

Memorandum

TO: City of Covington Finance and Administration Committee

FROM: Rachel Witherington, City Attorney

DATE: February 15, 2019

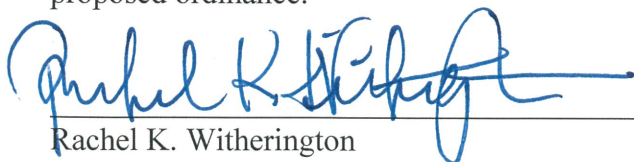
SUBJECT: Ritter Franchise License

Question: Does the City of Covington have the authority to grant a cable franchise to Ritter Communications, and if so, does the authorization have to be done by resolution an ordinance?

Short Answer: Yes, the City has the exclusive authority to grant cable television franchises, and the franchise should be approved by ordinance to comply with public notice provisions of the Cable Television Act of 1977.

Analysis: T.C.A § 7-59-102 grants the Board of Mayor and Aldermen the sole power and authority to regulate the operation of cable television company, cable service provider or video service provider that serves customers within the municipal boundaries by the issuance of franchise licenses. However, approval of franchise licenses requires public notice and showing the terms of any proposed franchise agreement. Furthermore, T.C.A. § 7-59-203 says that the City cannot grant “overlapping franchises,” in other words, franchises for the same service, for cable or video service within its jurisdiction on terms or conditions more favorable or less favorable than those in any existing cable or video franchise.

Therefore, the terms and conditions of any franchise granted to Ritter, should the Board choose to do so, has to be the same as the current cable or video franchises granted by the City, which include Comcast and, I believe, AT&T. I have gone over the original proposal from Ritter Communications and suggested edits to bring the terms and conditions in line with existing franchise licenses for cable system. Ritter has incorporated those suggested edits in the attached proposed ordinance.



Rachel K. Witherington

**STATE OF TENNESSEE
CITY COUNCIL FOR CITY OF COVINGTON**

ORDINANCE NO. _____

AN ORDINANCE GRANTING A NONEXCLUSIVE FRANCHISE RENEWAL TO E. RITTER COMMUNICATIONS, INC., D/B/A RITTER COMMUNICATIONS, ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, OPERATE, AND MAINTAIN A CABLE SYSTEM IN; AND SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE; AND PROVIDING FOR REGULATION AND USE OF THE CABLE SYSTEM.

Section 1. Definitions. For the purpose of this Ordinance, the following words and phrases shall have the meanings set forth in this section.

- (a) "Cable Service" means:
 - (1) The transmission to subscribers of (i) video programming, or (ii) other programming service, and
 - (2) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- (b) "Cable System" means Grantee's facility located within the City, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service to multiple Subscribers within the City.
- (c) "Facilities" means any reception, processing, distribution or transmission component of the Cable System, including cables, conduits, converters, splice boxes, cabinets, manholes, vaults, poles, equipment, drains, surface location markers, appurtenances, fiber, and related facilities maintained by Grantee.
- (d) "FCC" means the Federal Communications Commission.
- (e) "Franchise" means the rights granted to Grantee under this Ordinance to construct and operate the Cable System and to provide Cable Services and other services as permitted under applicable law.
- (f) "Grantee" means E. Ritter Communications Inc., d/b/a Ritter Communications, and its permitted successors.
- (g) "Gross Revenues" means all revenue received by Grantee from subscribers for the provision of Cable Television Service in the City and all revenues received from non-subscribers in the City for advertising services and as commissions from home shopping services. The term Gross Revenues shall not include franchise fees, advertising revenues, fees for programming supplied on a per program or per channel charge basis, late fees, fees from other services, any fees itemized and passed through as a result of franchise imposed requirements, revenue received by Grantee for the delivery of other communications service over its cable system including without limitation, telephony, data transmission interactive services or other broadband information services, or any taxes or fees on services furnished by Grantee imposed by any municipality, state, or other governmental unit.

