

ORDINANCE 2023-02-02-0047

APPROVING THE SETTLEMENT OF LITIGATION STYLED *City of San Antonio v Time Warner Cable Texas, LLC, d/b/a Spectrum and Charter Communications*, Case No. 5:17-CV-01232-JKP.

* * * * *

WHEREAS, the City of San Antonio has disputed payment of franchise and public, educational, and governmental ("PEG") fees by Time Warner Cable Texas, LLC Spectrum and Charter Communications (hereinafter "Spectrum") to the City; and

WHEREAS, on October 23, 2017, the City filed a lawsuit against Spectrum in the District Court of Bexar County, Texas, which suit was later removed to the United States District Court for the Western District of Texas, San Antonio Division, under the style *City of San Antonio v Time Warner Cable Texas, LLC, d/b/a Spectrum and Charter Communications*, Case No. 5:17-CV-01232-JKP ;

WHEREAS, while the City diligently prepared for a trial on the merits, it is in the City's best interest to settle this matter to avoid uncertainties and risks associated with further litigation; and


WHEREAS, the parties have reached an agreement to resolve the City's claims as set forth in the attached Settlement Agreement and Mutual Release subject to City Council approval; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Attorney is hereby authorized to execute a Settlement Agreement and Mutual Release that substantially conforms to the agreement attached hereto as Exhibit "A."

SECTION 2. This ordinance is effective immediately upon the receipt of eight affirmative votes; otherwise, it is effective ten days after passage.

PASSED AND APPROVED this 2nd day of February, 2023.


M A Y O R
Ron Nirenberg

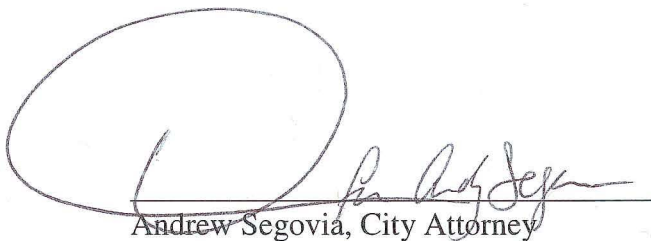
ATTEST:

APPROVED AS TO FORM:

DLK
February 2, 2023
Item No. 8



Debbie Racca-Sittre, City Clerk



Andrew Segovia, City Attorney



City of San Antonio
City Council Meeting
February 2, 2023

8.

2023-02-02-0047

Ordinance approving the settlement of a lawsuit styled City of San Antonio v. Time Warner Cable Texas, LLC d/b/a Spectrum and Charter Communications, Case No. 5:17-CV-01232-JKP, in the United States District Court, Western District of Texas, San Antonio Division. [Andy Segovia, City Attorney]

Councilmember Rocha Garcia moved to Approve on the Consent Agenda. Councilmember Courage seconded the motion. The motion carried by the following vote:

Aye: Nirenberg, Bravo, McKee-Rodriguez, Viagran, Rocha Garcia, Castillo, Cabello Havrda, Pelaez, Courage, Perry

Absent: DISTRICT 7

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is entered into by and between Plaintiff City of San Antonio, Texas ("City"), and Defendant Spectrum Gulf Coast, LLC, formerly known as Time Warner Cable Texas, LLC ("Spectrum") (together, "the Parties").

RECITALS

WHEREAS, the Parties have a dispute regarding Spectrum's payment of franchise and public, educational, and governmental ("PEG") fees to the City; and

WHEREAS, on October 23, 2017, the City filed a lawsuit against Spectrum in the District Court of Bexar County, Texas (225th Judicial District), styled *City of San Antonio, v. Time Warner Cable Texas, LLC d/b/a Spectrum and Charter Communications*, Cause No. 2017-CI-20297;

WHEREAS, on December 4, 2017, Spectrum removed the case to the United States District Court for the Western District of Texas;

WHEREAS, the City filed an amended complaint on July 24, 2018, styled *City of San Antonio, v. Time Warner Cable Texas, LLC d/b/a Spectrum and Charter Communications*, Case No. 5:17-CV-01232-JKP, alleging that Spectrum underpaid franchise and PEG fees to the City; and

WHEREAS the Parties' dispute in the foregoing WHEREAS clauses, including their respective claims and defenses in litigation, is collectively referred to as "the Dispute"; and

WHEREAS, without any admission of liability whatsoever by any Party as to the validity, force, or effect of any asserted or unasserted claims or defenses, the Parties desire fully, completely, and finally to settle and resolve the Dispute as set forth below.

AGREEMENTS AND COVENANTS

NOW THEREFORE, in consideration of the premises, mutual covenants, and promises set forth in this Agreement, and for other good and valuable consideration, the validity, sufficiency, and receipt of which are hereby acknowledged, the City and Spectrum hereby STIPULATE AND AGREE as follows:

1. **Effective Date:** This Agreement shall become effective upon the later of the date it is (a) signed by all Parties; or (b) finally approved by the city council of the City.
2. **Compromise and Settlement.** This Agreement constitutes a good-faith compromise and settlement of all claims in the Dispute. This Agreement shall not be admissible in any proceeding as evidence of liability or wrongdoing. This Agreement may be introduced, however, in a proceeding to enforce its terms.
3. **Dismissal With Prejudice of Litigation.** Within five (5) business day of the Effective Date, the City and Spectrum shall jointly stipulate to dismiss the Litigation and all claims

filed therein, with prejudice, and file a joint notice of dismissal with prejudice with the Court presiding over the Litigation.

