

**CITY OF ELSMERE, KENTUCKY
ORDINANCE 1807-2021**

AN ORDINANCE GRANTING AND ISSUING A COMPETITIVE, NON-EXCLUSIVE FRANCHISE FOR A COMBINED TERM OF TEN (10) YEARS TO, AND AUTHORIZING THE EXECUTION OF THE FRANCHISE AGREEMENT WITH, CINCINNATI BELL EXTENDED TERRITORIES LLC, ITS PERMITTED SUCCESSORS OR ASSIGNS, PROVIDING FOR THE CONSTRUCTION, ERECTION, INSTALLATION, UPGRADE, MAINTENANCE, REPAIR AND OPERATION OF A CABLE TELEVISION SYSTEM FOR THE PROVISION OF CABLE TELEVISION SERVICES IN THE CITY OF ELSMERE, ALL UPON THE TERMS, CONDITIONS AND COVENANTS CONTAINED IN THE FRANCHISE AGREEMENT.

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 (KRS 65.210 - 65.300), and is authorized to exercise jointly the powers of the respective TBNK Member Governments relating 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**”); and

WHEREAS, Cincinnati Bell Extended Territories LLC, a wholly-owned subsidiary of Cincinnati Bell Inc. (“**CBET**”) and the present holder of several nonexclusive, competitive Franchise Agreements, each dated as of January 1, 2009 (the “**Prior Franchise(s)**”), providing for cable television 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 television system and related facilities along, under, over, above, through or across the streets and rights-of-way within the Franchise Areas; 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, CBET’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 CBET substantially complied with the material terms and conditions of the Prior Franchises under applicable law; (4) considered and determined that CBET has the financial, technical and legal qualifications to own and operate its cable system and to provide cable services over the cable

system; and (5) determined that CBET'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 cable television franchise proposal offered by CBET (often referred to as the Bell Alternative Franchise Agreement or CBET Counterproposal), as modified 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 LLC; and (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; 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 received from the Mission Group/Ad Hoc 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, operation, maintenance and repair 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 television services; and

WHEREAS, in response to such advertisement, the Board received prior to 2:00 PM on August 17, 2021 (the time and date by which all bid proposals and applications were to be received), a single bid proposal and application from CBET (the "**CBET Bid Proposal**") and no other person or entity, together with a form of a franchise agreement dated as of June 1, 2021, which franchise agreement and CBET Bid Proposal had been submitted to the Franchise Negotiations Committee and the members of the Board for consideration (the "**CBET Franchise Agreement**"); and

WHEREAS, after (1) having considered the CBET Bid Proposal, including the accompanying CBET Franchise Agreement, and (2) having made a comparison and evaluation of the aforesaid documents vis-à-vis the Proposed Franchise Agreement, the Board (1) determined that the CBET Bid Proposal and the terms, conditions and covenants of the CBET Franchise Agreement submitted by CBET are identical to the terms, conditions and covenants contained in the Proposed Franchise Agreement in all material respects, and (2) 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 CBET 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, and based upon the foregoing recitals and the City's acceptance of such recitals, the City desires to: (1) accept the CBET Bid Proposal, including the CBET 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 CBET, for a combined Term of ten (10) years, providing for the continued ownership, construction, installation, upgrade, operation, and maintenance 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 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, CBET is hereby granted for itself and its permitted successors and assigns, a franchise, in complete form and substance of the Proposed Franchise Agreement, and with the following rights and privileges set forth herein and therein:

(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) and such other provisions of the Proposed Franchise Agreement 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, CBET, 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 CBET to provide Cable Service.

SECTION II

The franchise granted in this Ordinance is not exclusive. The City expressly reserves the right to grant to other Persons such rights, privileges, or authorizations that are similar to the rights and privileges herein set forth 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 CBET 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 of the Proposed Franchise Agreement (Duration and Acceptance of Franchise).

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 CBET, 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. CBET 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 CBET 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, 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

By: _____

D. MARTY LENHOF, MAYOR

1st Reading – October 12, 2021

2nd Reading – November 9, 2021

Ayes: 5 Nays: 0 Abstain: 0

ATTEST:

Misty Ezell

Misty Ezell, City Clerk



Telecommunications Board of Northern Kentucky



SUMMARY OF RENEWED CABLE FRANCHISE BETWEEN TBNK AND CINCINNATI BELL FIOPTICS

A. Main Provisions:

1. **TERM OF FRANCHISE** - The initial term of this Franchise shall be from the date of the Effective Date for a period of five (5) years (the "Initial Term"). At that point, the Franchise shall be automatically renewed for an additional five (5) year period (the "Renewal Term"), unless six (6) months prior written notice is given by the Grantor or Grantee that either Party does not wish to exercise the automatic renewal.

