

MUNICIPAL ORDER 06-2023

A MUNICIPAL ORDER AWARDING A NON-EXCLUSIVE FRANCHISE FOR A TERM OF TEN (10) YEARS FOR A TELECOMMUNICATIONS SYSTEM TO OPENFIBER KENTUCKY COMPANY, LLC.

WHEREAS, by Ordinance 10-2022, the City of Owensboro created a ten (10) year, non-exclusive franchise for a telecommunications system within the City; and

WHEREAS, the City of Owensboro offered at bid a non-exclusive telecommunications franchise pursuant to Ordinance 10-2022; and

WHEREAS, after publication of said advertisement, the City of Owensboro received a bid from OpenFiber Kentucky Company, LLC (“OFKY”).

NOW, THEREFORE, BE IT ORDERED BY THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

Section 1. The Board of Commissioners hereby awards a ten (10) year, non-exclusive telecommunications franchise to OFKY.

Section 2. All prior ordinances or orders, or parts thereof in conflict herewith, are to the extent of such conflict, hereby repealed.

Section 3. The Mayor is hereby authorized and directed to execute the Franchise Agreement with OFKY. The Franchise Agreement is attached as Exhibit A.

Section 4. The Mayor, City Manager and other appropriate staff members are hereby authorized to sign any and all other agreements, instruments or documents deemed necessary in furtherance of the authority outlined herein.

**INTRODUCED, PUBLICLY READ AND FINALLY APPROVED ON ONE
READING**, this the 17th day of January, 2023.

Thomas H. Watson, Mayor

ATTEST:

Beth Davis, City Clerk

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT made and entered into this ___ day of January, 2023, by and between the City of Owensboro, Kentucky, a municipality of the home rule class, 101 East Fourth Street, P.O. Box 10003, Owensboro, KY 42302-9003 (hereafter “Owensboro”), and OpenFiber Kentucky Company, LLC, 1700 Eastpoint Pkwy., Suite 230, Louisville, KY 40233 (hereafter “OFKY”).

WITNESSETH:

WHEREAS, by Ordinance 10-2022 Owensboro created a ten (10) year, non-exclusive franchise for a telecommunications system within the confines of Owensboro; and

WHEREAS, Owensboro offered at bid a telecommunications franchise pursuant to Ordinance 10-2022; and

WHEREAS, by Municipal Order 06-2023 Owensboro accepted the bid of OFKY to acquire said franchise; and

WHEREAS, Owensboro and OFKY have entered into this Franchise Agreement to memorialize the grant by Owensboro to OFKY of said franchise subject to the terms and conditions reflected in Ordinance 10-2022.

NOW THEREFORE, for and in consideration of the mutual covenants and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, Owensboro and OFKY hereby agree to incorporate the foregoing recitals as if fully set forth herein and further agree as follows:

1. Ordinance 10-2022, which is attached hereto as Exhibit “A”, is incorporated herein by reference in its entirety and shall apply as if fully set forth herein.

2. Municipal Order 06-2023, which is attached hereto as Exhibit “B”, is incorporated herein by reference in its entirety and shall apply as if fully set forth herein.

3. Owensboro has granted unto OFKY a non-exclusive franchise for a telecommunications system within the confines of Owensboro, Kentucky, for a term of ten (10) years, subject to the provisions of Ordinance 10-2022.

4. The franchise memorialized in this Franchise Agreement shall commence February 1, 2023 and shall expire as provided in the terms and provisions of Ordinance 10-2022.

5. OFKY does hereby bind itself, its successors and assigns, to faithfully and fully perform each and every condition of said franchise as memorialized in this Franchise Agreement, and further to faithfully perform all acts required of it pursuant to said franchise.

6. This Franchise Agreement memorializes the agreement between the parties contained and embodied in Ordinance 10-2022 and shall be binding upon and inure to the benefit of the respective successors in interest to the parties hereto.

IN WITNESS WHEREOF, Owensboro and OFKY have executed this Franchise Agreement as their free and voluntary act and deed effective as of the day and year first above written.

[Signatures on following page]

City of Owensboro, Kentucky

BY: _____
Thomas H. Watson, **Mayor**

ATTEST:

Beth Davis, City Clerk

OpenFiber Kentucky Company, LLC

BY: _____

EXHIBIT "A"

ORDINANCE 10-2022

AN ORDINANCE REPEALING AND REPLACING ORDINANCE 8-2005 WITH AN ORDINANCE CREATING AND ESTABLISHING FOR BID A NON-EXCLUSIVE TELECOMMUNICATIONS (OR RELATED NON-CABLE) FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR THE GENERATION, TRANSMISSION, DISTRIBUTION AND SALE OF TELECOMMUNICATIONS OR RELATED NON-CABLE SERVICES WITHIN THE PUBLIC RIGHTS-OF-WAY OF CITY OF OWENSBORO FOR A TEN (10) YEAR DURATION; AND PROVIDING FOR COMPLIANCE WITH OTHER RELEVANT LAWS, REGULATIONS, STANDARDS, AND ORDINANCES; DEFINITIONS; WORK, MATERIALS AND CONSTRUCTION STANDARDS; WIRE MOVING AND TREE TRIMMING; PERFORMANCE BONDS; INDEMNIFICATION; INSURANCE; ACCESS TO PROPERTY AND INSPECTIONS; NOTICE OF FILINGS WITH THE PUBLIC SERVICE COMMISSION; NO VESTED RIGHTS; LIMITED ASSIGNMENT; NOTICE OF FORECLOSURE AND BANKRUPTCY; CANCELLATION OR TERMINATION; VIOLATIONS AND PENALTIES; PERMITTING AND INSPECTION FEES; ADDITIONAL PERMITTING AND OTHER REQUIREMENTS FOR SUBSTANTIAL NEW CONSTRUCTION; AND BID REQUIREMENTS; ALL EFFECTIVE ON DATE OF PASSAGE.

WHEREAS, pursuant to its powers under Sections 163 and 164 of the Kentucky Constitution, the Board of Commissioners of the City of Owensboro may create franchises for telecommunications systems;

WHEREAS, the City of Owensboro is aware of increased interest in providing telecommunications services in the City; and

WHEREAS, the City of Owensboro seeks to repeal Ordinance 8-2005, which governs telecommunications franchises, and replace it with this Ordinance to reflect the changing landscape of telecommunications service in the City and the changes in federal and state law since 2005.

NOW THEREFORE BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY AS FOLLOWS:

Ordinance 8-2005, which governs telecommunications franchises is hereby repealed in its entirety and replaced with the following:

Section 1 - Creation of Franchise.

There is hereby created a non-exclusive franchise granting to the purchaser thereof whose bid may be accepted, the discretionary right to construct, erect, operate and maintain upon, through, along, under and over the streets, alleys, avenues, public roads, highways, bridges, viaducts, sidewalks and other public ways of City of Owensboro, a Telecommunications System (or a related system which is not otherwise a Cable System) embracing underground conduits, manholes, telephone poles, cables, boxes, wires, fixtures, fiber, electrical conductors and other apparatus, equipment and facilities necessary, essential, used or useful to and in the operation of any type of Telecommunications System, subject to all of the provisions of this Ordinance. This franchise does not excuse the Franchisee from complying with any and all applicable existing and future local laws and ordinances, as may be adopted or amended in the future, and their pursuant regulations. It shall be the responsibility of the Franchisee to negotiate Pole attachment agreements with any entity, including Owensboro Municipal Utilities, owning such Poles.

Section 2 - Existing Legislation.

The Government has already adopted legislation and regulations pertaining to, and including but not limited to, permitting, construction, street project and other related activities by Franchisees and Franchisees' contractors, employees and agents in its Rights-of-way. Therefore, the terms and provisions of the Owensboro Municipal Code, (the "Code"), and as it may be amended in the future is incorporated herein by reference and shall apply as if fully set forth herein.

Section 3 - Definitions.

The definitions and terminology of any terms contained in this Ordinance which are not specifically defined in this section shall be contained in the applicable provisions of the Code (as they may be amended in the future) which are hereby incorporated herein by reference.

