



**City of Powell, Ohio**

**RESOLUTION 2006-42**

Adopted December 5, 2006

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE A COMPETITIVE VIDEO SERVICE AGREEMENT.**

**WHEREAS,** City Council adopted Ordinance 2006-60 titled 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, and

**WHEREAS,** under Chapter 953 a Competitive Video Service Provider must enter into a Competitive Video Service Agreement with the City before it can occupy or use the public way for the purpose of providing Competitive Video Service to the Citizens of Powell, and

**WHEREAS,** Council has determined that it is beneficial for the City to enter into a Competitive Video Service Agreement with The Ohio Bell Telephone Company, an Ohio corporation that uses the name AT&T Ohio.

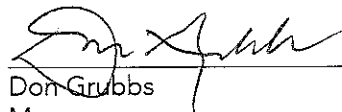
**NOW THEREFORE BE IT RESOLVED BY THE MUNICIPALITY OF POWELL, DELAWARE COUNTY, OHIO AS FOLLOWS:**

**Section 1:** That the Council of the Municipality of Powell hereby authorizes the City Manager to execute a Competitive Video Service Agreement with AT&T, which is attached hereto and incorporated herein by reference.

**Section 2:** That it is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this Resolution were adopted in an open meeting of the Council and that all deliberations of the Council and any of the decision making bodies of the Municipality of Powell which resulted in such formal actions were in meetings open to the public in compliance with all legal requirements of the Municipality of Powell, Delaware County, Ohio.

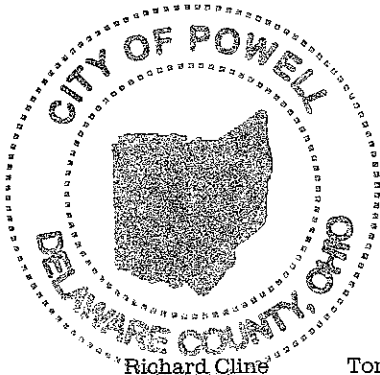
**Section 3:** That this Resolution shall take effect immediately upon its adoption.

**By unanimous consent, Resolution 2006-42 was adopted.**

  
\_\_\_\_\_  
Don Grubbs  
Mayor  
12-16-06  
Date

  
\_\_\_\_\_  
Susie Ross  
City Clerk  
12/19/06  
Date

**EFFECTIVE DATE: December 6, 2006**



This legislation has been posted in accordance with the City Charter on this date 12/20/06

  
\_\_\_\_\_  
Clerk of Council

**City Council**

Don Grubbs, Mayor

Richard Cline

Tom Counts

Elmer Meider

Bill Morton

Art Schultz

Dan Wiencok

## COMPETITIVE VIDEO SERVICE AGREEMENT

This COMPETITIVE VIDEO SERVICE AGREEMENT, executed the \_\_\_ day of \_\_\_\_\_ 2006 (the "Effective Date"), is made by and between the City of Powell, Ohio ("City") and The Ohio Bell Telephone Company, an Ohio corporation that uses the name AT&T Ohio ("Company").

### RECITALS

A. Under Chapter 953 of the City of Powell Codified Ordinances, a Competitive Video Service Provider must enter into a Competitive Video Service Agreement with the City before it can occupy or use the public way for the purpose of providing Competitive Video Service to the citizens of Powell.

B. The Company is a Competitive Video Service Provider, as defined by Section 953.02 (H), and it enters into this Competitive Video Service Agreement with the City to comply with the City's Codified Ordinances.

C. By entering into this Competitive Video Service Agreement, the Company does not concede that the City has jurisdiction to require the Company to enter into an agreement before it may occupy or use the public way to upgrade its existing telecommunications network and provide broadband products and services, including Competitive Video Service, to the citizens of Powell. Nor does the Company concede that the City has jurisdiction to impose Chapter 953's requirements on the Company. Rather, the Company voluntarily enters into this agreement to avoid litigation and delay. The Company, however, specifically <sup>RESERVES</sup> ~~reverses~~ its right as a "telephone company," and thus, a "public utility" under Ohio law to access the City's public way to deploy optical fiber and associated network facilities in its existing telecommunications network to provide products and services to its customers.

