

**WESTFALL TOWNSHIP**

**ORDINANCE NO. 174**

An Ordinance of Westfall Township, Pike County, Pennsylvania adopting a Cable Franchise Agreement with Optimum for the Township to authorize and grant a Franchise to Optimum to construct, operate and maintain a cable system utilizing Township rights of way and properties within the jurisdiction of the Township with the goal to protect and manage the aforesaid rights of way within the Township

**WHEREAS**, pursuant to the Second Class Township Code, 53 P.S. Section 66506, the Board of Supervisors may make and adopt any ordinances, bylaws, rules and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth necessary for the proper management, care and control of the Township and its finances and the maintenance of peace, good government, health and welfare of the Township and its citizens, trade, commerce and manufactures; and

**WHEREAS**, pursuant to the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 (hereinafter collectively referred to as the "Cable Act"), the regulations of the Federal Communications Commission (hereinafter referred to as the "FCC") and Pennsylvania law, the Township is authorized to grant franchises to construct, operate and maintain a Cable System utilizing public rights-of-way and properties within the Township's jurisdiction; and

**WHEREAS**, there is currently no cable franchise agreement between the Township and Optimum; and

**WHEREAS**, the Township is seeking a cable franchise agreement to authorize the maintenance, construction, operation, and upgrade of Optimum cable system over, under and along the aforesaid rights-of-way for use by the Townships residents; and

**WHEREAS**, the aforesaid rights-of-way used by Optimum are public properties acquired and maintained by the Township at a significant expense to the Townships taxpayers and the right to use said rights-of-way is a valuable property right; and

**WHEREAS**, the Township desires to protect and manage the aforesaid rights-of-way; and

**WHEREAS**, the Township held a public hearing on Optimum on the subject cable franchise agreement, including reviewing the cable operator's past performance and identifying the Township's future cable-related community needs; and

**WHEREAS**, the Township has determined that Optimum has the financial, legal and technical ability to provide Cable Services to Subscribers located in the Township; and

**WHEREAS**, the Township, after affording the public notice and opportunity to comment, has determined that the public interest would be served by entering into a cable franchise

agreement with Optimum according to the specific terms and conditions outlined herein;

**NOW THEREFORE, BE IT ORDAINED AND ENACTED** by the Westfall Township Supervisors, and it is hereby ordained and enacted by the authority of same as follows:

**1. GRANT OF AUTHORITY**

Pursuant to the Cable Act, the regulations of the FCC and Pennsylvania law, the Township hereby grants a non-exclusive franchise to Optimum, authorizing and permitting Optimum to construct, operate, and maintain a Cable System in the Township's public rights-of-way.

Subject to the terms and conditions contained herein, the Township hereby grants to Optimum the right to construct, extend, install, operate, maintain, upgrade and rebuild a Cable System, including such wires, cables, fiber, conductors, ducts, conduits, amplifiers, pedestals, attachments and other property and equipment as are necessary and appropriate to the operation of the Cable System in, under, over, along, across and upon the streets, lanes, avenues, alleys, sidewalks, bridges, highways and other public places and rights-of-way under the jurisdiction of the Township, including property over which the Township has a sufficient easement or right-of-way, for the purpose of reception, transmission, amplification, origination, distribution or redistribution of video, audio, and other electronic signals and impulses as permitted by applicable law.

Notwithstanding this authority, Optimum shall obtain all necessary government permits for occupying or disturbing any public places and/or rights-of-way. Prior to obtaining such permits, Optimum shall provide the Township with all reasonable information and documentation that the Township requires. Optimum shall comply with all other government regulations and requirements thereto.

**2. TERM OF FRANCHISE**

The term of this Agreement shall be for a period of ten (10) years commencing on the Effective Date and expiring on Optimum, unless the franchise is terminated prior to the expiration date in accordance with the terms and conditions of this Agreement.

**3. NON-EXCLUSIVITY**

This franchise granted to Optimum shall be non-exclusive. Nothing in this Agreement shall affect the right of the Township to grant another franchise, subject to the level playing field provisions of Paragraph 6, to construct, operate or maintain a Cable System or for any other purpose.

