

CITY OF ELSMERE, KENTUCKY, KENTUCKY

ORDINANCE NO.: 1829-2023

AN ORDINANCE OF THE CITY OF ELSMERE, IN KENTON COUNTY, KENTUCKY, GRANTING AND ISSUING A COMPETITIVE, NON-EXCLUSIVE FRANCHISE FOR A COMBINED TERM OF TEN (10) YEARS TO, AND AUTHORIZING THE EXECUTION OF A FRANCHISE AGREEMENT WITH, SPECTRUM MID-AMERICA, LLC, AN AFFILIATE OF CHARTER COMMUNICATIONS INC., AND ITS PERMITTED SUCCESSORS AND ASSIGNS, SAID FRANCHISE PROVIDING FOR: THE CONSTRUCTION, ERECTION, INSTALLATION, UPGRADE, REPAIR, MAINTENANCE, AND OPERATION OF A CABLE TELEVISION SYSTEM FOR THE PROVISION OF CABLE TELEVISION SERVICES WITHIN THE CONFINES OF THE CITY OF ELSMERE; RETENTION OF POLICE POWERS AND SOVEREIGN IMMUNITY; A \$300,000 PERFORMANCE BOND TO ENSURE FRANCHISE COMPLIANCE; INDEMNIFICATION BY FRANCHISEE INCLUDING ADEQUATE INSURANCE COVERAGE; CONSTRUCTION AND TECHNICAL STANDARDS; COMPLIANCE WITH FCC TECHNICAL & CUSTOMER SERVICE STANDARDS; CONDITIONS OF STREET OCCUPANCY; PUBLIC, EDUCATIONAL & GOVERNMENT ACCESS CHANNELS; PAYMENT OF FRANCHISE FEES & OFFSET; COUNCIL APPROVAL REQUIRED FOR TRANSFER OF CONTROL OR ASSIGNMENT OF FRANCHISE; RIGHT TO AUDIT RECORDS; DEFAULT, REVOCATION & TERMINATION OF FRANCHISE PROCEDURES.

WHEREAS, the Telecommunications Board of Northern Kentucky (the “**Board**” or “**TBNK**”) is a public agency established by the Kenton County Kentucky Fiscal Court and the Cities of Bromley, Covington, Crestview Hills, Edgewood, Elsmere, Fort Mitchell, Fort Wright, Independence, Kenton Vale, Lakeside Park, Ludlow, Park Hills, Ryland Heights, Taylor Mill and Villa Hills (collectively, the “**TBNK Member Government(s)**”) in accordance with the provisions of the Interlocal Cooperation Act of Kentucky (codified at KRS 65.210 - 65.300), and is authorized to exercise jointly the powers of the respective TBNK Member Governments relating or pertaining to cable television matters, cable services and other telecommunication services, including the negotiation, administration and regulation of cable television franchises, as provided in the formative documents of TBNK (the “**Interlocal Agreement**”) being filed with the Kentucky Secretary of State on March 21, 1996 and being of record with the Kenton County Clerk’s Office in Miscellaneous Book 341, Page 315; and

WHEREAS, Spectrum Mid-America, LLC (“**SMA**”), a wholly-owned subsidiary of Charter Communications Inc. (“**Charter**”) and the present holder of several nonexclusive, competitive Franchise Agreements, each dated as of August 5, 1977 (the “**Prior Franchise(s)**”), providing for Cable Services throughout the geographical confines of each of the TBNK Member Governments (collectively, the “**Franchise Area(s)**”), asked each TBNK Member Government, including the City, through the auspices of TBNK, to renew or otherwise replace the Prior Franchises with another

franchise providing for the continued ownership, construction, erection, installation, upgrade, maintenance, repair, use and operation of a Cable System and related facilities along, under, over, above, through or across the Streets and rights-of-way within the Franchise Areas of each of the TBNK Member Governments; and

WHEREAS, in connection with the powers and administrative responsibilities set forth in the Interlocal Agreement, the Board has reviewed for and on behalf of the TBNK Member Governments, including the City, SMA's performance under the Prior Franchises and has further: (1) identified the present and future cable-related community needs and interests of the TBNK Member Governments and their respective citizens; (2) determined that the foregoing meet the requirements of Section 626 of the Cable Act (47 U.S.C. § 546); (3) resolved that SMA and its predecessors in interest, including Insight Kentucky Partners II L.P., Charter and Time Warner Cable Inc., substantially complied with the material terms and conditions of the Prior Franchises under Applicable Law; (4) considered and determined that SMA has the financial, technical and legal qualifications to own and operate its Cable System and to provide Cable Service over the Cable System; and (5) determined that SMA's plans for owning, constructing, operating and maintaining its Cable System are adequate; and