- (a) "Applicant" means a Person which is applying for a franchise.
- (b) "Application" shall refer to the list of documents and information set forth in Section 4 required from new entrants, including any written responses provided on Government forms or written correspondence provided in response to Government inquiries and investigations. Applications must comply with the requirements of this Ordinance in its entirety.
- (c) "Board of Commissioners" shall mean the Board of Commissioners of the City of Owensboro, Kentucky.

- (d) "Cable Service" shall have the meaning in this Ordinance as it is defined in Section 602(6) of the Communications Act of 1934, as it may be amended (hereinafter cited as 47 U.S.C. § 522(6)).
- (e) "Cable System" shall have the meaning in this Ordinance as it is defined in Section 602(7) of the Communications Act of 1934, as it may be amended (47 U.S.C. § 522(7)).
- (f) "Communications Act" means the Communications Act of 1934, as amended from time to time (47 U.S.C. § 151 et seq.).
- (g) "Customer" means a person located within the territorial limits of the Government who is legally receiving Telecommunications Service from the Franchisee.
- (h) "Equipment and apparatus" means any manholes, underground conduits, ducts, nodes, electronic devices, Poles, Towers, or Support structures, cables, boxes, wires, fixtures, conductors, or other facilities necessary, essential, used or useful to and operated by the Telecommunications System.
- (i) "Facility" or "Facilities" mean any tangible asset of Franchisee's Telecommunication System in the Right-of-way, including but not limited to equipment and apparatus such as cabinets, pipes, conduits, wires, cables, amplifiers, transformers, fiber optic lines, antennae, Pole, Tower, or Support structure, or ducts, required, necessary, used or useful in the provision of utility or other services.
- (j) "FCC" means the Federal Communications Commission, or its lawful successor.
- (k) "Franchise Fee" means for the purposes of this Ordinance any fee that may be imposed by the Government on Franchisee as compensation for Franchisee's use of public rights-of-way and roads. Use of this definition in this Ordinance is without prejudice to any rights Franchisee or Government may have under Federal and Kentucky law as they may be amended.
- (l) "Government" or "City" means (unless otherwise specified) the City of Owensboro, a city created pursuant to the Kentucky Revised Statutes, as it now exists in its present territorial limits, or may hereafter be extended or reduced, and its elected and appointed officials, employees, agents, commissions, boards, consultants, assigns, volunteers and successors in interest.
- (m) "Franchisee" means a Person to which a franchise under this Ordinance is granted by the Board of Commissioners, or its successors and assigns.

- (n) "Gross Revenue" means after adjustment for the net write-off of uncollectible accounts, any and all revenues derived by Franchisee within the City of Owensboro from Franchisee's Telecommunications System, including, but not limited to: revenues from the sale of and use of Telecommunications Services originating or terminating in the City of Owensboro; revenues charged to or attributable to a circuit location in the City of Owensboro, regardless of where the circuit is billed or paid; revenues from the use, rental, or lease of Franchisee's operating Facilities within the City of Owensboro, revenues from the provision of any and all products, services, or charges (including installation, maintenance and service charges) and revenues from any leases or Indefeasible Right of Use interests ("IRU") of any portion of Franchisee's Telecommunications System within the City of Owensboro. "IRU" or "Indefeasible Right of Use" means any form of acquired capital interest in Franchisee's Telecommunications System in which the holder possesses a right to use the Telecommunications System but not the right to control, maintain, construct or revise the Telecommunications System.
- (o) "Minimum Annual Franchise Fee" means \$10,000 in the first year of the Franchisee's franchise and shall increase by \$1,000 annually.
- (p) "PSC" means the Kentucky Public Service Commission or its lawful successor.
- (q) "Person" is any person, firm, partnership, association, corporation, company, or limited liability company.
- (r) "Pole" means a utility, lighting, or similar Pole made of wood, concrete, metal, or other material, located or to be located within a public right-of-way. The term does not include a Tower or Support structure.
- (s) "Road" or "Street" or "Right-of-way" shall mean the surface of and the space above and below any public road, street, highway, freeway, lane, path, public way or place, sidewalk, alley, court, boulevard, parkway, drive or easement now or hereafter held by the Government for the purpose of public travel and shall include other easements or rights-of-way as shall be now held or hereafter held by the Government which shall, within their proper use and meaning entitle the Government and its Franchisee to the use thereof for the purposes of installing or transmitting Telecommunications System transmissions over Poles, Towers, or Support structures, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to a Telecommunications System.
- (t) "Shall" is mandatory, not merely directive.
- (u) "Small wireless facilities" are Wireless facilities that meet each of the following conditions:

- (1) The Facilities are mounted on Poles, Towers, or Support structures fifty-five (55) feet or less in height including their antennas;
 - (2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three (3) cubic feet in volume;
 - (3) All other Wireless equipment associated with the structure, including the Wireless equipment associated with the antenna and any associated equipment on the structure, including collations, is no more than fifteen (15) cubic feet in volume, cumulatively. The following types of associated, ancillary equipment are not included in the calculation of equipment volume: electric meter, telecommunications demarcation box, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for connection of power and other services;
 - (4) The Facilities do not require antenna structure registration under federal law;
 - (5) The Facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards provided in federal law; and
 - (6) Small wireless facilities do not include Poles, Towers, or Support structures.
- (v) "Support structure" means a structure in the Right-of-way other than a Pole or a Tower to which a Wireless facility is attached at the time of the application for an Installation permit
- (w) "Telecommunications Service" means any service provided for consideration for the purpose of provision, transmission, conveyance, or routing of information including, but not limited to, voice, video, images data, or any other information signals without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself and whether or not the transmission medium is wireline. By way of example, and not limitation, Telecommunications Service includes, but is not limited to the following:
1. telecommunications service (as defined by 47 USC §153(53)) (as such term is now, or may in the future be, defined under federal law);
 2. telephone exchange service (as defined by 47 USC §153(54)) (as such term is now, or may in the future be, defined under federal law);
 3. exchange access (as defined by 47 USC §153(20)) (as such term is now, or may in the future be, defined under federal law);

4. mobile service (as defined by 47 USC §153(33)) (as such term is now, or may in the future be, defined under federal law);
 5. advanced communications services (as defined by 47 USC §153(1)) (as such term is now, or may in the future be, defined under federal law);
 6. long distance, inter-exchange and inter-LATA services, which may include MTS, WATS, 800, operator services, directory assistance and travel card services;
 7. private line point to point service for end users of voice and data transmission; non-entertainment video, videoconferencing, or point to point private line service; and
 8. any other intrastate or interstate telecommunications services which the Kentucky Public Service Commission or the FCC has authorized or services provided by radio common carrier.
- (x) "Telecommunications System" means all fiber optics, wires, cables, ducts, conduits, vaults, Poles, Towers, or Support structures, anchors, nodes, antennas, cabinets, fixtures, transformers, Equipment and apparatus and other necessary facilities owned or used by Franchisee for the purpose of providing Telecommunications Service and located in, above or below the Streets.
- (y) "Transfer" means any sale, lease, mortgage, assignment, merger or other form of transfer of this Ordinance or of the rights and privileges granted or authorized by this Ordinance.
- (z) "Tower" means any structure in the public right-of-way built for the sole or primary purpose of supporting a Wireless facility. A Tower does not include a Pole or a Support structure.
- (aa) "Wireless facility" means a Telecommunications System that enables Wireless services, but does not include: (i) the Support structure, Tower, or Pole on, under, or within which the equipment is located or collocated; or (ii) coaxial, fiber-optic or other cabling that is between Telecommunications System or Poles or that is otherwise not immediately adjacent to or directly associated with a particular antenna. A Small wireless facility is one (1) example of a Wireless facility.
- (bb) "Wireless services" means any wireless services using licensed or unlicensed spectrum, whether at a fixed location or mobile, provided to the public.

Section 4 - Applications.

All applications received by the Government from Applicants shall become the sole property of the Government. Applications shall be accompanied by a non-refundable application fee of five thousand dollars (\$5,000.00) payable to the Government. Said application fee shall defray in whole or part the Government's costs to process any application filed under this Ordinance and negotiate, award and administer any franchise. Said application fee shall not be considered franchise fee payments.

- (a) The Government reserves the right to reject any and all applications and waive informalities, and/or technicalities where the best interest of the Government may be served.
- (b) All questions regarding the meaning or intent of the Ordinance or application documents shall be submitted to the Government in writing. Replies will be issued by Addenda mailed or delivered to all parties recorded by the Government as having received the application documents. The Government reserves the right to make extensions of time for receiving applications as it deems necessary. Only replies to questions by written Addenda will be binding. All applications must contain an acknowledgment of receipt of all Addenda.
- (c) Applications must be submitted at the time and place indicated in the application documents. Applications may be modified at any time prior to the opening of the applications, provided that any modifications must be duly executed in the manner that the Applicant's application must be executed.
- (d) Before submitting its application, each Applicant must (i) examine the Ordinance and the application documents thoroughly, (ii) familiarize itself with local conditions that may in any manner affect performance under this Ordinance, and (iii) familiarize itself with federal, state and local laws, ordinances, rules and regulations affecting performance under the franchise.
- (e) The Government may make such investigations as it deems necessary to determine the ability of the Applicant to perform under the franchise, and the Applicant shall furnish to the Government all such information and data for this purpose as the Government may request. The Government reserves the right to reject any application if the evidence submitted by, or investigation of, such Applicant fails to satisfy the Government that such Applicant is properly qualified to carry out the obligations of the franchise and to complete the work contemplated therein. Conditional applications will not be accepted.
- (f) All applications received by the Government from the Applicants will become the sole property of the Government. Applicants shall submit all requested information

as provided by the terms of this Ordinance. The following information must be complete and verified as true by the Applicant:

1. *Name and address of Applicant.* The Applicant's name, address, e-mail address and telephone and facsimile numbers; date of application and signature of Applicant or appropriate corporate officer(s); the name, address and e-mail address, and telephone and facsimile numbers of a local representative who shall be available at all times; and information regarding how to contact the local representative in an emergency.
2. *Description of proposed Telecommunications System.* A description of the Applicant's proposed Telecommunications System design.
3. *Services.* A statement setting forth a description of all the types of Telecommunications Services proposed.
4. *Applicant organization.* The Applicant shall be a corporation or limited liability company authorized to do business in the Commonwealth of Kentucky, as certified by the Secretary of State. Applicant must fully disclose the ownership of the Facilities to be used in rendering the Telecommunications Service.
5. *Technical description.* Applicant shall provide a technical description of the type of Telecommunications System proposed by the Applicant and Applicant's plan for the installation of the Telecommunications System. Telecommunications System designs are to be submitted in bullet format detailing equipment start point, routes and end point location accompanied by network routing map(s). The following information shall be included in the application:
 - a. If the Applicant is proposing an underground installation in existing ducts or conduits within the rights-of-way, information in sufficient detail to identify the location of the existing ducts or conduits to be occupied.
 - b. If Applicant is proposing an underground installation within new ducts or conduits to be constructed within the rights-of-way.
 - c. The location, depth, size and quantity of proposed new ducts or conduits.
6. A preliminary installation schedule and completion date.

7. *Engineering statement.* A statement from the Applicant's senior technical staff member, or consultant, advising that the Applicant's planned Telecommunications System and operations thereof would meet all the requirements set forth herein.
 8. *Additional requirements.* Supplementary, additional or other information that the Applicant deems reasonable for consideration may be submitted at the same time as its application but must be separately bound and submitted with the above number of copies. The Government may, at its discretion, consider such additional information as part of the application.
 9. A copy of the Applicant's certificate of authority from the PSC where the Applicant is lawfully required to have such certificate from the PSC.
 10. A copy of all insurance policies or certificates required under this Ordinance.
 11. A statement signed by the Applicant that the Applicant agrees to be bound by all provisions of this Ordinance and its franchise and agrees to obtain all applicable permits and authorizations prior to constructing, installing, or operating a system in the right-of-way.
- (g) The information provided by Applicant shall be certified as true and correct and Applicant shall be responsible to certify to the Government any material changes to the information provided in the completed application during the term of any franchise.
- (h) *Supplementation to applications.* The Government reserves the right to require such supplementary, additional or other information that it deems reasonably necessary for its determinations.
- (i) *The Government's rights reserved.* The Government reserves the right to waive all formalities and/or technicalities where the best interest of the Government may be served.

Section 5 - Rights under Franchise.

- (a) The Franchisee shall have the non-exclusive right and privilege of constructing, erecting, operating and maintaining a Telecommunications System upon, through, along, under and over the Rights-of-way within the City of Owensboro as they now exist or may hereafter be extended; subject

to the provisions hereof and to all powers (including police power) inherent in, conferred upon or reserved to the Government, including but not limited to those contained in the Code. The Government reserves the right to grant similar franchises to more than one Franchisee.

- (b) This Ordinance does not give the Franchisee, the right nor the privilege of attaching its Telecommunications System to any buildings, Poles, Towers, or Support structures streetlights, Equipment and apparatus, or Facilities owned by the Government. Additionally, this Ordinance does not give the Franchisee the right nor the privilege of constructing, erecting, operating and maintaining a Telecommunications System upon, through, along, under and over real property owned by the Government (other than Rights-of-way.) If Franchisee desires to attach its Telecommunications System to any buildings, Poles, Towers, or Support structures, streetlights, Equipment and apparatus, or Facilities owned by any Person, including the Government or construct, erect, operate and maintain a Telecommunications System upon, through, along, under and over real property owned by any Person, including the Government, the Franchisee shall be required to enter into separate agreements with the Government.
- (c) This Ordinance does not include the right or privilege to provide Cable Service or open video system (as defined by 47 CFR 76.1500 (a)), which shall be subject to separate franchising requirements, and also does not apply to (1) private communications system services provided without using the public rights of way; (2) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (3) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996.

Section 6 - Standards.

The Franchisee shall conform to at least the minimum standards or requirements in federal, state and local law or regulation in the operation of its Telecommunications System pursuant to this Ordinance. In addition to complying with other applicable law, the Franchisee agrees that:

- (a) All working Facilities and conditions used during construction, installation and maintenance of Facilities (including clearance of wires and cables above the Rights-of-way and placement of any underground facilities) shall comply with the standards of the Occupational Safety and Health Administration, the National Electric Safety Code, and the National Electric

Code. In the operation of its Telecommunications System, the Franchisee shall conform to all standards required by applicable local, state, or federal law or regulation;

- (b) All materials and equipment used or installed in construction shall be of first class quality, and any defect in the work, materials or equipment, whether latent or patent, will be remedied by the Franchisee at its cost;
- (c) Construction, reconstruction, maintenance, or removal of any Facilities, shall be performed with due regard for the rights of the Government and others, and shall not unnecessarily interfere with, or in any way injure the property of the Government or others under, on, or above the ground, or otherwise unduly interfere with the public use of the Rights-of-way;
- (d) Placement of lights, danger signals or warning signs shall be undertaken by the Franchisee in compliance with applicable law;
- (e) Unless exempted by the Government, Facilities shall be installed underground at any location where all other utilities' Facilities that are used to provide customer service are then being installed underground, or when otherwise required under the Code, or when existing poles do not have adequate space to maintain required clearances and upsizing of poles is not reasonably feasible, and shall be in conformance with the applicable requirements of this Ordinance and those set forth in the Code, the Zoning Ordinance, or any other applicable local law or regulation. The Franchisee assumes all responsibility for damage or injury to persons or property resulting from its placement or maintenance of any above-ground Facilities;
- (f) Franchisee shall identify all of its Facilities, new and existing, by tagging or marking its Facilities with the Franchisee's name and telephone number. Facilities in existence prior to the effective date of this ordinance are to be identified and tagged during ordinary and routine maintenance and repair activities. Additionally, Franchisee shall provide the Government annually with an electronic map which contains the location of all of its Facilities;
- (g) The Government, through its City Manager or his or her designee, or through such assistants as the Government may employ or designate, may, at all times and under reasonable conditions with prior notice, have reasonable access to all or any of the property used in part or in whole by the Franchisee in its operating and maintaining the

Telecommunications System under this Ordinance and located within the Rights-of-way; and

- (h) The Franchisee agrees to provide to the Government and/or its Board of Commissioners with information pertaining to its provision of Telecommunications Services pursuant to this Ordinance upon reasonable request. This shall include, but is not necessarily limited to, attending public meeting(s) at which some or all of the members of the Board of Commissioners are in attendance (in order to provide such information upon reasonable advance notice) and providing an annual update to the Board of Commissioners upon its request.

Section 7 - Moving Permits and Tree Trimming.

- (a) The Franchisee shall, at the request of any Person holding a moving permit issued by the Government, temporarily raise or lower its wires to permit the moving of buildings or other structures. The expense of such temporary removal or raising or lowering of wires shall be paid by the Person requesting the same, and the Franchisee shall have the authority to require such payment in advance. The Franchisee shall be given not less than fifteen (15) days advance notice to arrange for such temporary wire changes.
- (b) The Franchisee shall have the authority to trim trees upon the overhanging Rights-of-way so as to prevent the branches of such trees from coming in contact with the wires or cables of the Franchisee. Any trimming, removal or other disturbance of trees shall conform to all applicable laws or regulations.

Section 8 - Bonds.

The Franchisee may, with respect to aspects of those projects in excess of one hundred thousand dollars (\$100,000.00) be required to post a project performance bond(s). This bond (or bonds) shall be set in an amount and duration to be determined by the Government upon discussing and verifying the scope of such a project with the Franchisee, and shall be in favor of the Government to be issued by an entity subject to jurisdiction and venue in the City of Owensboro, Kentucky.

Section 9 - Indemnification.

The Franchisee agrees to indemnify, hold harmless, and defend the Government from any and all losses or claims of whatever kind to the extent that they arise from or are alleged to have arisen, directly or indirectly from the execution, performance or breach of this franchise by Franchisee, its employees, agents, servants, owners, principals, lessees, contractors and subcontractors, excluding negligence and misconduct on the

part of the Government. This indemnity agreement shall in no way be limited by any financial responsibility, insurance, or loss control requirements below and shall survive to the extent permitted by the applicable statute of limitations.

For purposes of this Indemnity provision:

- (1) The word "defend" includes, but is not limited to, investigating, handling, responding to, resisting, providing a defense for, and defending claims, at Franchisee's expense, using an attorney selected by the Franchisee and approved in writing by the Government which approval shall not be unreasonably withheld.
- (2) The word "claims" includes, but is not limited to, claims, demands, liens, suits, and other causes of action of whatever kind.
- (3) The word "losses" includes, but is not limited to: attorneys' fees and expenses; costs of litigation; court or administrative agency costs; judgments; fines; penalties; interest; all environmental cleanup and redemption costs of whatever kind; and any liability arising from death, injury or damage of any kind to any Person, including employees and agents of Franchisee, its servants, owners, principals, licensees, vendees, lessees, contractors and subcontractors or the Government, and damage to or destruction of any property, including the property of the Government.

Section 10 – Insurance.

- (a) The Franchisee shall procure and maintain for the duration of the franchise the following insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance hereunder by the Franchisee:

- (1) Commercial General Liability Insurance with:

- A. Limits of not less than \$5,000,000.00 for property damage and personal bodily injury or death to any one or more persons per occurrence.
- B. \$5,000,000.00 general aggregate.
- C. Products-Completed Operations coverage.
- D. Personal and Advertising Injury coverage.
- E. Explosion, collapse & underground coverage.
- F. Franchisee's policies shall include and Franchisee's certificate of insurance will list as additional insureds, "the City of Owensboro, its elected and appointed officials, employees, and, to the extent they

have an insurable interest, its agents, boards, consultants, assigns, volunteers and successors in interest.”

G. Additionally, such insurance shall contain endorsement that Franchisee’s insurance coverage shall be primary insurance with respect to the Government. Any insurance or self-insurance maintained by the Government shall be in excess of the Franchisee’s insurance and shall not contribute to it.

(2) Automobile Liability Insurance providing limits of not less than \$5,000,000.00.

(3) Workers’ Compensation Insurance as required by the Kentucky Revised Statutes and Employers Liability Coverage equal to \$1,000,000 with endorsement that insurer shall agree to waive all rights of subrogation against Government for losses arising from work performed by the Franchisee for Government.

(4) The Franchisee shall abide by all local, state, and federal insurance regulations.

(5) The required limits may be met by a combination of primary and excess or umbrella insurance.

(b) Acceptability of Insurers. Insurance is to be placed with insurers qualified to do business in the Commonwealth of Kentucky and having an A.M. Best rating of A-:VIII or better.

(c) Evidence of Insurance. The Government is to be furnished Certificates of Insurance reflecting the above coverages, and Franchisee agrees to provide the Government the following:

(1) Signed renewal Certificates for expiring policies;

(2) New Certificates of Insurance if policies or carriers change during terms of this franchise, showing compliance with the above insurance requirements; and

(3) Copies of insurance policies upon request.

(d) Right to Review, Audit and Inspect. Franchisee understands and agrees that the Government may review, audit, and inspect any and all of Franchisee’s relevant records and operations to ensure compliance with these Insurance requirements.

(e) Safety and Loss Control. Franchisee agrees to adhere to and comply with all Federal, State and Local safety and environmental laws, regulations and ordinances. The Franchisee shall provide all safeguards, safety devices and protective equipment necessary to protect the life, health, safety and property of all persons on the job site, the public and the owner as required by applicable federal, state and local law.

- (f) Maintenance of Insurance. The insurance required in this Section 10 shall not be suspended, voided, canceled by the Franchisee, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested to the Government.
- (g) Definition of Default. Franchisee understands and agrees that the failure to comply with any of these insurance, safety or loss control provisions (including with, among other things, Section 10(f)) within ten (10) business days after notice from the Government that the Franchisee is not in compliance shall constitute a default under this Ordinance. The Government may elect, at its option, any single remedy or any combination of remedies, as available, including but not limited to, purchasing insurance and charging Franchisee for any such insurance premiums purchased, or terminating the Franchisee's franchise. The date of default with respect to Section 10(f) shall relate back to the date of breach, without regard to the date on which notice is provided by the Government.

Section 11 - Non-discrimination and Affirmative Action.

The Franchisee shall comply with all applicable federal, state or local non-discrimination and affirmative action requirements of any laws, regulations and executive directives, and shall not discriminate in its employment practices against any employee or Applicant for employment because of race, color, religion, national origin, sex, age or disability.

Section 12 - Transfer of Control & General Rate Cases.

- (a) In the event that the Franchisee files for a Transfer of the Franchisee, or a general rate case with the PSC, it will furnish the City Manager or his designee with timely notice of such filing. In the event the Government should choose to intervene in such PSC action, the Franchisee shall not oppose such intervention.
- (b) No Transfer shall take place, whether by forced or voluntary sale, lease, mortgage, assignment, encumbrance or any other form of disposition, without prior notice to and approval by the Government which shall not be unreasonably refused, withheld, or delayed. The notice shall include full identifying particulars of the proposed transaction, and the Board of Commissioners shall act by resolution. The Government shall have one hundred twenty (120) days within which to approve or disapprove a transfer of control or assignment. If no action is taken within such one hundred twenty (120) days, approval shall be deemed to have been given.

- (c) Section 12(b) is not intended to apply to assignments to a parent, subsidiary or affiliate of the Franchisee, or in those instances in which the Franchisee has filed for a transfer of control before the PSC. Such inter-corporate transfers or transfers subject to the jurisdiction of the PSC shall require notice to the Government as provided in Section 12(a).
- (d) In making a determination on whether to grant an application for a Transfer, the Government may consider the financial, technical and other qualifications of the transferee (assignee) to operate the Telecommunications System, whether the incumbent Franchisee is in compliance with this Ordinance and, if not, the proposed transferee's (assignee's) commitment to cure such noncompliance and any other criteria allowed by applicable law.
- (e) The consent or approval of the Government to any Transfer of the Franchisee shall not constitute a waiver or release of the rights of the Government in and to the streets.

Section 13 - Franchise Duration.

- (a) The franchise hereby created shall be for a period of ten (10) years from the date of acceptance by the Government.
- (b) The franchise created by this Ordinance creates no vested rights in the Franchisee other than those provided by this Ordinance or at law, and any installation or placement of Facilities by the Franchisee in the Rights-of-way is at the Franchisee's risk.