If either Party chooses not to automatically renew this Franchise, then at the end of the Initial Term, Grantee's ability to provide Cable Services under this Franchise shall continue on a month-to-month basis - provided that, in such event, Grantee demonstrates earnest efforts towards good faith negotiations to arrive at a mutually agreeable franchise. In the event, however, the Parties are unable to arrive at a mutually agreeable franchise prior to the six (6) month period, which begins with the thirty-sixth (36) month before the expiration date of the Renewal Term, either Party may initiate federally outlined formal and informal franchise renewal proceedings under Section 626 of the Cable Act (47 U.S.C. §546) by providing written notice to the other Party of its intent.

2. **FRANCHISE FEE** - The **Franchise Fee is set at the same five percent (5%)** of the Gross Revenues derived from the operation of Grantee's Cable System, as it has been in the past franchise.
 - a. **PAYMENT OF MULTICHANNEL VIDEO PROGRAMMING SERVICES TAX - OR FRANCHISE FEES** - We added provisions to make clear that the cities/county can (and that most cities have) opt-out of the Hold Harmless distribution fund managed by the Kentucky Revenue Department and instead collect franchise fees directly from the cable operator.
 - i. We also reserved the right for cities/county to opt-back-into the distribution fund in the future and receive their local historical Hold Harmless distribution amount, as opposed to receiving direct franchise fee payments from Cable Operators, should they believe it would be advantageous to do so.
 - b. **OPT-OUT and IN - LIMITATION ON TRANSITIONS** - Both Parties agree that the number of times that the cities/county can Opt-In and Opt-Out of the Distribution Fund is limited to a total of three (3) times during the Term of this Franchise Agreement. Bell agrees to cooperate in good faith with the cities/county in making any such Opt-Outs or Opt-Ins to the Distribution Fund.

3. **POLICE POWERS** – Cincinnati Bell originally offered a provision that was weak on protections for the cities. The Mission Group, wanted strong protection for police powers. After further negotiation and some give and take on both sides, we believe this provision, along with the core Rights of Way provisions contained in this agreement, will give our cities and the county what they need. We also tied this provision to Kentucky Statutes on “home rule” and noted its power to enact laws or ordinances addressing rights-of-way and other subjects or topics that are within the jurisdiction of said cities/county. **Specifically, in the case of a conflict between a provision in the franchise and any adopted Rights of Way law or ordinance currently in place, the law or ordinance would prevail. Municipalities may also adopt any future Rights of Way ordinance, but any specific provisions in such a future ordinance that are also addressed in the franchise would be resolved in favor of the franchise.** *Between being able to enforce any existing ordinance in its entirety, and the core Rights of Way provisions included in the Franchise Agreement, along with the ability to adopt any future ordinance, the cities should be able to fully exercise their police powers, with these few Right of Way provisions being agreed to as limits on just those specific items for any future ordinances.*
4. **RELIEF FROM THIS FRANCHISE** – Subsection B of this provision was straight forward, and is a fair concept designed to maintain a level playing field, which requires that if we offer any more favorable terms to a competing Cable Service, then those terms shall also be simultaneously extended to the Bell, upon their written request. This is a standard enough provision, and one that we have agreed to before.

Subsection C is an expanded concept which deals with the idea that we shall not unreasonably refuse to grant relief requested by Cincinnati Bell related potentially to a broader group of possible competing multi-channel services. The parameters of this subsection and the services that might be applicable have changed as we negotiated the draft. This is a provision that we wanted to be careful with.

As it was first presented by Bell, this provision could also potentially be interpreted to mean that we might have to match the terms under which any video streaming service (such as Netflix, or Hulu) currently operates. We are not comfortable with the idea of matching terms of an entity - even those that are not subject to regulation by us - for whom we did not and cannot currently provide any terms. Also, Netflix is not a multi-channel service, but rather more of a library of On Demand video titles – much like a virtual video rental store. By contrast, a multi-channel service would have to have multiple channels of live programming 24/7 – much like Cable TV.

Cincinnati Bell insisted that they could not sign an agreement without some version of this provision being included. So after some back and forth on language, the final version of this language removed the reference to Netflix or any specific streaming service. This is closer to the version that has been in the original 2009 franchise.