NOW, THEREFORE, in consideration of the foregoing recitals, which are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties covenant and agree as follows:

### SECTION 1

1. Chapter 953 Grant and Requirements. Pursuant to Chapter 953 of the City of Powell Codified Ordinances, the City hereby authorizes the Company to occupy or use public rights-of-way and to provide Competitive Video Services within the City. The Company agrees to comply with the requirements of Chapter 953 of the City of Powell Codified Ordinances.
2. Pursuant to Chapter 953 of the City of Powell Codified Ordinances, the Company agrees to pay 5% of its gross revenues to the City as described in Section 953.05.
3. Pursuant to Chapter 953 of the City of Powell Codified Ordinances, the Company agrees to comply with the lawful application of Chapters 905, 909 and 1135 of the codified ordinances.

of the City of Powell. The Company further agrees to comply with the City's current permitting process regarding the placement of facilities.

## **SECTION 2**

### Change of Law.

(a) In the event that, after the Effective Date, any court, agency, commission, legislative body, or other authority of competent jurisdiction: (i) issues a finding that limits the validity or enforceability of this agreement, in whole or in part, or preempts provisions of this agreement, in whole or in part; (ii) reaches conclusions or requires any mechanisms or obligations that are inconsistent with, change in any way, or substitute for the factual or legal premises on which this agreement is based in whole or in part; (iii) establishes the legal basis or framework pursuant to which the Company may offer or provide Competitive Video Service; or (iv) requires the Company either to: (A) perform any act which is inconsistent with any provision of this Agreement or (B) cease performing any act required by any provision of this Agreement, then the Company shall promptly notify the City of such finding, conclusion or requirement, and the Company, at its option, may comply with such finding, conclusion or requirement to the extent permitted by law. To the extent that the Company determines that such finding, conclusion or requirement has a material adverse effect on the Company's rights under this Agreement, the Company, upon notice to the City, may require the City to enter into good faith negotiations to modify this Agreement in the manner which best effectuates the overall purpose of this Agreement and the intentions of the parties. If the parties do not reach a mutually acceptable agreement, then the Company may terminate this Agreement upon ten (10) days notice.

(b) In the event the finding, conclusion or requirement described in Section 2 (a) is subsequently repealed, reversed, amended or changed so that the validity or enforceability of the provisions of this Agreement is not limited in whole or in part, the offering of Competitive Video Service is not inconsistent with this Agreement or the provisions of this Agreement are not preempted in whole or in part, such provisions, at the option of the Company, shall return to full force and effect and be binding on the parties, provided that this Agreement has not been earlier terminated.

(c) Under no circumstances shall any finding, conclusion or requirement described in Section 2 (a) or (b) be applied retroactively or be interpreted to have any retroactive effect.

(d) The City may take advantage of a change in any applicable federal or state law. To the extent that the City determines that such change in law has an effect on the City's rights under this Chapter 953, the City, upon notice to the Company, may require the Company to enter into good faith negotiations to modify this Agreement in the manner which best effectuates the overall purpose of this Agreement and the intentions of the parties.

## **SECTION 3**

### Term.

The term of this Agreement shall be from the Effective Date of this Agreement through December 5, 2009 (3 years). The term may be extended upon mutual agreement of the parties.

IN WITNESS WHEREOF, the party of the first part, City Manager Steve Lutz, thereunto duly authorized by the City Council of Powell, has caused the corporate name of the City of Powell to be signed and the corporate seal of the City of Powell to be affixed and the Company, the party of the second part, by its officers thereunto duly authorized, has caused its name to be signed and its seal to be affixed as of the date and year first above written.

City of Powell, Ohio

By  
Name: Steve Lutz  
Title: City Manager  
Approved as to form:

\_\_\_\_\_  
City of Powell  
Director of Law

The \_\_\_\_\_ Company

By  
Name:  
Title: President,

Attest: