



City of Powell, Ohio

ORDINANCE 2006-60

Adopted October 17, 2006

AN ORDINANCE ESTABLISHING AND ENACTING CHAPTER 953 OF THE CODIFIED ORDINANCES OF THE CITY OF POWELL, OHIO, ENTITLED "CABLE SERVICE AND COMPETITIVE VIDEO SERVICE" TO FACILITATE A COMPETITIVE MARKETPLACE FOR BROADBAND SERVICES.

WHEREAS, it is imperative that the City of Powell ("City") residents have access to robust and reliable broadband products and services;

WHEREAS, it is in the public interest for the City to reform its regulatory policies to promote technological neutrality, competition, investment, and innovation which will ensure that broadband service providers have sufficient incentive to develop and offer such products and services to the citizens of Powell;

WHEREAS, the Council recognizes that the construction of telecommunication facilities capable of providing broadband products and services requires substantial capital investment and such networks, once built, are capable of providing voice, video, and high-speed data services;

WHEREAS, the Council acknowledges that the ability to offer competitive video service is critical to securing investment in the City because it creates a potential additional revenue stream from which deployment costs can be recovered;

WHEREAS, competitive video service provided over a broadband network will compete with cable service provided over a cable system;

WHEREAS, the Council firmly believes that enabling competition rather than regulation should determine success within the marketplace;

WHEREAS, the City must harmonize regulation of competing video services that are provided via different technologies and network architectures, so that cable operators and competitive video service providers can compete on a level playing field and, ultimately, the City residents will benefit from robust competition;


NOW, THEREFORE, BE IT ORDERED BY THE COUNCIL OF THE CITY OF POWELL, OHIO, THAT:

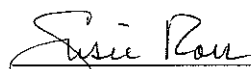
Section 1: That Chapter 953, "Cable Service and Competitive Video Service," which is attached hereto and incorporated herein as "Attachment A", is hereby enacted.

Section 2: It is hereby found and determined that all formal actions of this Council concerning and relating to passage of this Ordinance were adopted in an open meeting of the Council and that all deliberations of this Council and any of its committees which resulted in such formal actions were in meetings so open to the public in compliance with all legal requirements of the Municipality of Powell, Delaware County, Ohio.

Section 3: This ordinance shall take effect at the earliest date allowed by law.

VOTE ON ORDINANCE 2006-60: Y 6 N 0

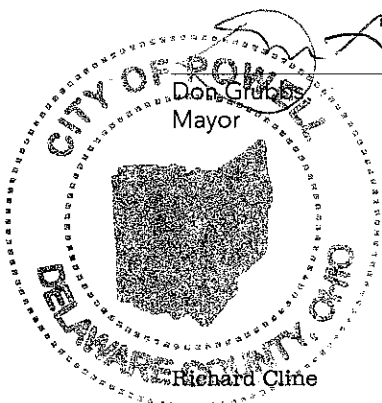

Don Grubbs
Mayor
Date 11-8-06


Susie Ross
City Clerk
Date 11/9/06

EFFECTIVE DATE: November 16, 2006

This legislation has been posted in accordance with the City Charter on this date 11/9/06


Susie D. Ross
Clerk of Council



Richard Cline

Tom Counts

Elmer Meider

Bill Morton

Art Schultz

Dan Wiencsek

City Council
Don Grubbs, Mayor



City of Powell, Ohio

CERTIFIED AS ADOPTED, this 9th day of November, 2006.

[Signature]
Mayor

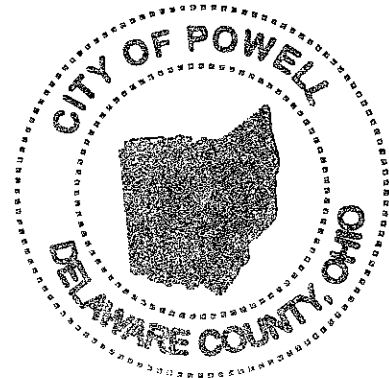
[Signature]
City Administrator *Manager*

November 9, 2006
Date

I hereby certify that copies of this Ordinance were posted in accordance with the Charter of the City of Powell starting on NOVEMBER 9, 2006.