**4. POLICE POWERS**

Optimum's rights under this Agreement are subject to the police powers of the Township to adopt and enforce general laws and regulations necessary for the safety and welfare of the

public. Such laws and regulations are separate and distinct from the terms and conditions contained in this Agreement.

## **5. NO WAIVER OF RIGHTS**

No course of dealing between the Township and Optimum, nor any delay on the part of the Township or Optimum in exercising any rights hereunder, shall operate as a waiver of any such rights of the Township or Optimum or acquiescence in the actions of the Township or Optimum in contravention of such rights, except to the extent expressly waived by the Township or Optimum, as applicable.

## **6. LEVEL PLAYING FIELD**

(a) If the Township grants an additional franchise for construction and/or operation of a Cable System or open video system, and such additional franchise imposes any Material Obligations, as defined below, that are more favorable or less burdensome to the competitive entity than those contained in this Agreement, then Optimum may request that the Township amend this Agreement to make such Material Obligation(s) consistent with the franchise of the competitive entity.

(b) Solely for the purposes of this Section, "Material Obligations" are limited to the following: Optimum obligations under this Agreement; and Optimum obligations under this Agreement to provide service throughout the Township within a reasonable period of time after execution of the additional franchise.

## **7. PERMITS**

Optimum shall apply to the Township for all required permits and shall not undertake any activities in the public rights-of-way subject to a permit without receipt of such permit, issuance of which shall not be unreasonably withheld by the Township. Optimum shall pay any and all required permit fees.

## **8. REPAIRS AND RESTORATION**

(a) Whenever Optimum or any agent, including any subcontractor, takes up or disturbs any pavement, sidewalk or other improvement of any public or private way or place, the same shall be replaced and the surface restored in as good condition as before the disturbance within ten (10) business days of the completion of the disturbance. Upon failure of Optimum to comply within the time specified, the Township may cause proper restoration and repairs to be made and the expense of such work shall be paid by Optimum upon demand by the Township along with any liquidated damages applied by the Township in accordance with this Agreement.

(b) Whenever Optimum or any agent, including any subcontractor, shall install, operate or maintain equipment, cable, or wires, it shall avoid damage and injury to property, including structures, improvements and trees in and along the routes authorized by the Township, except as may be approved by the Township if required for the proper installation, operation and

maintenance of such equipment, cable, or wires. Optimum shall promptly repair and restore any private property that is damaged as a result of construction, installation, repair or maintenance of the Cable System within ten (10) business days.

(c) Optimum operating, construction, repair and maintenance personnel, including all agents and subcontractors, shall be thoroughly trained in the use of all equipment and the safe operation of vehicles. Optimum operating, construction, repair and maintenance personnel shall follow all safety procedures required by all applicable federal, state and local laws and regulations. All areas of the Cable System shall be routinely inspected and maintained so that conditions that could develop into safety hazards for the public and/or operating and maintenance personnel may be corrected before they become a hazard. Optimum shall install and maintain its wires, cables, fixtures, and other equipment in such a manner as shall not interfere with any installations of the Township or any public utility serving the Township.

(d) Whenever Optimum or any agent, including any subcontractor, shall disturb any pavement, sidewalk or other public property in order to perform any underground activity, it shall utilize the Pennsylvania One Call System prior to any such disturbance. It shall notify the Pennsylvania One Call System no less than three (3) and no more than ten (10) working days in advance of any such disturbance and adhere to any additional requirements which the Commonwealth which maybe established in the future. Optimum shall also adhere to all requirements of the Pennsylvania Underground Utility Line Protection Act.

(e) All structures and all lines, equipment and connections in, over, under, and upon streets, sidewalks, alleys, and public and private ways and places of the Township, wherever situated or located, shall at all times be kept and maintained in a safe and suitable condition and in good order and repair. Optimum shall not keep or maintain disconnected or loose cables, lines, or wires on utility poles or anywhere else in the public rights-of-way.

## **9. DISCONNECTION AND RELOCATION**

(a) Optimum shall, at no cost to the Township, protect, support, temporarily disconnect, relocate in the same street, or other public way and place, or remove from any street or any other public way or place, any of its property as required by the Township or its designee by reason of traffic conditions, public safety, street construction, change or establishment of street grade, or the construction of any public improvement or structure.

