ORDINANCE NO. 74

MUDDY CREEK TOWNSHIP, BUTLER COUNTY, PENNSYLVANIA

AN ORDINANCE AUTHORIZING THE EXECUTION OF AN AMENDED AND RESTATED CABLE FRANCHISE AGREEMENT WITH ARMSTRONG UTILITIES, INC.

WHEREAS, pursuant to the Second-Class Township Code, Muddy Creek Township ("Township") is authorized to license and regulate cable television companies operating within the Township to the extent allowed by Federal and State law and regulations; and

WHEREAS, pursuant to the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996, as amended, the regulations of the Federal Communications Commission, and Pennsylvania law, the Township is authorized to grant and renew franchises to cable companies to construct, operate and maintain cable systems utilizing public rights-of-way and properties within the Township's jurisdiction; and

WHEREAS, Armstrong Utilities, Inc. ("Armstrong") currently operates within the Township and holds a non-exclusive cable franchise in the Township by virtue of a cable franchise agreement executed on November 10, 2008; and

WHEREAS, Armstrong has requested that the Township amend, restate, and renew the cable franchise agreement in order to allow Armstrong to continue to maintain, construct, operate, and upgrade its cable system over, under and along the rights-of-ways for use by the Township's residents; and

WHEREAS, the rights-of-way used by Armstrong are public properties acquired and maintained by the Township on behalf of the residents of the Township, and the right to use the rights-of-way is a valuable property right; and

WHEREAS, the Township desires to protect and manage the rights-of-way, establish standards for construction and maintenance of the cable system, maintain a technologically advanced cable system, receive franchise fees for Armstrong's use of the Township's rights-of-ways as provided by federal law, establish certain reporting requirements, and provide for the current and future cable related needs of its residents; and

WHEREAS, the Board of Supervisors has determined that Armstrong has the financial, legal, and technical ability to provide cable service to subscribers located in the Township; and

WHEREAS, the Board of Supervisors, after affording Township residents with advanced notice and an opportunity for comment, has determined that the public interest would be served by renewing Armstrong's cable franchise according to the terms and conditions contained in the Amended and Restated Franchise Agreement ("Agreement") and that the process for consideration of Armstrong's request complies with all applicable federal, state, and local laws and regulations.

NOW, THEREFORE, IT IS HEREBY ENACTED AND ORDAINED, pursuant to the authority conferred by the Second-Class Township Code, as follows:

1) Grant of Franchise Renewal. The Board of Supervisors hereby approves the Amended and Restated Franchise Agreement negotiated with Armstrong, including all the terms and conditions contained therein, and authorizes the execution of the Amended and Restated Franchise Agreement. A copy of the Agreement is attached hereto as Exhibit A and incorporated herein.

2) The provisions of this Ordinance, so far as they are common to those regulations in force immediately prior to the enactment of this Ordinance, are intended as a continuation of such prior regulations and not as new enactments.

3) Ordinance Number 60, adopted on November 10, 2008, as amended, is hereby repealed.

4) All other ordinances or regulations, or parts of such ordinances or regulations, in conflict with this Ordinance or inconsistent with its provisions, are hereby repealed to the extent necessary to give this Ordinance full force and effect.

5) If any section, subsection, sentence, clause, phrase, or word of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not render this Ordinance invalid.

6) This Ordinance shall take effect and be in force five (5) days after adoption.

ENACTED AND ORDAINED, by the Board of Supervisors in lawful session duly assembled this the 29th day of April 2019.

ATTEST: **TOWNSHIP OF MUDDY CREEK**

By: ______________________
Dale R. Kerr, Chair

____
Kelly Livermore,
Township Secretary
(SEAL)

By: ______________________
Eric Saunders, Supervisor

By: ______________________
Robert J. Jesteadt, Supervisor

AMENDED AND RESTATED
FRANCHISE AGREEMENT

This Amended and Restated Franchise Agreement (the "Agreement"), dated ______________________, between Muddycreek Township, Butler County, Commonwealth of Pennsylvania (the "Franchise Authority") and Armstrong Utilities, Inc., a Pennsylvania corporation, with principal offices located at One Armstrong Place, Butler, Pennsylvania 16001 (the "Armstrong").