- (h) "Person" is any person, firm, partnership, association, corporation, company, or other legal entity.
- (i) "Street" means the surface of, and the space above and below, any public street, road, highway, freeway, lane, alley, path, court, sidewalk, parkway, or drive, or any easement or right-of-way now or later existing within the City.
- (j) "Subscriber" means any Person who lawfully receives Cable Service.
- (k) "City" means Covington TN.
- (l) "City Council" means the governing body of the City.

Section 2. Grant of authority.

- (a) Grant of nonexclusive authority. The City grants to Grantee the right and privilege to construct, erect, operate, and maintain, in, upon, along, across, above, over and under the Streets, all Facilities necessary or desirable for the construction, maintenance, and operation of the Cable System. This Franchise shall be nonexclusive, and the City may grant franchises to other Persons. Any additional franchises shall contain the same substantive terms and conditions as this Franchise and shall be competitively neutral and nondiscriminatory as compared to this or any other franchise granted by the City for the operation of a Cable System or other wireline multichannel video distribution system. Grantee may use the Cable System to deliver non-Cable Services as permitted by applicable law.
- (b) State or National Franchises. If another operator of a Cable System or other wireline multichannel video distribution system obtains the right to provide service in the City through a national or state franchise, Grantee may petition the City to replace this Ordinance with the applicable terms of such state or national franchise. The City shall act on the petition at a public meeting within 90 days of filing. The City shall not unreasonably deny the petition. Grantee may appeal any decision to a court of competent jurisdiction. Grantee's rights under this Section to petition for amendments to this Agreement shall be in addition to any rights to amend or terminate local franchises under State or Federal law.
- (c) Rules of Grantee. The Grantee may promulgate rules, regulations, terms and conditions governing its business and services as reasonably necessary to enable Grantee to exercise its rights and perform its obligation under this Ordinance.

Section 3. Franchise term. The Franchise granted under this Ordinance commences upon adoption by the City Council and shall continue for 15 years, unless renewed, revoked or terminated sooner. So long as Grantee remains in material compliance with the provisions of this Ordinance, Grantee, at its option, may extend the term for an additional 15 years by providing written notice to the City no more than 24 months, but not less than 12 months before expiration of the initial term.

Section 4. Conditions of street occupancy.

- (a) Location of Facilities. Grantee shall locate all Facilities so as to minimize interference with the use of the Streets and with the rights and reasonable convenience of adjacent property owners.
- (b) Construction codes and permits. Grantee shall obtain all necessary permits and shall comply with all ordinances of general applicability before commencing any

construction, upgrade or extension of the Cable System, including the opening or disturbance of any Street.

- (c) Repair of Streets and property. Grantee, at its expense, shall promptly restore any Street or public property damaged by Grantee during the construction, repair, maintenance or reconstruction of the Cable System.
- (d) Public projects. After reasonable prior notice, Grantee, at its expense, shall relocate its Facilities as required by the City due to traffic conditions, public safety, street construction, or other public improvements by the City. In requiring Grantee to protect, support, temporarily disconnect, relocate or remove any portion of its property, the City shall treat Grantee the same as, and require no more of Grantee, than any other similarly situated utility. Grantee shall have the right to seek reimbursement from the City, including under any applicable insurance or government program for reimbursement.
- (e) Building movement. Upon request of any Person holding a moving permit issued by the City and after reasonable prior notice, Grantee shall temporarily move its Facilities to permit the moving of buildings. Grantee may require the requesting Person to pay all costs related to the temporary relocation of Facilities, and may require payment in advance.
- (f) Tree trimming. Grantee may trim any trees in or overhanging the Streets, alleys, sidewalks, or public easements of the City as necessary to protect Grantee's Facilities.

Section 5. Cable System operations and safety.

