooperative is required to indemnify and defend, it will thereafter have complete control of such litigation, but the Cooperative may not settle such litigation without the consent of the City, which consent will not be unreasonably withheld, conditioned, or delayed. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the Cooperative; and every defense or immunity that the City could assert in its own behalf.

14-0514. **EFFECTIVE DATE.** This franchise ordinance takes effect and is in full force from and after its passage and approval by the Board of City Commissioners. The Cooperative must specify its acceptance of the franchise in writing, within ninety (90) days of Board approval of this franchise ordinance, to be filed with the City Auditor and in no event will this franchise ordinance be binding on the Cooperative until the filing of such acceptance.

SECTION 2. Effective Date. This ordinance shall be in full force and effect from and after the date of its final passage and publication.

APPROVED:



President of Board of City Commissioners of  
the City of West Fargo, North Dakota

ATTEST:



City Auditor

Date of First Reading: June 20, 2022

Date of Second Reading  
and Final Passage: August 1, 2022

**COOPERATIVE:**  
**Dickey Rural Services, Inc.**

Date: August 8, 2022

By: 

Its: CEO/GM