PREAMBLE

Armstrong currently holds a Franchise from Franchise Authority pursuant to the Franchise Agreement between the parties dated January 1, 2009, which will expire on December 31, 2018 (the "Existing Agreement"). Armstrong and the Franchise Authority wish to amend and restate the Existing Agreement. The Franchise Authority has determined that it is in the public interest to continue Armstrong's Franchise.

This Agreement was duly authorized, approved and ratified by the Franchise Authority pursuant to Ordinance No. __________________ enacted on __________________.

Therefore, the parties, for good and valuable consideration, intending to be legally bound, agree as follows:

1. <u>Definitions</u>. For the purpose of this Agreement, the following terms are defined below. Where consistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number.

(a) AAA – American Arbitration Association.

(b) Affiliate – any entity that controls, is controlled by, or is under common control with, Armstrong.

(c) Armstrong – Armstrong Utilities, Inc. or its assignees.

(d) Cable System – a facility within the Franchise Authority consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service and which is provided to multiple subscribers within a community. The term does not include (i) a facility that only retransmits the signals of one or more television broadcast stations; (ii) a facility that serves subscribers without using any public right-of-way; (iii) a facility of a common carrier which is subject to the provisions of 47 USC Ch. 5, Subch. II, unless the facility is used in the transmission of video programming directly to subscribers (but not if the facility is used solely to provide interactive on-demand services); (iv) an open video system that complies with 47 USC §573; or (v) any facilities of any electric utility used solely for operating its electric utility system (47 USC §522(7)).

(e) Cable Service – the one-way or two-way transmission to or from subscribers of video programming or other programming services, and subscriber interaction, if any, which is required for the selection or use of video programming or other programming service. (47 USC §522(6)).

(f) FCC – Federal Communications Commission.

(g) Force Majeure Event – an event that is unforeseeable or otherwise beyond the control of the affected party.

(h) Franchise – an initial authorization, or renewal thereof, issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system. (47 USC §522(9)).

(i) Franchise Authority – defined in the introductory paragraph.

(j) Franchise Fee – defined in Section 6(a).

(k) Gross Receipts – revenues of any kind including, without limitation, cash, credits, property and in-kind contributions, received directly or indirectly by Armstrong from any source arising from, attributable to, or in any way derived from, the provision of Cable Service within the Franchise Area. Gross Receipts will include the following: (i) basic service fees; (ii) fees for any programming service other than basic service; (iii) fees for any optional, per-channel, or per-program services; (iv) fees for installation, additional outlets, relocation, disconnection, reconnection or change-in-service; (v) fees for control devices and antennas; and (vi) fees for music services. Gross Receipts will not include (x) bad debts or (y) any taxes on services furnished by Armstrong and imposed directly upon any subscriber or user by the Franchise Authority, state, federal, or other governmental unit. The term Gross Receipts will include revenues associated with (i) internet or cable modem services, (ii) data transmission services, or (iii) interactive services (the "Listed Services") if and when a competent governmental authority defines a Listed Service to be a cable service that is subject to franchise fees under applicable law. In the event that a Listed Service is subject to franchise fees, the Franchise Authority will hold a public hearing at which Armstrong will have the right to address the issue of franchise fees with respect to the Listed Services. Subject to the outcome of this public hearing, the Franchise Authority may choose to add one or more applicable Listed Services to the list of fees included in the calculation of Gross Receipts, provided that the franchise fee for any applicable Listed Service will not exceed 2.5% of the Gross Receipts for such Listed Service.

(l) Public Way – any street, lane, alley, bridge, viaduct, or similar public way located in Muddycreek Township.

2. **<u>Term</u>.** The Franchise will begin on ____________________ and continue for a period of fifteen (15) years. Unless either party provides the other party with a written termination notice at least one hundred eighty (180) days in advance of the renewal date, the Franchise will automatically renew for an additional fifteen (15) years.