- (a) Technical standards. Grantee shall operate the Cable System in compliance with all applicable technical standards promulgated by the FCC.
- (b) Safety requirements. Grantee shall employ ordinary care and shall maintain in use commonly accepted methods and devices to reduce failures and accidents.
- (c) System maps. Upon request by the City, Grantee shall make available to City representatives for review at Grantee's office up-to-date as-built maps showing locations of all Facilities in the Streets.
- (d) System maintenance. When feasible, Grantee shall schedule Cable System maintenance to minimize service interruptions.

Section 6. Customer service and rates.

- (a) Subscriber Inquiries. Grantee shall have a publicly listed toll-free telephone number and be operated so as to receive Subscriber complaints and requests during normal business hours. Grantee shall investigate and promptly resolve customer complaints regarding quality of service or service outages.
- (b) Rates. Grantee shall provide the City and Subscribers with 30 days written notice of changes to Cable Services or rates.
- (c) Obligations. Grantee shall comply with all customer service obligations set forth in 47 C.R. R 76.309.

Section 7. Franchise fee.

Grantee shall pay to City an annual franchise fee in an amount equal to five percent (5 %) of Gross Revenues as defined in Section 1(g). Such payments shall be payable annually to the City within sixty (60) days of the last day of December each year. Following reasonable prior notice, the City may inspect Grantee's books, records, and reports to verify franchise fee calculations and payments.

Section 8. Contribution to Public, Education and Governmental Access.

Grantee shall make an annual contribution to the City to support and extend public, educational and governmental ("PEG") access to cable television channel capacity within the City. That contribution will be five hundred dollars (\$500) per year. The contribution shall be reviewed for adjustment every five (5) years, determined by mutual agreement between Grantee and the City.

Section 9. Insurance and Indemnification.

(a) Insurance. During the term of the Franchise granted under this Ordinance, Grantee shall maintain a comprehensive general liability insurance policy with the following minimum coverage limits:

- (i) \$1,000,000 for personal injury or death;
- (ii) \$1,000,000 for property damage; and
- (iii) \$500,000 automobile insurance/combined bodily injury and property damage.

Each policy of insurance shall contain a statement that the insurer will not cancel the policy or fail to renew the policy for any reason without first giving 30 days' advance written notice to the City.

(b) Indemnification. During the term of the Franchise granted under this Ordinance, Grantee shall indemnify and hold harmless the City, its officers, agents and employees ("Indemnitees") from and against any claims, liabilities, damages, losses, and expenses (including, without limitation, reasonable attorney fees) ("Losses"), which may arise out of or be in any way connected with Grantee's construction, installation, operation, maintenance of the Cable System, unless such Losses arise from the negligence or intentional misconduct of the City, its officers, agents or employees.

Section 10. Transfer of Franchise. Grantee shall not transfer or assign its rights granted under this Ordinance without the prior written approval of the City. Prior approval shall not be required for the following: (i) the assignment of, or the granting of a security interest in, the Franchise or the Cable System for the purpose of securing indebtedness; or (ii) the assignment or transfer of the Franchise or the Cable System to an affiliate under common ownership or control with Grantee.

Section 11. Franchise extension and renewal.

(a) Extension. Beyond the term provided in Section 3, City and Grantee may extend by mutual agreement the term of the Franchise granted under this Ordinance, and the existing terms and conditions of this Ordinance shall govern the extended term.

(b) Renewal. Any renewal of the Grantee's Franchise shall be done in accordance with Section 546 of the federal Cable Act, 47 USC § 546, and applicable FCC regulations.

Section 12. Franchise termination. The City may terminate the Franchise granted under this Ordinance in case of material noncompliance by Grantee. Material noncompliance shall include:

- (a) A material violation by Grantee of any term, condition, or provision of this Ordinance that remains uncured within the applicable cure period;
- (b) Failure of Grantee to comply with any reasonable provision of any applicable Ordinance;
- (c) Grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt, or there is a notice of prospective foreclosure or other judicial sale of all or a substantial part of the Cable System;
- (d) Grantee abandons the Cable System;
- (e) Grantee fails to operate the Cable System for a period of 30 days; or
- (f) Grantee is found to practice any fraud upon the City.