[Signature]
Clerk of Council

NOVEMBER 9, 2006
Date



(Exhibit 'A')

Cable Service and Competitive Video Service Ordinance

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953.01 Title

This Chapter shall be known and may be cited as the Cable Service and Competitive Video Service Chapter.

953.02 Definitions

- A) *Affiliate* means any person that directly or indirectly owns or controls the Provider, any person that a Provider directly or indirectly owns or controls, or any person under common ownership or control with a Provider.
- B) *Cable Operator* means any person or group of persons who has executed a Franchise Agreement and (1) who provides Cable Service over a Cable System and directly or through one or more affiliates owns a significant interest in such Cable System, or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a Cable System.
- C) *Cable Service* means (a) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (b) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- D) *Cable System* means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (i) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (ii) a facility that serves subscribers without using any public right-of-way; (iii) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, except that such facility shall be considered a Cable System [other than for purposes of 42 U.S.C. § 541 (c)] to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (iv) an open video system that complies with 42 U.S.C. § 573; (v) any facilities of any electric utility used solely for operating its electric utility system, or (vi) the facilities of a Competitive Video Service Provider under Chapter 191.
- E) *The City* means the City of Powell, Ohio.
- F) *Competitive Video Service* means video program provided by a Competitive Video Service Provider and provided through wireline facilities located at least in part in the public rights of way without regard to delivering technology, including internet protocol technology. This definition does not include video programming provided by a commercial mobile service provider defined in 47 U.S.C. § 332(d).
- G) *Competitive Video Service Agreement* means the agreement executed by the City and a Competitive Video Service Provider pursuant to Chapter 953 of the Powell Codified Ordinances.
- H) *Competitive Video Service Provider* means an entity providing video services that has not executed a Franchise Agreement with the City as of the effective date of this ordinance and is not a Cable Operator, or an affiliate, successor, or assignee of such Cable Operator.
- I) *Council* means the elected City Council for the City of Powell, Ohio.
- J) *Franchise* means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 47 USC § 546), issued by the Franchising Authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a Cable System by a Cable Operator in the City of Powell.

- K) *Franchise Agreement* means the agreement executed by the Franchising Authority and a Cable Operator pursuant to Chapter 953 of the Powell Codified Ordinances.
- L) *Franchising Authority* means the City of Powell, Ohio.
- M) *Gross Revenues* means all consideration of any kind or nature, including without limitation, cash, credits, property, and in-kind contributions (services or goods) received by the Provider from the provision of Service within the franchise area.
- (1) Subject to paragraph (2), the term "gross revenues" shall include the following:
- a. All charges and fees paid by subscribers for the provision of Service, including fees attributable to Service when sold individually or as part of a package or bundle, or functionally integrated, with services other than the Service; and
 - b. All revenue derived from the Provider's Service pursuant to compensation arrangements for advertising attributable to the local Service area.
- (2) For the purposes of this section, the term "gross revenues" shall not include the following:
- a. Any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt;
 - b. Refunds, rebates, credits or discounts to subscribers or a municipality to the extent not already offset by clause (i) and to the extent such refund, rebate, credit, or discount is attributable to the Service;
 - c. Subject to paragraph (4), any revenues received by the Provider or its Affiliates from the provision of services or capabilities other than the Service, including telecommunications services, information services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with the Service;
 - d. Any revenues received by the Provider or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;
 - e. Any requirements or charges for managing the public rights-of-way with respect to a Franchise or Competitive Video Agreement under this section, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages;
 - f. Any amounts attributable to the provision of Service to customers at no charge, including the provision of such Service to the public institutions without charge;
 - g. Any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a Federal, State, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility user taxes;
 - h. Any forgone revenue from the provision of Service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue;
 - i. Sales of capital assets or surplus equipment;
 - j. Reimbursement by programmers of marketing costs actually incurred by the Provider operator for the introduction of new programming; and

- k. The sale of Services for resale to the extent the purchaser certifies in writing that it will resell the Service and pay a Provider fee with respect hereto.
- N) *Person* means an individual, partnership, association, joint stock company, trust, corporation or governmental entity.
- O) *Provider* means either a Cable Operator or a Competitive Video Service Provider.
- P) *Service* means either a Cable Service or Competitive Video Service.