3. **Franchise.**

(a) The Franchise Authority grants Armstrong a Franchise throughout the Franchise Authority. The Franchise includes the right to solicit subscribers to, and sell advertisements for, and otherwise own, promote, and operate, the Cable System.

(b) The Franchise is not exclusive. The Franchise Authority reserves the right to grant a similar Franchise to any person at any time. The Franchise Authority will not enter into a Franchise agreement, permit, license, authorization, or any other agreement with another person or entity to construct or operate a Cable System, or otherwise provide cable, internet, or telecommunication services in any part of the Franchise Authority which grants more favorable terms and conditions to the other person or entity.

(c) The Franchise includes a continuing right to enter, use, and occupy the surface, subsurface, and space above or below any Public Way when, and to the extent necessary, to provide the Cable Service.

(d) The parties will comply with all applicable federal, state, and local laws, rules, and regulations. In particular, Armstrong will comply with the following:

(i) All applicable health and safety laws, regulations, and ordinances, and applicable industry standards and codes, including the National Electric Safety Code of the National Board of Fire Underwriters.

(ii) Technical standards adopted by the FCC or another governmental body with jurisdiction, including requirements relating to channel capacity, bandwidth, and periodic testing.

4. **Construction; Maintenance.**

(a) Armstrong will maintain the Cable System in good repair and working order at all times.

(b) Where and when reasonably available, Armstrong will utilize the existing poles, conduits, or other facilities of public utilities or other third parties legally in the Public Way. If no public utility or other third party poles, conduits, or other facilities are reasonably available, then Armstrong will submit the proposed build-out plans to the designated Franchise Authority representative for approval or reasonable disapproval at least thirty (30) days before the proposed build-out is scheduled to commence. The designated Franchise Authority representative will advise Armstrong of its determination within fifteen (15) days after receipt of Armstrong's proposal.

(c) The technical quality of the Cable Service will be sufficient to provide subscribers with uniform-quality television reception.

(d) Armstrong will take reasonable efforts to (i) assess subscriber needs and viewing preferences and (ii) provide substitute programming for any existing programming that is discontinued or otherwise becomes unavailable.

5. **Use and Occupancy of Public Ways.**

(a) Armstrong will construct, maintain, and remove the Cable System in a workmanlike manner and take reasonable efforts to cause minimal interference with (i) the community's use of the Public Way and (ii) the rights or reasonable convenience of the property owners, tenants, or occupants who adjoin the Public Way.

(b) Armstrong will not place the Cable System where it will interfere with any utility line or fixture, or water hydrant, or interfere with the usual use of the Public Way.

(c) If Armstrong damages a paved surface for which the Franchise Authority is responsible, Armstrong will repair or replace, as applicable, the paved surface to its prior condition. Repairs or replacements will be completed within sixty (60) days of the end of the activity which caused the damage. If Armstrong reasonably requires a longer period to complete the repairs or replacement, Armstrong and the Franchise Authority will mutually agree on the revised timeline for the repair or replacement.

(d) Armstrong may trim trees which are located on, or which overhang, the Public Way to the extent that such trimming is minor in nature or must be performed immediately due to a safety risk. Armstrong may perform other tree trimming activities with the prior approval of the Franchise Authority, which will not be unreasonably withheld. All trimming is at Armstrong's expense.

(e) The Franchise Authority will provide Armstrong with at least sixty (60) days prior notice of any of the following activities which affect the Cable System: (i) changes to the grade, alignment, or paved width of any Public Way; (ii) vacation of a Public Way; (iii) construction to or of a Public Way; (iv) utility installation or maintenance; (v) installation or maintenance of traffic signals, rail tracks, or any other improvement by the Franchise Authority or other public agency. The Franchise Authority will provide Armstrong with such notice as is reasonable given the circumstances of any of the following conditions which affect the Cable System: (vi) traffic conditions; (vii) public safety issues. Armstrong and the Franchise Authority will then mutually agree on a time table for Armstrong to move any affected part of the Cable System.

(f) Any person holding a moving permit permitting an oversized item to be moved through the Public Way will provide at least fifteen (15) days' notice of the move to Armstrong. Armstrong will temporarily raise or lower its Cable System as and to the extent necessary to permit the moving of the oversized item. The person holding the moving permit will pay, in advance, for Armstrong's actual costs of raising or lowering the Cable System.