Section 13. Termination procedures. If the City seeks to terminate the Franchise under Section 13, the City shall follow the procedures in this section.

- (a) Notice of complaint. The City shall provide Grantee with written notice describing with reasonable specificity the alleged noncompliance.
- (b) Opportunity to cure. Grantee shall have 60 days from receipt of written notice to cure the alleged noncompliance. If Grantee cures the alleged noncompliance within the 60-day period, the City shall provide Grantee with written notice withdrawing the complaint.
- (c) Public hearing. If Grantee fails to cure the alleged noncompliance within the 60-day cure period, or if Grantee provides the City with written notice disputing the complaint, and the parties fail to otherwise resolve the matter, the City shall schedule a public hearing on the alleged noncompliance. At the public hearing, Grantee may present testimony, cross-examine witnesses and deliver to the City Council all evidence relevant to Grantee's defense. At the conclusion of the public hearing, the City Council may dismiss the complaint, defer action, order appropriate sanctions, or terminate the Franchise in accordance with this section.
- (d) Termination. The City Council may, after a duly noticed public hearing, terminate the Franchise for material and willful continuing noncompliance by Grantee. If Grantee contests the termination in a court of competent jurisdiction, Grantee may operate the Cable System in accordance with this Ordinance while the case is pending.
- (e) Force Majeure. Grantee's failure to comply with any provision of this Ordinance shall not constitute noncompliance when the failure is due to circumstances beyond Grantee's control, including, without limitation, acts of nature, adverse weather, natural or man-made disaster, civil disturbance, war or insurrection, or shortage of supplies, material, or labor.
- (f) Removal of Facilities. Upon expiration or termination of the Franchise, Grantee shall be afforded a six-month period to sell or otherwise dispose of the Cable System. During the six-month period, Grantee shall operate the Cable System in accordance

with this Ordinance. At the expiration of the six-month period, Grantee has the right to remove its Facilities within a reasonable time.

Section 14. Unauthorized reception of Cable Service; tampering with Facilities.

- (a) It shall be unlawful for any Person without Grantee’s consent to willfully tamper with, remove or injure any of Grantee’s Facilities.
- (b) It shall be unlawful for any Person to make or use any unauthorized connection to any part of Grantee’s Cable System.
- (c) Any Person that violates this subsection regarding theft of service shall be guilty of a misdemeanor and punished by a fine not to exceed \$500.00 for each occurrence or imprisonment for a term not to exceed 90 days or both, such fine and imprisonment as may be imposed by a court of competent jurisdiction.

Section 15. Notices. Notices under this Ordinance shall be in writing and shall be deemed given delivery by hand delivery, certified mail return receipt requested, or overnight courier to the following addresses:

To City: City of Covington
200 W. Washington, Ave.
Covington, TN 38019
Attn: _____
Phone: (901) 476-9613
Email: _____

To Grantee: Ritter Communications, Inc.
P. O. Box 17040
Jonesboro, AR 72403
Attn: Bob Mouser VP Business Development
Phone: (870) 429-1116
Email: Bob.Mouser@rittercommunications.com

A party may designate other addresses for providing notice by providing notice in writing of such addresses.

Section 16. Miscellaneous.

- (a) Severability. If any provision of this Ordinance is for any reason held illegal, invalid, or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining provisions of this Ordinance. The invalidity of any portions of this Ordinance shall not abate, reduce, or otherwise affect any consideration or other obligation required by Grantee under the remaining provisions of this Ordinance.
- (b) Complete Agreement. All ordinances and parts of ordinances in conflict with this Ordinance are repealed as of the effective date of this Ordinance, excluding all public utility franchises granted to public utilities, including utilities regulated by the Tennessee Public Utility Commission.

Passed and adopted this _____ day of _____, 2019

City of Covington

By: _____

Attest: _____
City Clerk

Name: _____

Title: Mayor