953.03 Grant of Authority

- A) In accordance with Chapter 953 of the Powell Codified Ordinances and upon executing a Franchise Agreement, a Cable Operator is authorized to occupy or use the public right of ways within the geographical boundaries of the City to construct, operate, maintain, repair, and upgrade existing facilities and install new facilities for the purpose of providing Cable Service for the citizens of the City. The Cable Operator may enter private property only as permitted by the owner of such private property for the purpose of constructing, operating, maintaining, repairing, and upgrading facilities.
- B) In accordance with Chapter 953 of the Powell Codified Ordinances and upon executing a Competitive Video Service Agreement, a Competitive Video Service Provider is authorized to occupy or use the public right of ways within the geographical boundaries of the City to construct, operate, maintain, repair, and upgrade existing facilities and install new facilities for the purpose of providing Competitive Video Service within the geographical boundaries of the City. Additionally, the Competitive Video Service Provider may enter private property only as permitted by the owner of such private property for the purpose of constructing, operating, maintaining, repairing, and upgrading facilities.
- C) A Provider must comply with state, federal and local law, if applicable, and agree in its respective Franchise Agreement or Competitive Video Service Agreement to comply with the requirements set forth in Chapter 953.

953.04 Level Playing Field

- A) Any incumbent Cable Operator providing Cable Service in the City on the effective date of this Ordinance may immediately opt out of its existing Franchise Agreement with the City and enter into a Franchise Agreement under this Chapter.

953.05 Fees For Operation of Cable Service and Competitive Video Service

- A) As compensation for rights granted under Chapter 953, Cable Operators shall pay to the City a franchise fee of 5% of the Cable Operator's Gross Revenues.
- B) As compensation for rights granted under Chapter 953, Competitive Video Service Providers shall pay to the City a fee of 5% of the Competitive Video Service Provider's Gross Revenues.
- C) Consistent with Ohio Revised Code 4939.05(B)(4), any fees paid by a Cable Operator or Competitive Video Service Provider under this Chapter will be credited, offset, or deducted from any public way fee assessed in Chapters 905 and 909 of the City of Powell Codified Ordinances.
- D) The City shall have the right to audit and to recompute any amounts determined to be payable in satisfaction of the fees set forth in this Section. Any additional amount due the City as a result of the audit shall be paid by Provider within 30 days after the Provider receives a written notice from the City. The notice which the City sends to Provider shall include a copy of the audit report. Provider shall pay the cost of the audit if the City determines that the annual payment to the City for the preceding year is thereby increased by more than five percent (5%).
- E) In the event that payment of any fee set forth in this Section, which has been recomputed pursuant to Section (D) above is not made on or before the expiration of thirty (30) days following written notice by the City, Provider shall be charged and shall pay, in addition to the amount due,

interest on the amount due equal to the prevailing prime rate plus two hundred (200) basis points of interest compounded daily from the due date for payment of the recomputed amount. The prevailing prime rate shall be the prime rate of Huntington Bank in Columbus, Ohio.

953.06 Right of Way Provisions

- A) Cable Operators operating Cable Systems and Competitive Video Service Providers providing Competitive Video Service in the City shall abide by all right of way provisions as set forth in this Chapter and in Chapters 905 and 909 of the City of Powell Codified Ordinances.