Section 14 - Penalties.

- (a) If, after the Franchisee is provided the opportunity to appear and present evidence before the City Manager or his or her designee, the City Manager finds that the Franchisee has violated any of the following provisions of this Ordinance, the following penalties shall be recoverable. The decision of the City Manager or his or her designee shall be the final administrative decision and shall be in writing and provide the basis for the decision. The decision may be appealed to a court of competent jurisdiction.
 - (1) For failure to complete or remove any construction project by no later than the ending term of any franchise awarded pursuant to this Ordinance or any extension thereof, the Franchisee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues; in lieu of a penalty, the Franchisee may post a performance bond, letter of credit or

other surety acceptable to the Government in an amount sufficient to complete such construction projects. This section shall not apply to any projects for which performance bonds or other surety are already pledged.

- (2) For failure to provide data and reports requested by the Government and as required by this Ordinance the Franchisee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.
 - (3) For failure to pay a permit fee or franchise fee when due pursuant to local law, the Franchisee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.
- (b) If the Franchisee fails to comply within thirty (30) days of any Board of Commissioners resolution directing compliance with any other provisions of this Ordinance, the Franchisee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues. The decision of the Board of Commissioners may be appealed to a court of competent jurisdiction.
- (c) The Franchisee shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Franchisee's performance or to seek the Franchisee's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Ordinance. The right of the Government to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 16 of this Ordinance.

Section 15 - Maintenance of Telecommunications System.

The Franchisee shall maintain its Telecommunications System in a safe and reasonable operating condition at all normal times during the term of its Franchise. An exception to this is automatically in effect when Telecommunications Service furnished by the Franchisee is interrupted, impaired or prevented by fires, strikes, riots or other occurrences beyond the control of the Franchisee, or by storms, floods or other casualties, in any of which events the Franchisee shall do all things reasonably within its power to restore normal Telecommunications Service within a reasonable period of time.

Section 16 - Right to Terminate and Cancel the Franchise.

- (a) In addition to all other rights and powers pertaining to the Government by virtue of this Ordinance or otherwise, the Government, by and through its

Board of Commissioners, reserves the right to terminate and cancel the franchise and all rights and privileges of the Franchisee hereunder in the event that the Franchisee:

- (1) Willfully violates any provision of this Ordinance, the franchise or any material rule, order, or determination of the Government made pursuant to the franchise or any federal, state or local regulation, except where such violation is without fault or through excusable neglect or due to a force majeure act;
 - (2) Willfully attempts to evade any provision of this Ordinance or the franchise or practices any fraud or deceit upon the Government;
 - (3) Fails to begin or complete construction as provided under this Ordinance or the franchise;
 - (4) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the franchise; or
 - (5) Has its authority to provide Telecommunications Service in the City of Owensboro, Kentucky revoked by entry of a final and non-appealable order by the Public Service Commission of Kentucky.
- (b) The Government may make a written demand that the Franchisee do or comply with any such provision, rule, order or determination. The Franchisee will be provided the opportunity to appear and present evidence before the City Manager or his or her designee, whose decision shall be the final administrative decision, and shall be in writing and provide the basis for the decision. If the violation by the Franchisee continues for a period of thirty (30) days following such a decision by the City Manager or his or her designee without written proof that the corrective action has been taken or is being actively and expeditiously pursued by the Franchisee, the Government may place its request for termination of the franchise on the next regular Board of Commissioners meeting agenda. The Government shall cause to be served upon Franchisee, at least ten (10) days prior to the date of such Board of Commissioners meeting, a written notice of intent to request such termination and the time and place of the meeting and shall publicly notice the same.
- (1) It shall be a defense to any attempt to terminate and cancel the franchise that the Franchisee was relying on federal law, state law, or a valid tariff in acting or not acting on the issue in dispute.

- (2) The Board of Commissioners shall consider the request of the Government and shall hear any Person interested therein, and shall determine in its discretion, whether or not any violation by the Franchisee was with just cause.
- (3) If such violation by the Franchisee is found to have been with just cause, the Board of Commissioners shall direct the Franchisee to comply therewith within such time and manner and upon such terms and conditions as are just and reasonable within the Government's lawful authority.
- (4) If the Board of Commissioners determines such violation by the Franchisee was without just cause, then the Board of Commissioners may, by resolution, declare that the franchise of the Franchisee shall be terminated and forfeited unless there is compliance by the Franchisee within such reasonable period as the Board of Commissioners may fix. Any such determination by the Board of Commissioners is a final appealable action to a court of competent jurisdiction.

Section 17 - Foreclosure or Other Judicial Sale.

The Franchisee shall provide the Government, in the form and manner required by the appropriate court or judicial body, at least thirty (30) days advance written notice, if at all possible, of the foreclosure or other judicial sale of all or a substantial part of the Franchisee's Facilities within the City of Owensboro, or upon the termination of any lease covering all or a substantial part of its Facilities, and such notification shall be treated as a notification that a transfer or assignment of the franchise has taken place.

Section 18 - Government's Rights After the Appointment of a Receiver or Trustee.

The Board of Commissioners shall have the right to cancel a Franchisee's franchise thirty (30) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Franchisee, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said thirty (30) days, unless:

- (a) Within thirty (30) days after his election of appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and remedied all defaults thereunder; and,

- (b) Such receiver or trustee, within said thirty (30) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the franchise granted to the Franchisee.

Section 19 - Advertising for Bids.

It shall be the duty of the City Manager or his designee to offer the terms of this Ordinance to the public. In the event that additional interested bidders are identified or express an interest in obtaining a franchise after this initial offering, the additional offering and advertisement to accommodate such bidders is hereby authorized.

Section 20 - Bid Process.

- (a) Bids and proposals for the purchase and acquisition of the franchise hereby created shall be in writing and shall be delivered to the City Manager or his designee upon the date(s) and at the time(s) fixed by him or her in said advertisement(s) for receiving same. Thereafter, the City Manager shall report and submit to the Board of Commissioners, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval.
- (b) The Board of Commissioners reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise; and, in case the bids reported by the City Manager shall be rejected by the Board of Commissioners, it may direct said franchise and privilege to be again offered for sale, from time to time, until a satisfactory bid therefor shall be received and approved.
- (c) Each bid made by a Person not already holding a franchise within the territorial limits of the City of Owensboro sufficient to render the Telecommunications Service required by this Ordinance, shall be accompanied by cash or a certified check drawn on a bank of the Commonwealth of Kentucky, or a national bank, equal to five percent (5%) of the fair estimated cost of the Telecommunications System required to render the Telecommunications Service, which check or cash shall be forfeited to the Government in case the bid should be accepted and the bidder should fail, for thirty (30) days after the confirmation of the sale, to pay the price and to give a good and sufficient performance bond in favor of the Government in a sum equal to one-fourth (1/4) of the fair estimated cost of the Telecommunications System to be erected, conditioned that it shall be enforceable in case the Franchisee should fail, within one hundred eighty (180) days, to establish and begin rendering the Telecommunications Service in the manner set forth in this Ordinance. Upon rendering the initial

Telecommunications Service, this bond may be replaced by the performance bond required by Section 23(b), if applicable.

- (d) Bids shall include such documentation as is necessary to support the bidder's determination of the fair estimated cost of the Telecommunications System required to render the Telecommunications Service and compliance with all applicable state, federal and local statutes, ordinances and regulations. The Government reserves the right to review any of bidder's supporting documentation which justifies bidder's determination of the estimated cost and compliance with laws and regulations. In addition, each bid shall be accompanied by a non-refundable payment to the Government in the amount of two thousand dollars (\$2,000.00) to cover the Government's cost of advertising and other administrative expenses incurred.

Section 21 - Compensation.