WHEREAS, the Board, acting for and on behalf of the TBNK Member Governments, has further determined that the several cable television franchise proposals offered by SMA, including its predecessors in interest, over the course of the franchise cable renewal process, as modified, changed and/or refashioned by: (1) extensive negotiations conducted by the "**Franchise Negotiations Committee**," a committee comprised of three (3) Board members, the Executive Director of TBNK, and the law firm of Frost Brown Todd LLP; (2) certain directions and instructions received from the "Mission Group" or "Ad Hoc Committee" that is/was comprised of several government officials of certain TBNK Member Governments; and (3) the terms and conditions contained in a competitive franchise agreement, dated July 1, 2021 and negotiated by the Franchise Negotiation Committee with Cincinnati Bell Extended Territories LLC, meets the future cable-related community needs and interests of the TBNK Member Governments and their respective citizens, and materially conforms to the aforesaid directions and instructions (a) received from the Mission Group/Ad Hoc Committee and (b) established by the Franchise Negotiation Committee (the "**Proposed Franchise Agreement**"); and

WHEREAS, acting in accordance with Sections 163 and 164 of the Kentucky Constitution for and on behalf of each TBNK Member Government, the Board placed in the local newspaper an advertisement seeking bid proposals and the submission of an application from the public at large for the (1) construction, maintenance, repair and operation of a Cable System in, on, over and through the Streets and rights-of-way of each of the TBNK Member Governments and (2) provision of Cable Services; and

WHEREAS, in response to such advertisement, the Board received prior to 2:00 PM on May 5, 2023 (the time and date by which all bid proposals and applications were to be received), a single bid proposal and application from SMA (the "**SMA Bid Proposal**") and no other person or entity, together with a form of a franchise agreement dated as of May 1, 2023, which franchise agreement

and SMA Bid Proposal had been submitted to the Franchise Negotiations Committee and the members of the Board for consideration (the “**SMA Franchise Agreement**”); and

WHEREAS, after (1) having considered the SMA Bid Proposal, including the accompanying SMA Franchise Agreement, and (2) having made a comparison and evaluation of the aforesaid documents vis-à-vis the Proposed Franchise Agreement, the Board (a) determined that the SMA Bid Proposal and the terms, conditions and covenants of the SMA Franchise Agreement submitted by SMA are identical to the terms, conditions and covenants contained in the negotiated Proposed Franchise Agreement in all material respects, and (b) is recommending that the Proposed Franchise Agreement, a copy of which is attached hereto as **Attachment A** and made a part of this Ordinance, be adopted by ordinance and be granted and issued to SMA by each of the TBNK Member Governments, including the City; and

WHEREAS, having afforded the public adequate notice and an opportunity for comment pursuant to 47 USC § 546(h), and based upon the foregoing recitals and the City’s acceptance of such recitals, the City desires to: (1) accept the SMA Bid Proposal, including the SMA Franchise Agreement, the terms and conditions of which are identical to those contained in the Proposed Franchise Agreement; and (2) grant and issue a nonexclusive, competitive franchise to SMA, for a combined Term of ten (10) years, providing for the continued ownership, construction, installation, upgrade, maintenance and operation of its Cable System throughout the respective Franchise Area of the City, pursuant to and upon the terms, conditions and covenants set forth in the Proposed Franchise Agreement, a copy of which is attached hereto as **Attachment A** and made a part of this Ordinance, as such agreement may be further modified or changed as described below in Section V of this Ordinance. *Except as otherwise defined in this Ordinance, the terms defined in the Proposed Franchise Agreement are used in this Ordinance as defined in the Proposed Franchise Agreement.*

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ELSMERE, KENTON COUNTY, KENTUCKY, AS FOLLOWS:

SECTION I

Based upon the foregoing recitals and acting in accordance with the Cable Act and Applicable Law, and subject to the terms, conditions and covenants set forth in the Proposed Franchise Agreement, SMA is hereby granted for itself and its permitted successors and assigns, a franchise, in complete form and substance of the Proposed Franchise Agreement, which is attached hereto as **Attachment A**, and with the following rights and privileges set forth herein and in the Proposed Franchise Agreement:

(1) to own, construct, erect, install, upgrade, maintain, repair, replace, and operate a Cable System and to provide Cable Services within the geographical limits or Franchise Area of the City;

(2) to locate the Cable System in, upon, along, across, over and under the Streets of the City, as provided in the Proposed Franchise Agreement;

(3) to locate the Cable System on city-owned poles, but subject to (a) the terms and conditions set forth in Article II (Cable System Extension, Operation, Standards and Procedures) of the Proposed Franchise Agreement and such other provisions contained therein and (b) any presently existing or future ordinance or regulation of the City; and

(4) as specifically provided in Article II, Section 5.E (Erection, Removal, and Common Use of Poles) of the Proposed Franchise Agreement, SMA, through a separate pole attachment agreement or utility easement agreement with an affected utility, may locate the Cable System on or within the facilities or property of such utility company.