953.07 Permits To Operate Systems in the City

- A) No person shall offer to subscribers a Cable Service or Competitive Video Service within the City except pursuant to this Chapter of the City of Powell Codified Ordinances. A Cable Operator, however, not electing under Section 953.04 to enter into a Franchise Agreement under Chapter 953 may continue to provide Cable Service under its existing agreement.
- B) All Franchise Agreements and Competitive Video Service Agreements granted by ordinance pursuant to this Chapter shall be nonexclusive. Council reserves the right to issue as many permits as it deems advisable in the public interest.
- C) The Franchise Agreements or Competitive Video Service Agreements shall take effect and will be in force from and after the earliest period allowed by law, and upon the filing by the Provider with the City Administrator of its acceptance, in writing, of each and all of the terms and provisions of the Franchise Agreement or Competitive Video Service Agreement; provided, however, if the Provider shall fail to file such written acceptance within thirty days after the passage of the ordinance by Council, then the ordinance granting the Franchise Agreement or Competitive Video Agreement shall be null and void.
- D) If any section, subsection, sentence, clause, phrase or portion of this Chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, or in conflict with rules and regulations of the Federal Communications Commission, then such portion shall be deemed a separate, distinct and independent provision of this chapter, and such holding shall not effect the validity of the remaining portions thereof.
- E) Any Franchise Agreements or Competitive Video Service Agreements executed pursuant to this chapter may be revoked, after a full due process hearing, by a simple majority vote of Council upon the recommendation of the City Administrator, for violation of material provisions of this chapter, after giving the Provider ninety days notice in writing of intention to revoke such permit, unless such violation is corrected during the period of notice, or unless the Provider has made a reasonable attempt to correct the violation during that time.
- F) The term of each Franchise Agreement and Competitive Video Service Agreement shall be determined by Council, the effective date to be pursuant to subsection (C) above.
- G) All renewals shall be in accordance with federal law, if applicable.

953.08 Service Rates to Subscribers

- A) Providers may set their own service rates and conditions of service.
- B) An up-to-date copy of all the Provider's rates, rules, regulations and policies having to do with subscriber service must be made available to customer, or on the Provider's web site, and provided to the City Administrator upon request.

953.09 Scope

- A) This is an enabling ordinance authorizing the use of the City's right of way for the provision of Cable Service and Competitive Video Service in the City, but it does not take the place of any license or permit that may be additionally required by law of the Provider, either currently or at some later date.

- B) It shall be the responsibility of the Provider to obtain any and all such licenses or permits necessary to the operation and conduct of its business activities.
- C) Failure of the Provider to obtain and conform to the material provisions of any and all such franchises, licenses, or permits, and to make prescribed payments if required as a condition of their issuance, shall be considered a violation of this chapter, and subject the Provider to the penalties set forth in Section 953.10.

953.10 Penalty

- A) In addition to the provisions of Section 953.07(E), having to do with revocation of permits, whoever violates any provision of this chapter shall be deemed guilty of a misdemeanor of the fourth degree; any such violation shall constitute a separate offense of each successive day continued.

953.11 Public and Community Benefits

- A) A Provider shall designate a sufficient amount of capacity on its network to allow the provision of a comparable number of public, educational, and governmental (PEG) channels or hours of programming, at the City's discretion, that have been activated and provided as of the effective date of this Ordinance, provided such programming is submitted in a manner and form that is capable of being accepted and transmitted by the Provider and compatible with the Provider's technology.
- B) Any programming made available under this section shall be solely for noncommercial governmental and educational purposes and the content shall be the sole responsibility of the City.
- C) Providers shall cooperate with the City to develop an appropriate notification over the Cable Service or Competitive Video Service in the event of a public safety emergency.