It now references several other types of video services along with “virtual multichannel video distributors” – not just any or every kind of streaming service. It also focuses specifically on a competing “multi-channel service” as the potential service in question.

More importantly it says that any such competing “*multi-channel service*” would be “*franchised as provided in the Cable Act,*” so the service would have to fall under the franchise conditions of the federal law. No video streaming service, nor satellite service, nor any other multi-channel service – other than Cable TV – currently falls into this category.

In the final version Bell also agreed to add language that says that we “*shall take into consideration all of the circumstances in existence at the time, including, but not limited to, Applicable Law that might stipulate different levels of requirements applicable to different multi-channel service providers.*” This allows us to weigh other aspects of the law with or against possible advantages and disadvantages related to such a request, as well as limits that the law might place on the Grantor for regulating different types of providers, including advantages that the law might provider different types of providers.

5. **REQUIRED SERVICES AND FACILITIES – PEG ACCESS** (Public, Educational & Government Access) – We negotiated a few modifications to the PEG Access provisions, as outlined below:

- i. **NKU Access Channel** — TBNK had offered the release of this channel, as NKU has been doing less with it, but the Mission Group had requested that such channel be restored, which Bell agreed to incorporate back into the renewed franchise.
- ii. The new agreement also **retains the other six (6) local PEG channels for Public, Educational, and Governmental use.**
- iii. **PEG Channels can be provided in HD** – The new agreement states that HD PEG channels will be provided to the cities/county if HD PEG channels are provided to other communities located in Northern Kentucky. Since Bell has provided Campbell County and their participating cities with HD PEG channels, our cities/county will be provided the same.
- iv. **No PEG Support Fees** – Our cities/county said that they do not wish to require cable operators to charge subscribers a monthly PEG Support Fee of 25 cents, so that PEG Support has been eliminated.
- v. **Release of Return Lines from City/County Buildings** – A 2019 FCC Order, which was recently and mostly upheld on appeal at the 6th Circuit Appeals Court, permits cable operators to charge cities/county for the cost of maintenance and upkeep of those lines. **TBNK has agreed to give them up (even if the FCC Order is vacated), as TBNK is now streaming live meetings of the cities/county back to TBNK for distribution downstream over the PEG Access channels.**
- vi. **Complimentary Cable Service** – An FCC Order also allows cable operators to charge cities/county for such free cable service and/or offset that charge against franchise fees due under the franchise. **We developed a provision that provides for continuation of free cable service if the FCC Order is reversed by what will be a newly re-constituted FCC, which is re-considering the order.** However, if the FCC Order is not reversed, then the cable operator is required to give notice and allow the cities/county an opportunity to decide if they want to (a) continue receiving such service but pay for it directly or allow the cable operator to offset the charge against franchise fees or (b) cancel the service.

6. **CUSTOMER SERVICE OBLIGATIONS** – Requires compliance with all the customer service standards or obligations specified by FCC Regulations. Instead of listing the contents of those regulations in the body of the agreement, the Franchise references the FCC standards. This streamlined the document and allows the provision to adapt as the standards may be amended from time to time by the FCC. (The same approach of referencing FCC regulations was taken in regards to compliance with FCC technical standards, as well as Electrical Safety Codes.)
7. **USE OF STREETS (& Rights-of-Way)** – The original draft of the Bell Alternative Franchise contained few rights-of-way provisions as compared to the presently existing Bell 2009 Franchise Agreement or the TBNK Franchise submitted to Cincinnati Bell last fall. Per instructions of the Mission Group, we kept to a more streamlined approach for these rights-of-way provisions in our reply draft. However, we did negotiate some modifications to a few of Bell's provisions in this final draft and **added the following to provide some basic core protections for cities that presently do not have much of anything on the books:**
- i. The Franchise requires Bell to construct, remove, operate and maintain its Cable System in a manner consistent with:
 - a. all Applicable Laws,
 - b. good engineering practices and construction standards
 - ii. Specifically, it also requires compliance with:
 - a. National Electrical Safety Code (National Bureau of Standards);
 - b. National Electrical Code (National Bureau of Fire Underwriters);
 - c. Applicable FCC or other federal, State and local regulations including Technical Standards; and
 - d. Applicable local permits and ordinances.
 - iii. Requires cable pedestals to be located on the far side of a homeowner's lot and not in the middle of the lot;
 - iv. Permits cables and lines to be installed above ground in areas where telephone and electric lines are above ground; however, the cities/county may require such cables and lines to be placed underground at a later date (or follow any regulations that any specific city presently has adopted);
 - v. All new cables and wires shall be installed, where possible, parallel with electric and telephone lines.
 - vi. Permits cities/county to repair streets damaged by the cable operator and to bill or invoice the cable operator for costs incurred in making the repairs.
 - vii. Permits cities/county to remove cable lines and equipment in emergency situations and not be liable for damages.
 - viii. Authorizes cable operator to trim trees but such trimming must follow any applicable ordinance(s) and the cable operator must submit a trimming plan for prior approval.