(g) The Franchise Authority may inspect all pole attachments, installation, and maintenance of basic Cable System hardware, and the removal of the Cable System to ensure compliance with this Agreement.

6. Fees and Reports.

(a) Each calendar quarter (or pro rata portion of a calendar quarter, as applicable), Armstrong will pay to the Franchise Authority an amount equal to five percent (5%) of the Gross Receipts for the prior quarter (the "Franchise Fee").

(b) Armstrong will provide the Franchise Authority with a written report, certified by Armstrong's chief accounting officer, setting forth the amount of Gross Receipts paid to Armstrong during the applicable calendar year.

(c) The Franchise Authority may inspect and audit Armstrong's records with respect to the Franchise Fee. Armstrong will make its applicable records available at its corporate headquarters upon request. Inspection and audit requests will be made by the Franchise Authority in writing and scheduled by Armstrong's corporate accounting staff.

7. Miscellaneous.

(a) Insurance. Armstrong will maintain a general comprehensive liability insurance policy against liability for loss or damage for personal injury, death, and property damage, with minimum liability limits of: one million dollars ($1,000,000.00) for personal injury or death of any one person, and one million dollars ($1,000,000.00) for personal injury or death of two (2) or more persons in any one occurrence.

(b) Changes to Law. If, and to the extent that, the terms of this Agreement are or become inconsistent with applicable law, then the parties will amend or modify this Agreement to both comply with applicable law and fulfill the intent and purposes of this Agreement.

(c) Separability. If any portion of this Agreement is for any reason held invalid or unconstitutional by any court or administrative tribunal of competent jurisdiction, that portion will be deemed a separate, distinct, and independent provision and the holding shall not affect the validity of the remaining portions of this Agreement.

(d) Interpretation. If the parties later find any ambiguity in the terms and conditions of this Agreement, the parties will make a good faith effort to cure the ambiguity in a manner consistent with the parties' original intent.

(e) Default; Arbitration.

(i) If a party determines that the other party is in default of this Agreement, the non-defaulting party will provide the defaulting party with a written notice detailing the default. The defaulting party will have ninety (90) days from the date of notice to either (1) cure the violation or, (2) for violations which cannot reasonably be cured within ninety (90) days, demonstrate to the non-defaulting party that the defaulting party is using its reasonable best efforts to cure the default. If the defaulting party fails to either cure or demonstrate that it is using its reasonable best efforts, the non-defaulting party may invoke the arbitration procedure described below.

(ii) The parties will submit any dispute arising under this Agreement to arbitration in accordance with the rules and procedures of the AAA, using one arbitrator and the services and facilities of the AAA office located nearest to the Cable System. The arbitrator's decision and award will be final and binding upon the parties. The non-prevailing party will bear the costs of the arbitration proceeding, including the fees of the arbitrator.

(f) Force Majeure. If a party is unable to perform any of its obligations under this Agreement due to a Force Majeure Event, the non-performing party will notify the other party of the Force Majeure Event in writing as soon as possible given the circumstances. The non-performance will be excused and no penalties or sanctions will be imposed on the non-performing party. For clarity, this section does not relieve the parties of their obligation to amend this Agreement in accordance with the section of this Agreement titled Changes to Law.

8. Binding Effect; Assignment; Amendment. This Agreement is binding upon, and inures to the benefit of, the parties and their respective successors and assigns. Armstrong will not assign this Agreement or the Franchise to any non-Affiliate (other than a collateral assignment of a security interest) without the prior written consent of the Franchise Authority, which consent will not be withheld unreasonably. This Agreement cannot be amended or modified, by ordinance or otherwise, except as agreed upon in writing by both parties.

In witness whereof, the parties now execute this Agreement as of the date set forth in the introductory paragraph.

Armstrong Utilities, Inc.

By:______________________________
Name: Jeffrey A. Ross
Its: President

Muddycreek Township

By: ______________________________
Name: ____________________________
Its: ______________________________