953.12 Service to Schools and Public Buildings

- A) Providers offering service in the City collectively must offer one free installation and free monthly basic Service to one outlet at each public and parochial school, City government building, fire station, police station, and library building that is passed by Providers' systems. Each such Provider shall have the responsibility to offer a free installation and free monthly basic Service to a share of such schools, governmental, or library buildings. Each such Provider's share shall be proportionate to the total number of such Providers, unless other negotiated compensation has been provided to the City.
- B) Such Providers shall meet as necessary and determine who will provide Service to which school or public building under Section 953.12(A). If Providers are unable to reach agreement as to who will provide free Service to which school, governmental, or library building, the City Manager will confer with the Providers and determine the assignments in a reasonable manner. This obligation will apply to a new Provider of Service once that Provider's Service is available on the section of its system that passes the school or public building assigned to that Provider. Until such time, the incumbent Provider of Service to that location will provide Service to such school or public building.

953.13 Indemnification

- A) The Provider shall indemnify and save harmless the City and all contractors, officers, employees and representatives thereof from all claims, demands, causes of action, copyright action, liability, judgments, costs and expenses or losses for injury or death to persons or damage to property owned by, and Worker's Compensation claims against any parties indemnified herein, arising out of, caused by, or as a result of the Provider's construction, lines, cable, erection, maintenance, use or presence of, or removal of any poles, wires, conduit, appurtenances thereto, or equipment or attachments thereto. The Provider, however, shall not indemnify (1) the City for any liabilities, damages, cost and expense resulting from the willful misconduct or negligence of the City, its

officers, employees and agents or (2) third parties for any activity or function conducted in connection with any access channel or any emergency messages under Section 953.11(C).

- B) The Provider must either be self insured, and attach a copy of its certificate of self insurance as an exhibit to its Franchise Agreement or Competitive Video Service Agreement, or carry a good and sufficient public liability and property damage insurance to fulfill the terms of subsection (A) of this section, which insurance shall be in the amounts of not less than five hundred thousand dollars (\$500,000) for property damage in any one accident, nor less than one million dollars (\$1,000,000) aggregate in any single policy year; and not less than five hundred thousand dollars (\$500,000) bodily injury or death of any one person, with a minimum of one million dollars (\$1,000,000) as to any one accident. Such policy shall be subject to the approval of the Law Director as to its form and extent of coverage, as distinguished from dollar amount of coverage. Such policy shall specifically insure against claims arising as the result of underground evacuation.
- C) The policy shall provide by endorsement that it may only be cancelled or amended by the insurance company after thirty days notice, in writing to the Law Director.
- D) The policy, or policies, must be in force before the provider commences any construction or installations.
- E) Either the original policy, or policies, or certificates of insurance must be on file with the City Administrator.
- F) The policy shall provide that the naming of the City as an additional insured shall not exempt the insurer from liability to the City for damage to property owned by it or in which it has an interest.
- G) Upon termination or revocation of its permit or upon cessation of operations by the Provider, the Provider is under obligation to remove all of its equipment and installations over City streets, at the request of the City Administrator; over private property at the request of the property owner; and from the homes or business establishments of subscribers at their request. Upon termination or revocation, the Provider shall be permitted to abandon in place underground portions of the Cable System or wireline facilities.
- H) The Provider shall post bond of one hundred thousand dollars (\$100,000) guaranteeing the removal of all his equipment and installations, if his operation ceases, whatever the cause or reason, if requested to do so by Council.
 - (1) Such bonding as called for in this subparagraph I, shall be subject to these requirements:
 - a. Such bond shall be executed by the Provider and one or more sureties reasonably approved by the Law Director.
 - b. Either the bond, or bonds, or certified copies must be on file with the City Administrator.
 - I) The bond, or bonds, must provide by endorsement that it cannot be cancelled or amended by the bonding company prior to ten (10) days notice to the City Administrator.

953.14 Assignment

- A) A Provider may not assign or transfer its Franchise Agreement or Competitive Video Service Agreement or any interest therein, without the prior consent of City, which consent shall not be unreasonable withheld; except that the Provider may assign or transfer its agreement or any interest therein to its affiliate upon written notice and without prior consent of the City.