This was done to provide some or limited protection for those smaller cities that do not have in place, or fail to develop and adopt, rights-of-way ordinances or regulations. As provided in Section B.1 above, the use of streets and rights-of-way still fall under the "police powers" of the cities/county.

8. **SOVEREIGN IMMUNITY** – The original Bell Alternative Franchise did not contain such a provision and, as directed by the Mission Group, we added a sovereign immunity provision which provides that none of the cities/county waive any tort or other immunity they may have by law.
9. **TRANSFER OF OWNERSHIP OR CONTROL** – Prior express written approval by the City/County and the TBNK is required before any change in Control of the Franchise or the Cable System may occur and before the Franchise or any rights, interest or obligations of the Grantee (Bell) in the Cable System or assets of the Cable System can be sold, assigned, transferred, or disposed of. Any such changes also must be in compliance with Applicable Law.

B. Other Streamlining and Concessions Provided in the Agreement:

In previous negotiations with Charter Communications, we offered multiple concessions to streamline the prior franchise agreement with Charter/Insight [about 90 pages in length]. Subsequently, we offered the same concessions to Cincinnati Bell and, these are reflected in this new Bell Renewed Franchise. The concessions consist of the following:

1. Bond Amount - Reduced bond amount from \$500,000 to \$300,000;
2. Liquidated Damages - Eliminated liquidated damages provision – this provision provided an amount that was to be paid by the cable operator for various breaches of the franchise agreement. We had never utilized this provision in the past and, if we had, the cities/county would have been sued;
3. Customer Service Centers - Reduced the number requirement for customer service centers, as the FCC Regulations only requires a cable operator to offer a service center which is conveniently located to the franchise area. In the prior franchise agreements, we once required up to a total of three service centers;
4. Return Feeds – As noted above, we have eliminated such feeds;
5. Customer Services Standards – Eliminated multiple pages of such standards from the franchise agreements, but require the cable operator to comply with the service standards contained in the FCC Regulations;
6. Technical Standards for Cable System – As noted above, significantly reduced provisions addressing compliance with technical standards set forth in the franchise agreements, but require the cable operator to comply with technical standards set forth in the FCC Regulations;
7. No Interconnection – In prior franchise agreements, we had required the cable operators to interconnect their cable systems in the franchise area. This was eliminated as we can accomplish our PEG programming without such interconnection;
8. Insurance Policy Increases – Eliminated the provision that allowed cities/county to require the cable operator to increase insurance coverage amounts;
9. Extension of Cable System – Eliminated requirement procedures and cost sharing on line extensions; and

10. Cable System Requirements – Streamlined provisions that addressed the type and character of the cable operator’s cable system. Since there is competition in our cities/county, we eliminated such provisions as we believe competition will drive the cable operators to offer better and improved cable systems and programming.
11. Rights-of-way – In prior franchise agreements, rights-of-way provisions were comprehensive and detailed, we have since streamlined such provisions per instructions received from the Mission Group, but with the understanding that cities/county can adopt rights-of-way ordinances or regulations should they chose to do so. Also, any Rights of Way ordinances presently in effect will prevail over the provisions of the Franchise Agreement.

C. Adoption Process – Needed Steps:

As we go through the adoption process, some of our steps to accomplish include:

- **Meeting with the Mission Group City Administrators to review the Agreement** (which we completed in the last week of July.)
- **The publication and completion of a legally required RFP to satisfy state requirements for issuing a franchise** (the RFP was published in the paper in August);
- **2nd TBNK Board meeting to officially approve bid from the RFP** (and the board made the subsequent approval of the bid from Bell in August);
- **Conducting a public input meeting, which is required by the federal Cable Act, and where we presented a summary of the franchise** (this meeting was conducted on September 22nd and our cities were invited to attend);
- **Providing a model ordinance and copy of the franchise to our communities for adoption.** (Now in process)
- **TBNK Member Governments complete the approval process with two readings of the adopting ordinance.** (Now in process)
- **TBNK Member Governments Provide to TBNK copy of both 1) the signed ordinance, and 2) the signed franchise document.**