The franchise and privileges granted in this Ordinance and the Proposed Franchise Agreement authorize SMA, among other things, to provide Cable Service over its Cable System.

SECTION II

The franchise granted in and by this Ordinance is not exclusive and it replaces, supersedes, and supplants the Prior Franchise. The City expressly reserves the right to grant to other Persons such rights, privileges, or authorizations that are similar to the rights and privileges set forth herein and in the Proposed Franchise Agreement, in the same or other Streets of the City. The City specifically reserves the right to grant, at any time during the Term of the Proposed Franchise Agreement, such additional franchises or licenses for a cable television system or broadband network as it deems appropriate.

SECTION III

The Term of the franchise granted in this Ordinance shall be for an initial period of five (5) years, with an automatic renewal period of an additional five (5) year period, but subject to and conditioned upon the terms, requirements and/or qualifications contained in Article I, Section 6 (Duration and Acceptance of Franchise) of the Proposed Franchise Agreement. Subject to Section V of this Ordinance, the Term shall commence: (1) upon the date the last TBNK Member Government adopts an ordinance granting a franchise to SMA upon substantially the same terms, conditions and covenants as are contained in the Proposed Franchise Agreement, and (2) when such franchise agreements are fully executed by the parties thereto. The Effective Date of the Proposed Franchise Agreement shall be evidenced by the Commencement Agreement called for in Article I, Section 6 (Duration and Acceptance of Franchise) of the Proposed Franchise Agreement.

SECTION IV

To the extent that there is any resolution or ordinance respecting Cable Systems which, in part or in whole, is directly inconsistent with this Ordinance and which is otherwise applicable to SMA, such part or such whole of the prior resolution or ordinance shall be repealed to the extent of the inconsistency; subject, however, to police and legislative powers reserved by the City below.

All rights and privileges granted in this Ordinance and the Proposed Franchise Agreement are and shall be, at all times during the aforesaid Term, subject to all lawful exercise of the police and legislative powers of the City. SMA shall comply with all Applicable Law and such other ordinances and regulations which the City has adopted or shall adopt, applying to the public generally and to other licensees, grantees, or franchisees.

SECTION V

That the Mayor is hereby authorized to execute the Proposed Franchise Agreement for and on behalf of the City, and to comply with all of the provisions thereof; provided, however, that prior to the execution of the Proposed Franchise Agreement, the Board, acting through its negotiation team and legal counsel, is hereby authorized to negotiate with SMA and to make such changes to the Proposed Franchise Agreement as the Board may deem necessary or appropriate, so long as such changes do not affect the overall substance of this Ordinance and the Proposed Franchise Agreement.

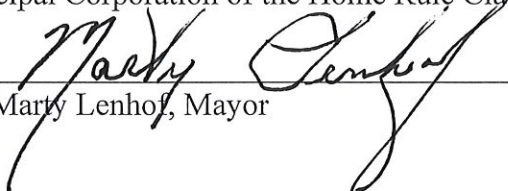
SECTION VI

The provisions of this Ordinance are severable; and the invalidity of any provision of this Ordinance shall not affect the validity of any other provision thereof; and such other provisions shall remain in full force and effect, so long as they remain valid in the absence of those provisions determined to be invalid.

SECTION VII

Subject to Section III and V of this Ordinance, this Ordinance shall take effect and be in full force when passed, published, and recorded according to law. This Ordinance may be published in abbreviated form.

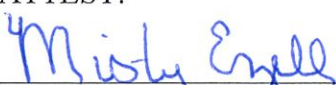
CITY OF ELSMERE, KENTUCKY
A Municipal Corporation of the Home Rule Class

By: 
Marty Lenhof, Mayor

1st Reading – September 5, 2023
2nd Reading – September 12, 2023

Ayes: 6 , Nays: 0 , Abstain:

Published: , 2023

ATTEST:

Misty Ezell, City Clerk