## **10. EMERGENCY REMOVAL OF EQUIPMENT**

If, at any time, in case of fire or other disaster in the Township, it shall be necessary, in the reasonable judgment of the Township or its agent, to cut or move any of the wires, cable or equipment of the Cable System, the Township shall have the right to do so without cost or liability, provided that, wherever possible, the Township shall give Optimum notice and the ability to relocate wires, cable or other equipment.

## **11. TREE TRIMMING**

Optimum, or its agents, including subcontractors, shall not trim, cut, or remove trees without first obtaining permission in writing from the Township. Upon written request and approval by the Township, Optimum shall have the authority to trim, cut, or remove trees, as may be necessary for the installation and maintenance of its equipment. When Township permission is granted, such trimming, cutting, or tree removal shall be performed in accordance with accepted arboreal standards and any Township regulations. Optimum shall reasonably compensate the Township or other property owners for any damages caused by such tree trimming, cutting, or removal. Optimum shall notify adjacent property owners at least seven (7) days prior to any tree trimming, cutting, or removal. If Optimum or its agents, including subcontractors, wish to cut down and remove any tree or trees, it shall apply to the Township for permission and, if permission is granted, shall perform such cutting and removal in accordance with accepted arboreal standards and any Township regulations.

## **12. CREDIT FOR SERVICE INTERRUPTIONS**

In the event that there is a Service Interruption to any Subscriber caused by an event that is not force majeure for twenty-four (24) or more consecutive hours, Optimum shall grant such Subscriber, upon request, a pro rata credit or rebate, on a daily basis, of that portion of the service charge during the next consecutive billing cycle, or, at its option, apply such credit to any outstanding balance that is currently due.

## **13. SERVICES TO COMMUNITY FACILITIES**

(a) Within three (3) months of the Effective Date, Optimum shall, at no charge to the Township, provide one (1) outlet of Expanded Basic (or equivalent) video service to public facilities, including, but not limited to, THE Township Municipal Building, police stations, fire companies, public works buildings, water and sewage treatment plants, all public and private school buildings and public libraries.

(b) Within three (3) months of the Effective Date, Optimum shall, at no charge to the Township, provide high speed Internet service via cable modem to the Township Municipal Building. No charge shall be made for installation or service.

## **14. VIOLATIONS**

(a) If the Township has reason to believe that Optimum violated any provision of this Agreement, it shall notify Optimum in writing of the nature of such violation and the section of this Agreement that it believes to have been violated. If the Township does not notify Optimum of any violation of this Agreement, it shall not operate as a waiver of any rights of the Township hereunder or pursuant to applicable law.

(b) Optimum shall have thirty (30) days to cure or dispute such violation after written notice is received by taking appropriate steps to comply with the terms of this Agreement. If the nature of the violation is such that, in the Township's reasonable judgment, it cannot be fully cured

within thirty (30) days due to circumstances outside of Optimum control, the period of time in which Optimum must cure the violation may be extended by the Township in writing for such additional time necessary to complete the cure, provided that Optimum shall have promptly commenced to cure and is diligently pursuing its efforts to cure in the reasonable judgment of the Township.

(c) If the violation has not been cured within the time allowed as set forth herein, the Township may declare a breach of the agreement and terminate the agreement and/or Optimum shall be liable for liquidated damages and the Township's costs as set forth herein.

## **15. LIQUIDATED DAMAGES**

Because Optimum's failure to comply with provisions of this Agreement will result in injury to the Township and because it will be difficult to measure the extent of such injury, the Township may assess liquidated damages against Optimum in the amount of two hundred fifty dollars (\$250.00) per day for each day the violation continues, provided Optimum has had an opportunity to cure in accordance with this Agreement. Such damages shall not be a substitute for specific performance by Optimum or legal action by the Township but shall be in addition to such performance or action.

## **16. INDEMNIFICATION**

(a) Optimum shall indemnify, defend, save and hold harmless the Township, its elected and appointed officials, officers, agents and employees, from any and all claims for injury, loss, liability, cost or expense arising in whole or in part from, incident to or connected with any act or omission of Optimum, its officers, agents or employees, arising out of or in any way connected to, but not limited to, the construction, installation, upgrade, reconstruction, operation, maintenance or removal of the Cable System or any other equipment or facilities. The obligation to indemnify, defend, save and hold the Township harmless shall include, but not be limited to, the obligation to pay judgments, injuries, liabilities, damages, penalties, attorneys' fees, expert fees, court costs and all other costs of such indemnification.

