

COMMISSIONERS ORDINANCE O-2019-008

AN ORDINANCE OF THE BOARD OF COMMISSIONERS OF THE CITY OF NEWPORT, KENTUCKY CREATING AND PERMITTING NON-EXCLUSIVE FRANCHISE AGREEMENTS FOR THE USE OF CITY OWNED PROPERTY, STREETS AND RIGHTS-OF-WAY FOR THE INSTALLATION AND OPERATION OF CELLULAR AND WIRELESS COMMUNICATION SYSTEMS AND SERVICES.

Whereas, Section 163 of the Kentucky Constitution prohibits public utilities from using City owned property, streets and rights-of-way without obtaining a franchise agreement for the use thereof; and,

Whereas, the City desires to create and permit non-exclusive franchise agreements for the use of City owned property, streets and rights-of-way for the installation and operation of cellular and wireless communication systems throughout the City; and,

Whereas, this Ordinance is enacted for the purpose of complying therewith and creating the mechanism by which such non-exclusive franchise agreements may be awarded, including adherence to the provisions of Section 164 of the Kentucky Constitution and applicable Kentucky Revised Statutes.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF NEWPORT, KENTUCKY AS FOLLOWS:

SECTION I

DEFINITIONS

For the purposes herein, the following definitions shall apply:

CELLULAR AND WIRELESS COMMUNICATIONS SYSTEMS shall mean and include all of those devices, equipment, apparatus, and towers as set forth and further defined within the provisions of Section 9.30 of the Official Zoning Ordinance of the City for use in the transmission and distribution of cellular and wireless systems and services.

CITY shall mean the City of Newport, Kentucky.

CITY OWNED PROPERTY shall mean real estate located within the City that is owned and titled in the name of the City, primarily utilized for public use.

FRANCHISE shall mean the person or entity (Franchisee) with whom the City has awarded and granted a non-exclusive franchise agreement hereby established and permitted, pursuant to the terms and conditions as shall be set forth therein.

RIGHTS-OF-WAY shall mean the surface of and space above and below any real property in the City in which the federal government, Commonwealth, or City has a regulatory interest, or interest as a trustee for the public, as such interests now or hereafter exist, including, but not limited to, all streets, highways, avenues, roads, alleys, sidewalks, tunnels, bridges, or any other public place, area, or property under the control of the federal government, Commonwealth, or City.

STREET shall mean a public thoroughfare, constructed within the boundaries of an officially deeded and accepted public rights-of-way, which affords principal means of access to abutting property and the movement of vehicular traffic.

SECTION II

GRANT OF FRANCHISE

There is hereby established the ability for the City to grant non-exclusive franchises to various persons and/or entities for use of City owned property, streets, and Rights-of-Way for the installation and operation of cellular and wireless communication systems within the City, the terms and conditions of which shall be as shall be set forth in awarded and approved Non-Exclusive Franchise Agreements (NEFA). By virtue thereof, the City shall award the Franchisee the right to occupy and use City owned property, streets, and

Rights-of-Way to install, construct, maintain, upgrade, repair and remove equipment and facilities for the purpose of providing cellular and wireless communication systems and services within the City subject to the terms and conditions of the NEFA.

SECTION III

TERMS OF FRANCHISE

The terms and conditions of the award of a non-exclusive franchise are hereby established as follows:

- a. Bidding Requirement: Pursuant to Section 164 of the Kentucky Constitution, before the granting of any such non-exclusive franchise, the City shall first, after due advertisement, receive bids therefore publicly, and award such non-exclusive franchise to the highest and best bidder, however the City retains its right to reject any and all such bids.
- b. Certificate Requirement: Pursuant to KRS 278.020, all bidders must first obtain a Certificate of Public Convenience and Necessity (CPCN) from the Kentucky Public Service Commission as a prerequisite to being able to tender a bid for the non-exclusive franchise and submit the same therewith.
- c. Franchise Agreement: Upon the award of any non-exclusive franchise, the City and Franchisee shall enter into a written NEFA setting forth the terms and conditions thereof and shall set forth the rights and privileges of the Franchisee, which shall be approved and executed upon Order of the Board of Commissioners of the City.

- d. Non-Exclusive: Any franchise hereby established shall not be an exclusive franchise and shall be non-exclusive in nature, with the City reserving the right to grant such franchises to other persons or entities in accordance herewith and with applicable law.
- e. Area: Any NEFA entered into shall be for the use of those portions of the City owned property, streets, and rights-of-way necessarily utilized in order to carry out the purposes thereof.
- f. Term: The term of any NEFA entered into shall not exceed twenty (20) years in duration.
- g. Franchise Fee: The Franchisee shall be required to pay, on an annual basis, within thirty (30) days of the end of the City's fiscal year, a franchise fee of three percent (3%) of the gross receipts from the sale of services granted by the NEFA. The franchise fee shall be exclusive of any other fees, taxes or charges or which the Franchisee may otherwise be responsible.
- h. Rights-of-Way Usage Fee: The City hereby establishes a Right-of-Way Usage Fee (ROWUF) which the City is authorized to impose pursuant to the decision rendered in *Kentucky CATV Assn., Inc. V. City of Florence, Et. Al.* (520 S.W.3d 355, Ky., 2017) for incorporation into any NEFA, for which the Franchisee will be assessed, as follows:

- (1) Two Dollars (\$2.00), per linear foot of cable, fiber, conduit or wire occupying or upon any City owned property, streets, or Rights-of-Way;

(2) Fire Hundred Dollars (\$500.00) for each City pole, tower or other facility exceeding fifty (50) feet in height and occupying or upon any City owned property, streets, or Rights-of-Way; and,

(3) Five dollars (\$5.00), per each square foot of space in any City owned property, streets, or Rights-of-Way that the Franchisee facilities and related equipment occupies other than those set forth in (1) and (2) set forth above.

In the event the ROWUF shall be eliminated, discontinued, preempted, becomes invalid or otherwise declared null and void, the City shall determine, in good faith and in lieu thereof, a fair and reasonable compensation payable to the City from the Franchisee for use of its property, streets, or Rights-of-Way in order to provide cellular and wireless communications systems and services.

The ROWUF shall not be deemed as a tax and shall be paid in addition to any and all taxes or other fees or charges that the Franchisee shall be required to pay.

SECTION IV

That this Ordinance shall be signed by the Mayor, attested to by the City Clerk, recorded, published and effective upon publication.

PASSED: First reading April 22, 2019

PASSED: Second reading May 20, 2019

ATTEST:

Jerry R. Peluso, Mayor

Amy B. Able, City Clerk

PUBLISHED: Online on the City website, www.newportky.gov, with URL reference published in the Campbell County Recorder the 30th day of May 2019 as statutorily allowable under Section 143 of HB 487 approved in 2018 by the Kentucky Legislature and became law on April 27, 2018.