- (a) As of the effective date of this Franchise, the City receives distributions in accordance with KRS 136.600 to 136.660 ("KRS Distributions"). Franchisee shall only be obligated to comply with this Section if the City opts to collect Franchise Fees instead of the KRS Distributions. If the City opts to collect Franchise Fees instead of the KRS Distributions, Franchisee agrees that the payment period for the first Franchise Fee payable under this Franchise shall commence ninety (90) days after the City provides notice to Franchisee and the Kentucky Department of Revenue that the City has opted to collect Franchise Fees instead of the KRS Distributions.
- (b) If the City opts to collect Franchise Fees, said Franchise Fees shall be in an amount equal to the greater of either (a) the Minimum Annual Franchise Fee; or (b) an amount equal to either five percent (5%) of Franchisee's Gross Revenues if Franchisee provides Telecommunications Service to Customers within the City of Owensboro or if Franchisee does not provide Telecommunications Service to Customers within the City of Owensboro, an amount equal to two dollars (\$2.00) per linear foot of Facilities plus three hundred dollars (\$300) per antenna or small cell.
- (c) Subject to applicable law and without prejudice to any rights Franchisee or City may have under federal and Kentucky law as they may be amended, Franchisee agrees to timely pay all of the fees applicable to Franchisee associated with generally applicable, non-discriminatory ordinances, including any future amendments.
- (d) Franchise Fees owed to the City pursuant to this Section shall be payable quarterly to the City and said payment shall be made to the City no later than forty-five (45) days after the close of the quarter. Upon

request, Franchisee shall file a complete and accurate report of all Gross Revenues received within the territorial limits of the City during the previous three-month period. The Gross Revenue report shall include: a schedule of Gross Revenue by category by month and a schedule of Gross Revenue upon which the Franchise Fee is based. Subject to Section 622 of the Cable Act and Kentucky law, the payment of the Franchise Fee shall be in addition to any other tax or payment owed to the City by Franchisee.

- (e) The City shall have the right to inspect Franchisee's relevant revenue records at a location convenient to the City and the right to audit and to re-compute any amounts determined to be payable under this Bid; provided, however, that such audit shall take place within twelve (12) months following the close of each of the City's fiscal years. If, as a result of such audit or review, the City determines that Franchisee has underpaid its fees to the City in any twelve (12) month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, and subject to applicable law, Franchisee shall reimburse the City for all of the reasonable costs associated with the audit or review, including costs for attorneys, accountants and other consultants. Any undisputed additional amount due to the City as a result of an audit or review shall be paid within the thirty (30) days following written notice to Franchisee by the City.
- (f) In the event that any Franchise Fee payment or recomputed amount is not made to the City on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of 2% over the prime interest rate.
- (g) No acceptance of any payment by the City shall be construed as an accord and satisfaction that the amount paid is in fact the release of any claim that the City may have for further or additional sums payable under this Bid and the Franchise granted pursuant to this Bid.
- (h) Franchisee's first Minimum Annual Franchise Fee payable under this Ordinance shall be paid to the Government forty-five (45) days after the City exercises its constitutional right to access Franchise Fees on Telecommunications Services. Such payment will be prorated for the remaining calendar year (rounded to the nearest month) through December 31. Thereafter, Franchisee shall pay each Minimum Annual Franchise Fee on or before April 15, and Franchisee's Minimum Annual Franchise Fee payment will apply to the current calendar year (January 1 through December 31). Any Minimum Annual Franchise Fee paid to the Government will be credited towards Franchisee's Franchise Fee for that calendar year. In order to avoid penalization, the Government will notify the Franchisee in writing at such time as it believes that it is allowed to assess franchise fees due to a change in the law. If the Government fails to notify the Franchisee, the Franchisee shall be

relieved of its obligation to any applicable penalty but shall still be obligated to pay any outstanding franchise fees.

- (i) Gross Revenue based Franchise fee payments to the Government shall be computed based on Franchisee's Gross Revenues from each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) and paid on or before the forty-fifth (45th) day following each calendar quarter period during the term of a franchise created under this Ordinance.
- (j) Facilities based Franchise Fee payments to the Government shall be computed based on Franchisee's linear foot of Facilities in the City of Owensboro as of January 1 of each calendar year and paid on or before April 15th of each calendar year during the term of a franchise created under this Ordinance.
- (k) Prior to making each payment to the Government, Franchisee shall file with the Government a written report containing an accurate statement in summarized form, as well as in detail, of its calculation of the amount of the payment, verified by an officer or other authorized representative of Franchisee, setting forth its Gross Revenues according to their accounting subdivisions, and any deductions claimed for the period upon which the payment is computed. Such reports shall be in form satisfactory to the Government.
- (l) The Government reserves the right to require the Franchisee to collect any consumer or other tax or other fee that may be imposed by the Government, the Commonwealth of Kentucky, or the federal government on Telecommunications Services. Nothing in this Ordinance prohibits Franchisee from passing the Franchise Fee along to its customers, so long as that is not otherwise prohibited by law.
- (m) Notwithstanding any other provision of this Ordinance, the Franchisee shall be required to pay the Government an amount intended to adequately compensate it for its permitting and inspection of the Franchisee's construction activities in the Rights-of-way pursuant to the Code and all attorney's fees that the Government may incur relating to the franchising process, including but not limited to any attorneys' fees incurred relating to granting of the franchise and any transfer, renewal or modification of the franchise.

Section 22 - Additional Requirements.

In addition to all other requirements, and except to the extent prohibited by law, any Franchisee not already owning Facilities within the Rights-of-way sufficient to render Telecommunications Services within the City of Owensboro, or any Franchisee that is required pursuant to law to file for a certificate of convenience and necessity from the Kentucky Public Service Commission in order to replace or significantly upgrade or expand a substantial portion of its existing Facilities within the Rights-of-way, shall also be required to perform the following requirements during the construction, replacement, upgrade or expansion of its Telecommunications System unless the Board of Commissioners determines that any or all of such requirements are not necessary to adequately protect the interests of the Government:

- (a) In addition to obtaining any and all permits required pursuant to the Code, the Franchisee shall submit for the Government's approval a comprehensive schedule of construction of its Telecommunications System no later than one (1) month after the Government's acceptance of the Franchisee's bid. The schedule shall include sufficient detail for Government to determine the time and locations of construction activities and shall also depict the anticipated time frame of identifiable tasks required for construction purposes, as delineated by the Government. No construction related activities may be conducted in the Rights-of-way until the schedule is approved by the Government. In addition, at thirty (30) day intervals during construction, the Franchisee shall provide the Government with a plan of construction activities setting forth a general description of the activities to be undertaken during the following thirty (30) days and designating the geographical area of the City of Owensboro that will be affected. Approval by the Government of these plans shall constitute a condition which must be met prior to undertaking any construction activities.
- (b) The Franchisee shall furnish traffic control plans, including site-specific hours of construction, to the Government no later than seven (7) days prior to the commencement of any construction activities. Such plans are subject to approval or modification by the Government. No construction related activities may be conducted in the Rights-of-way without an approved traffic control plan.
- (c) The Franchisee shall provide the Government a local telephone contact number, staffed twenty-four (24) hours per day, to enable the Government to report any concerns regarding construction of the Telecommunications

System. In the event that the Government reports any concerns to the Franchisee, the Franchisee shall respond within a reasonable time as specified by Government or as specified elsewhere in this Ordinance. The Franchisee shall perform the required repair or correct any adverse impact to Government's use or operations or the use or operations of a third party caused by the Franchisee's construction activities in the Rights-of-way at no cost to the Government.

- (d) Fourteen (14) days prior to commencement of construction, and every thirty (30) days thereafter during construction, the Franchisee shall publish, at its sole cost, a notice in the *Messenger-Inquirer* containing a map depicting where construction will occur. Additionally, such notice shall provide a general description of construction activities and a telephone number to be called by citizens with questions concerning construction activities. A copy of said notice(s) shall be provided to the Government.
- (e) The Franchisee shall provide at least fourteen (14) days' notice to other utilities in the City of Owensboro of its interest in seeking construction permits to open the street before it applies for any street cut permit. The Government shall provide the Franchisee with a listing of all such utilities and their points of contact upon request. Such notice shall inform the other utility companies of the Franchisee's intent to undertake construction in the affected areas and state that the other utility companies must notify the Government and the Franchisee within seven (7) days of receipt of such notice of their desire to simultaneously lay conduit, or other Facilities, in any trench opened by the Franchisee.
- (f) Failure to comply with the above provisions, or the Code may, in the sole discretion of the Government:
 - (1) Be the basis for the Government to reasonably require that the Franchisee perform more extensive restoration work than otherwise anticipated by a permit; and
 - (2) Result in the Franchisee being assessed an additional premium on any permit fee to recoup any additional costs or expenses reasonably associated with the Franchisee's failure.
- (g) Unless otherwise provided an extension by the Board of Commissioners, the Franchisee must make Telecommunications Services available within the City of Owensboro within one year from the date of the award of the franchise. This requirement shall not apply to a Franchisee that does not

provide, or has no intention of providing, any Telecommunications Services to the City of Owensboro Customers.

- (h) The Franchisee shall maintain accurate Telecommunications System design drawings, maps and improvement plans of the Telecommunications System, in a form acceptable to the Government, in a manner consistent with industry construction standards. The Franchisee shall furnish the Government, without charge, with a complete set of "as-built" drawings within sixty (60) days of completion of construction of the Telecommunications System. Such maps and improvement plans shall also be furnished to Government in digital form and shall be provided pursuant to a lawful protective agreement.

Section 23 - Letter of Credit and Performance Bond.

In addition to all other requirements, and except to the extent prohibited by law, any Franchisee not already owning Facilities within the Rights-of-way sufficient to render Telecommunications Services within the City of Owensboro, shall also be required to perform the following requirements during the construction of its Telecommunications System unless the Board of Commissioners determines that any or all of such requirements are not necessary to adequately protect the interest of the Government:

- (a) Within ten (10) days after the award of a franchise pursuant to this Ordinance, the Franchisee shall deposit with the Government a one-year irrevocable renewable letter of credit from a financial institution acceptable to the City of Owensboro in the amount of fifty thousand dollars (\$50,000.00). The form and content of such letter of credit shall be approved by the Government. The letter of credit shall be used to ensure the faithful performance by the Franchisee of all provisions of this Ordinance; and compliance with all orders, permits and directions of any agency, commission, board, department, division or office of the Government having jurisdiction over its acts or defaults under this Ordinance; and the payment by the Franchisee of any claims, liens and taxes due the Government which arise by reason of the construction, operation or maintenance of the Telecommunications System.
 - (1) The letter of credit shall be maintained at fifty thousand dollars (\$50,000.00) during the entire term of Franchisee's franchise, even if amounts have to be withdrawn pursuant to this section.
 - (2) If the Franchisee fails to pay to the Government any compensation within the time fixed herein; or, fails, after ten (10) days' notice to pay to the Government any taxes due and unpaid; or, fails to repay the

Government, within such ten (10) days, any damages, costs or expenses which the Government is compelled to pay by reason of any act or default of the Franchisee in connection with its franchise; or, fails, after three (3) days' notice of such failure by the Government to comply with any provision of its franchise which the Government reasonably determines can be remedied by demand on the letter of credit, the Government may immediately request payment of the amount thereof, with interest and any penalties, from the letter of credit. Upon such request for payment, the Government shall notify the Franchisee of the amount and date thereof.

- (3) The rights reserved to the Government with respect to the letter of credit are in addition to all other rights of the Government and no action, proceeding or exercise of a right with respect to such letter of credit shall affect any other right the Government may have.

- (4) The letter of credit shall contain the following endorsement:

"It is hereby understood and agreed that this letter of credit may not be cancelled by the surety nor the intention not to renew be stated by the surety until thirty (30) days after receipt by the Government, by registered mail, of a written notice of such intention to cancel or not to renew."

- (b) If necessary, after the initial service requirement is met and the bonds required by Section 8 and Section 23 of this Ordinance no longer protect the Government, the Government may require the Franchisee to file with the Government a performance bond in the amount of Five Hundred Thousand Dollars (\$500,000.00) in favor of the Government. This bond shall be maintained throughout the construction period. In lieu of the above-mentioned performance bond, the Franchisee may deposit with the Government an irrevocable letter of credit from a financial institution acceptable to the City of Owensboro in the amount of Five Hundred Thousand Dollars (\$500,000.00). The form and content of such letter shall be approved by the Government.

- (1) In the event the Franchisee fails to comply with the Code or any law, Ordinance or regulation governing the franchise, or fails to well and truly observe, fulfill and perform each term and condition of this Ordinance or the franchise, including the Franchisee's application (as required in Section 4), there shall be immediately recoverable, jointly and severally, from the principal and surety of the bond or the letter of

credit, any damages or loss suffered by the Government as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of the Franchisee, plus a reasonable allowance for attorney's fees, including the Government legal staff, and costs, up to the full amount of the bond.

- (2) Upon completion of construction the Franchisee's initial service area the requirement of this additional performance bond shall be waived.
- (3) The bond or letter of credit shall contain the following endorsement:

"It is hereby understood and agreed that this bond [letter of credit] may not be cancelled by the surety nor the intention not to renew be stated by the surety until thirty (30) days after receipt by the Government, registered mail, of a written notice of such intention to cancel or not to renew."

- (4) The rights reserved to the Government with respect to the performance bond or letter of credit are in addition to all other rights of the Government, and no action, proceeding or exercise of a right with respect to such performance bond or letter of credit shall affect any other right the Government may have.

Section 24 - Discontinuing Use of Facilities.

If Franchisee decides to discontinue use of Facilities within all or a portion of the Streets and does not intend to use those Facilities again in the future, the Government may direct Franchisee to remove the Facilities or may permit the Facilities to be left in place as abandoned, which permission shall not be unreasonably withheld or delayed. If Franchisee is permitted to abandon its Facilities in place, upon written consent of the Government, the ownership of Facilities in the Government's Streets shall transfer to the Government and Franchisee shall have no further obligation therefor. Notwithstanding Franchisee's request that any such Facility remain in place, the Government may require Franchisee to remove the Facility from the street area or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The Government may require Franchisee to perform a combination of modification and removal of the Facility. Franchisee shall complete such removal or modification in accordance with a reasonable schedule set by the Government. Until such time as Franchisee removes or modifies the Facility as directed by the Government, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, Franchisee shall be responsible for all

necessary repairs and relocations of the Facility, as well as restoration of the Street, in the same manner and degree as if the Facility were in active use, and Franchisee shall retain all liability for such Facility.

Section 25 - Offers of Payment.

Bids offered for purchase of a franchise pursuant to this Ordinance shall state the bidder's acceptance of the conditions set forth in this Ordinance. If any bid shall include an offer of payment over and above the terms of the franchise, then a certified check for said amount, payable to the City of Owensboro, shall be deposited with the Government. This amount shall be in addition to the provision for any payments contained in Sections 20 and/or 21 of this Ordinance.

Section 26 - Forfeiture.

Any violation by the Franchisee or successor or authorized Franchisee representative of the provisions of this Ordinance or any material portions thereof, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of its franchise and all rights hereunder after written notice to the Franchisee and continuation of such violations, failure or default, as set forth herein.

Section 27 - Governing Law.

This Ordinance and any franchise awarded pursuant to it shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. The venue for any litigation related to this Ordinance or any franchise shall be in the court of competent jurisdiction in Daviess County, Kentucky.

Section 28 - Non-enforcement by the Government.

Franchisee shall not be relieved of its obligations to comply with any of the provisions of this Ordinance by reason of any failure of the Government to enforce prompt compliance, nor does the Government waive or limit any of its rights under this Ordinance by reason of such failure or neglect.

Section 29 - Agent.

The Franchisee shall designate in writing a local agent to oversee and manage all activities required pursuant to this Ordinance and to accept service of any legal proceeding initiated by the Government.

Section 30 - Third Parties.

This Ordinance and any franchise awarded pursuant to it does not create a contractual relationship with or right of action in favor of a third party against either the Government or the Franchisee.

Section 31 – Erection, Removal and Common Uses of Poles

(a) Franchisee shall not erect or authorize or permit others on its behalf to erect any Poles except when absolutely necessary to provide Telecommunications Service. Poles may not be erected by the Franchisee when other Poles are available on reasonable terms and conditions. Terms and conditions which comply with applicable State and/or Federal regulations shall be deemed reasonable. No Poles, Towers, or Support structures shall be erected by the Franchisee without prior approval of the Government with regard to need, location, height, type, and any other pertinent aspect. However, no location of any Poles, Towers, or Support structures of the Franchisee shall be a vested interest and such Poles, Towers, or Support structures shall be removed or modified by the Franchisee at its own expense whenever the Government determines that the public health, welfare and/or safety would be enhanced thereby.