(b) The Township shall not at any time be liable for any injury or damage to persons or property from any cause whatsoever arising from or in any way connected to the construction, installation, upgrade, reconstruction, operation, maintenance, or removal of the Cable System or any other equipment or facilities.

## **17. INSURANCE**

(a) Optimum shall maintain insurance throughout the term of this Agreement with the Township as an additional insured, with an insurance company which is authorized to conduct business in Pennsylvania and which has an A.M. Best rating (or equivalent) no less than "A", indemnifying the Township from and against any and all claims for injury or damage to persons or property, both real and personal, caused by the construction, installation, reconstruction, operation, maintenance or removal of the Cable System by Optimum or any of its contractors, subcontractors, agents or employees in the following amounts:

(1) The amount of such insurance against liability for damage to property shall be no less than One Million Dollars (\$1,000,000) as to any one (1) occurrence.

(2) The amount of such insurance against liability for injury or death to any person shall be no less than One Million Dollars (\$1,000,000).

(2) The amount of such insurance for excess liability shall be Five Million Dollars (\$5,000,000) in umbrella form.

(4) The amount of such insurance against all claims arising out of the operation of motor vehicles and general tort or contract liability shall be One Million Dollars (\$1,000,000).

(b) All insurance coverage shall be maintained throughout the period of this Agreement. All insurance policies shall contain a provision that the Township will receive thirty (30) days written notice prior to any changes or cancellation of the policy. All expenses incurred for said insurance shall be at no cost to the Township.

(c) A certificate evidencing the insurance coverage required herein shall be provided by Optimum to the Township within thirty (30) days of the Effective Date.

#### **18. TRANSFER, ASSIGNMENT OR CHANGE IN CONTROL**

(a) Neither Optimum nor its parent nor any Affiliated Entity shall transfer or assign, through its own action or by operation of law, its right, title or interest in the Cable System or in this Agreement without the prior written consent of the Township.

(b) Neither Optimum nor its parent nor any Affiliated Entity shall change, transfer or assign, through its own action or by operation of law, its control of the Cable System or of this Agreement without the prior written consent of the Township.

(c) Neither Optimum nor its parent nor any Affiliated Entity shall sell, convey, transfer, exchange or release more than fifty percent (50%) of its equitable ownership in the Cable System without the prior written consent of the Township.

(d) Optimum shall make written application to the Township of any transfer, change in control or assignment as described above and shall provide all information required by FCC Form 394 and any other applicable federal, state, and local statutes and regulations regarding transfer or assignment. The Township shall have one hundred twenty (120) days from the receipt of all required information to take action on the transfer or assignment.

(e) Any consent by the Township for any transfer or assignment described above shall not be effective until the proposed transferee or assignee shall have executed a legally binding document stating that it shall be bound by all the terms and conditions contained in this Agreement.

(f) In the event that Optimum, its parent or any Affiliated Entity seeks approval of the Township for a transfer, assignment or change of control, Optimum shall be responsible for any and all reasonable attorneys' and/or consulting fees incurred by the Township relative to the transfer, assignment, or change of control.

## **19. RENEWAL**

The Township and Optimum agree that any proceedings or activities that relate to the renewal of Optimum's franchise shall be governed by applicable federal, state and local law.

## **20. FORCE MAJEURE**

If for any reason of force majeure, Optimum is unable in whole or in part to carry out its obligations hereunder, Optimum shall not be deemed in violation of this Agreement during the continuance of such inability. The term "force majeure" as used herein shall have the following meaning: acts of God; acts of public enemies, including terrorist attacks; orders of any kind of the government of the United States of America or of the Commonwealth of Pennsylvania or any of their departments, agencies, political subdivisions, or officials, or any civil or military authority; insurrections, riots, epidemics; landslides; lightning; earthquakes; fires; hurricanes; volcanic activity; storms; floods; washouts; droughts; explosions; and partial or entire failure of utilities.

## **21. REMOVAL OF SYSTEM**

(a) Upon lawful termination or revocation of this Agreement or of any renewal hereof by passage of time or otherwise, Optimum shall remove its supporting structures, poles, transmissions and distribution systems and other appurtenances from the streets, ways, lanes, alleys, parkways, bridges, highways, and other public and private places in, over, under, or along which they are installed and shall restore the areas to their original condition. If such removal is not completed within six (6) months of such lawful termination or revocation, the Township or property owner may deem any property not removed as having been abandoned and the Township may place a lien on such property in accordance with the Pennsylvania Municipal Lien Act. The Township may also remove the property at Optimum's cost.

(b) During the term of the Agreement, if Optimum decides to abandon or no longer use all or part of its Cable System, it shall give the Township written notice of its intent at least ninety (90) days prior to such decision, which notice shall describe the property and its location. The Township shall have the right to either require Optimum to remove the property, remove the property itself and charge Optimum with the costs related thereto, or transfer ownership of the property to the Township's designee provided fair market value is paid to Optimum.

## **22. NOTICES**

Every notice or payment to be served upon or made to the Township shall be sent via personal service, regular U.S. mail, or special overnight courier to:



Westfall Township Board of Supervisors  
PO Box 247  
Matamoras, PA 18336

The Township may specify any change of address in writing to Optimum.

Every notice to be served upon Optimum shall be sent via personal service, regular U.S. mail, special overnight courier to:

Optimum  
605 Pennsylvania Avenue  
Matamoras, PA 18336

Optimum may specify any changes of address in writing to the Township.

Each delivery to Optimum or the Township shall be equivalent to direct personal notice, direction or order, and shall be deemed to have been given at the time of receipt.

### **23. EQUAL EMPLOYMENT OPPORTUNITY**

Optimum is an equal opportunity employer and shall comply with all applicable federal and state laws and regulations regarding equal opportunity employment.

### **24. GOVERNING LAW**

This Agreement shall be governed and construed by and in accordance with the laws of the Commonwealth of Pennsylvania. If suit is brought by a party to this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of Pennsylvania, County of Pike, or in the United States District Court for the Middle District of Pennsylvania.

### **25. ENTIRE AGREEMENT**

This written instrument contains the entire agreement between the parties, supersedes all prior agreements or proposals except as specifically incorporated herein, and cannot be changed without written amendment approved by both the Township and Optimum.

### **26. SEVERABILITY**

If any section, provision or clause of this Agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable, or is pre-empted by federal or state laws or regulations, such section, provision or clause shall be deemed to be severable from the remaining portions of this Agreement and shall not affect the legality, validity or enforceability of the remaining portions of this Agreement.

**27. CHANGE OF LAW**

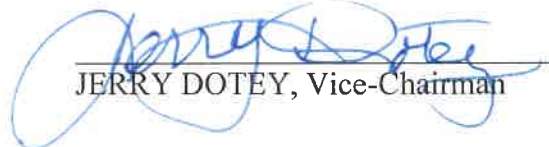
In the event there is a change in a federal or state statute or regulation applicable to the Cable System or to this Agreement, the Township or Optimum may notify the other party of its desire to amend this Agreement in order to comply with the change in statute or regulation. The Township and Optimum may amend this Agreement to comply with such change in statute or regulation provided such amendment is approved by the Township and Optimum.

**28. APPLICABILITY OF AGREEMENT**

All of the provisions in this Agreement shall bind Optimum, the Township and their respective successors and assigns. This Agreement is authorized by Ordinance No. 174 dated Optimum, 2019 of the Township Board of Supervisors.

**ORDAINED AND ENACTED** into an Ordinance at a regular meeting of the Board of Supervisors, duly advertised of the Township of Westfall, County of Pike, Pennsylvania, this 3<sup>rd</sup> day of June 2019.

  
ROBERT MELVIN, Chairman

  
JERRY DOTEY, Vice-Chairman

ROBERT BOSTINTO, Supervisor

  
PAUL FISCHER, Supervisor

  
PAUL SCHALDONAT, Supervisor

ATTEST:

  
JODI HULSE, SECRETARY

MANHEIM