(b) Where Poles, Towers, or Support structures already existing for use in serving the City of Owensboro are available for use by the Franchisee on reasonable terms and conditions, but it does not make arrangements for such use, the Government may require the Franchisee to use such Poles, Towers, or Support structures (with the consent of the Pole owner) for reasonable and proper consideration consistent with applicable law or place its facilities underground if it determines that the public health, welfare and/or safety would be enhanced thereby and if such use would not unduly interfere with Franchisee's operations.

Section 32. Aesthetic standards.

Unless otherwise approved by the City in order to prevent an effective prohibition of service in accordance with federal regulations, as applicable, no Person shall locate or maintain a Facility, Pole, Tower, or Support structure, except in accordance with the following design standards:

- (a) All Facilities shall be located and designed so as to minimize visual impact on surrounding properties and from Rights-of-way.
- (b) All new or replacement Poles, Towers, or Support structures placed in the Right-of-way shall be the same color, shape, material, and general height as those existing Poles, Towers or Support Structures adjacent to the location of the new or replacement Pole, Tower, or Support structure.
- (c) All coaxial, fiber-optic, or other cabling and wires shall be contained inside any new or replacement Tower, Pole, or Support structure. On existing Poles, Towers, or Support structures, or new wooden Poles, where it is impossible to

place wiring inside the Pole, Tower or Support structure, all coaxial, fiber-optic, or other cabling and wires shall be flush-mounted and covered with a metal, plastic, or similar material matching the color of the Pole, Tower or Support structure. All coaxial, fiber-optic, or other cabling and wires shall be contained inside any new Tower, Support structure or Pole placed in the Right-of-way.

- (d) No Tower shall be placed in the Right-of-way within two hundred fifty (250) feet on the same street of an existing Tower. Replacing an existing Tower with a Tower, or a lighted Pole with another lighted Pole housing Wireless facilities, in the same location shall not violate this provision.
- (e) All new Towers, Support structures and Poles should be located on the same side of the street as existing Towers, Poles, or Support structures. However, this does not preclude an applicant from locating its Wireless facilities on existing lighted Poles under a decommissioning agreement in which the applicant takes ownership of the lighted Pole.
- (f) The centerline of any new Pole, Support structure or Tower shall be aligned with the centerline of adjacent Poles or trees, unless the new structure's height conflicts with overhead power utility lines. Replacing an existing Pole, Support structure, or Tower with another Pole, Support structure, or Tower in the same location shall not violate this provision.
- (g) All new Poles, Towers, Support Structures or Facilities proposed to be fronting a dwelling shall be placed on property lines, unless it would obstruct sight distance at driveways or other accesses to roadways. In those instances where placement of a new Pole, Support structure, Tower, or Facilities on the property line would obstruct sight distance, the Pole, Support Structure, Tower, or Facilities shall be placed in such a location as to prevent the obstruction of sight distance at driveways or other accesses to roadways. Replacing an existing Pole, Support structure, Tower or Facility with a Pole, Support structure, Tower, or Facility in the same location shall not violate this provision.
- (h) New Poles, Support Structures, Towers, or Facilities shall not be placed in front of store front windows, walkways, entrances or exits, or in such a way that would impede deliveries. Replacing an existing Pole, Support structure, Tower, or Facility with a Pole, Support structure, Tower, or Facility in the same location shall not violate this provision.
- (i) No new Poles, Support Structures or Towers shall be placed in front of driveways, entrances, or walkways. Replacing an existing Pole, Support structure, or Tower with a Pole, Support Structure, or Tower in the same location shall not violate this provision.
- (j) No applicant shall locate or maintain a Pole, Support structure, Tower, or equipment associated with a Wireless facility, as to interfere with the health of a tree.
- (k) In areas where the undergrounding of utilities has occurred, but lighted Poles are present, the applicant shall locate its Wireless facilities on existing lighted Poles or seek to decommission the lighted Pole to replace it with a lighted Pole to house its Wireless facilities. Before locating its Wireless facilities on existing lighted

Poles or seeking to decommission the lighted Pole, the applicant must enter into an agreement to do so with the Pole owner.

- (l) If the applicant elects to decommission an existing lighted Pole in order to install a Wireless facility in its location pursuant to subsection (k), the applicant shall comply with this Ordinance, including these aesthetic standards, and any decommissioning agreement between the applicant and the City and/or the Pole owner.
- (m) In those locations where the undergrounding of utilities has occurred, all Facilities shall be placed underground.
- (n) No equipment associated with any Facility shall impede, obstruct, or hinder ADA access, or pedestrian or vehicular access, or block driveways, entrances, or walkways. The installation of new ground furniture is prohibited.
- (o) To protect the health and safety of the public from the harms of noise pollution, all Facilities shall have a low noise profile.
- (p) Within twenty-one (21) calendar days from the date the operator receives notice thereof, operator shall remove all graffiti on any of its Facilities located in the Right-of-way.
- (q) All Facilities, Poles, Towers, and Support structures shall comply with such additional design standards as may be set forth in any written policies or guidelines issued by the City.
- (r) All Poles, Towers, Support structures, and other lines and equipment installed or erected by any Person under this Ordinance shall be located so as to minimize any interference with the proper use of the Right-of-way with the rights and reasonable convenience of property owners whose property adjoins or abuts any affected Right-of-way. Subject to applicable codes, overhead drops shall be as close as possible to other utility drops in order to concentrate the drops in as small an area as possible to minimize visual clutter and interference with the use of private property.

Section 33 - Severability.

If any section, sentence, clause or phrase of the Ordinance is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the Ordinance.

Section 34 - Effective Date of Franchise.

The franchise created by this Ordinance shall become effective when the bid for it is accepted by the Board of Commissioners.

Section 35- Effective Date of Ordinance.

This Ordinance shall become effective upon its legal adoption and publication in the manner prescribed by statute.

INTRODUCED AND PUBLICLY READ ON FIRST READING, this 3rd day of May
2022.

PUBLICLY READ AND FINALLY APPROVED ON SECOND READING, this 17th
day of May 2022.



Thomas H. Watson, Mayor

ATTEST:



Beth Davis, City Clerk

EXHIBIT "B"

MUNICIPAL ORDER 06-2023

A MUNICIPAL ORDER AWARDING A NON-EXCLUSIVE FRANCHISE FOR A TERM OF TEN (10) YEARS FOR A TELECOMMUNICATIONS SYSTEM TO OPENFIBER KENTUCKY COMPANY, LLC.

WHEREAS, by Ordinance 10-2022, the City of Owensboro created a ten (10) year, non-exclusive franchise for a telecommunications system within the City; and

WHEREAS, the City of Owensboro offered at bid a non-exclusive telecommunications franchise pursuant to Ordinance 10-2022; and

WHEREAS, after publication of said advertisement, the City of Owensboro received a bid from OpenFiber Kentucky Company, LLC (“OFKY”).

**NOW, THEREFORE, BE IT ORDERED BY THE CITY OF OWENSBORO,
KENTUCKY, AS FOLLOWS:**

Section 1. The Board of Commissioners hereby awards a ten (10) year, non-exclusive telecommunications franchise to OFKY.

Section 2. All prior ordinances or orders, or parts thereof in conflict herewith, are to the extent of such conflict, hereby repealed.

Section 3. The Mayor is hereby authorized and directed to execute the Franchise Agreement with OFKY. The Franchise Agreement is attached as Exhibit A.

Section 4. The Mayor, City Manager and other appropriate staff members are hereby authorized to sign any and all other agreements, instruments or documents deemed necessary in furtherance of the authority outlined herein.

**INTRODUCED, PUBLICLY READ AND FINALLY APPROVED ON ONE
READING**, this the 17th day of January, 2023.

Thomas H. Watson, Mayor

ATTEST:

Beth Davis, City Clerk