4. **Payment, Attorneys' Fees, and Costs.** The Parties and each of them specifically understand, acknowledge, and agree that no money shall be due or owed by any party under this Agreement, except as specifically provided herein regarding future franchise fee and PEG fee payments from the Effective Date of this Agreement. All Parties shall bear their own respective attorneys' fees and costs incurred in connection with the Litigation. No Party shall have a right to recover any of its attorneys' fees or costs from any other Party.

5. **Methodology and Remittance of Franchise and PEG Fees.** For ten (10) years from the Effective Date, Spectrum will calculate franchise and PEG Fees to be remitted to the City using the methodologies in place and utilized by Spectrum as of the Effective Date, except as specifically provided below regarding Late Fee revenues. In turn, for ten (10) years from the Effective Date, the City will not challenge, contest, audit, review, or assert claims against Spectrum related to the methodology it uses as of the Effective Date to calculate franchise and PEG fees, including its methodology related to advertising revenue (including allocation); late fees; subscriber revenue; revenue derived from unreturned equipment; bad debt recoveries or other contra-revenue (including, but not limited to, customer development program adjustments, hotel on demand purchases, restocking fees, VOD adjustments, and refer-a-friend discounts); franchise fee revenues; "early termination fees"; "third-party advertising fees"; franchise fee revenues collected from subscribers or other customers; any revenue generated from new cable service; FCC User Fees; and any other issues raised in the City's prior, incomplete, franchise fee review, subject to the below subsections. With each franchise and PEG fee payment to the City, Spectrum shall provide payment cover letters stating the amounts of franchise and PEG fee payments and any true-up payments correcting information or past payments.

(a) **Right to Validate Compliance.** The City shall retain the right to request and review agreed-upon business records from Spectrum during the 10-year period following the Effective Date to the extent necessary to validate Spectrum's compliance with the methodologies agreed to by this agreement and the accuracy of Spectrum's payments under such methodology. Such business records, made available to the City upon request, shall be Spectrum's number of video subscribers in the City, Spectrum's summaries of revenue, and Franchise Tax Area ("FTA") validation reports, or those documents' functional equivalents, unless mutually agreed otherwise and unless the City articulates to Spectrum a reasonable need for any specific, additional business record, provided such information has not already been provided to the City, is not already equally available to the City, and that such information is kept by Spectrum in the ordinary course of business. The parties agree that any material provided by Spectrum to the City pursuant to this provision shall be treated as confidential and highly sensitive and that any review by the City of such material may be conditioned upon appropriate measures to protect the material's confidentiality, including through execution of non-disclosure agreements.

(b) **Late Fee and FCC User Fee Revenue.** For a period of ten (10) years from the Effective Date, Spectrum shall treat late fee revenue as "gross revenues" to calculate and remit franchise and PEG fees to the City under Chapter 66 of the Texas Public Utility Regulatory Act ("PURA") (the treatment of late fees being referred to as the "Late Fee Methodology"), subject to the following: For the first three (3) years from the Effective Date, Spectrum shall treat 100% of

the amounts calculated under the Late Fee Methodology as cable and video revenue for purposes of franchise fee and PEG fee payments to the City; for years four (4) through seven (7) from the Effective Date, Spectrum shall treat 75% of the amounts calculated under the Late Fee Methodology as cable and video revenue for purposes of franchise fee and PEG fee payments to the City; and for years eight (8) through ten (10) from the Effective Date, Spectrum shall treat 45% of the amounts calculated under the Late Fee Methodology as cable and video revenue for purposes of franchise fee and PEG fee payments to the City. At the conclusion of the ten year period covered by this agreement, Spectrum shall calculate and remit franchise and PEG fees in accordance with the terms of PURA.

6. **Street Validation Process.** No later than sixty (60) days after the Effective Date, Spectrum and the City shall agree in writing to a process to validate subscriber revenue associated with addresses within and without the City using Spectrum's list of serviceable addresses for all zip codes that include the City, and City boundary information using a mutually agreeable source (such as U.S. Census Bureau TIGER Database or a functional equivalent), and for the true-up of franchise and PEG fees on a go-forward basis based on miscoded addresses (such process being referred to as "Street Address Validation Process"). The City shall give Spectrum at least ninety (90) days' advance written notice of its intent to engage in the Street Validation Process for a given year, but the Street Validation Process may be conducted no more frequently than three times within 10 years following the Effective Date (the initial Street Validation Process to commence within one year following the Effective Date; at year 5 upon request; and at year 10 upon request). The parties shall bear their own costs in complying with the agreed Street Validation Process.

7. **Mutual Special Releases and Covenants Not to Sue.**

(a) **The City's Release of Spectrum.** Except with respect to any obligations created by or arising out of this Agreement, the City hereby covenants not to sue and releases and absolutely and forever discharges Spectrum, including its parent Charter Communications, Inc., and its agents, contractors, employees, attorneys, predecessors, successors and assigns, subsidiaries and any of their affiliated entities and each of them, from any and all claims, demands, grievances, liabilities, debts, accounts, obligations, costs, expenses, liens, actions and causes of action, of every kind and nature whatsoever, whether known or unknown, anticipated or unanticipated, suspected or unsuspected, which the City has or claims to have, now or hereafter, against Spectrum or its agents, contractors, employees, attorneys, predecessors, successors and assigns, and each of them, arising out of or in connection with the Dispute.

(b) **Spectrum's Release of the City.** Except with respect to any obligations created by or arising out of this Agreement, Spectrum hereby covenants not to sue and releases and absolutely and forever discharges the City and its elected officials, agents, contractors, employees, attorneys, predecessors, successors and assigns, and each of them, from any and all claims, demands, grievances, liabilities, debts, accounts, obligations, costs, expenses, liens, actions and causes of action, of every kind and nature whatsoever, whether known or unknown, anticipated or unanticipated, suspected or unsuspected, which Spectrum has or claims to have, now or hereafter, against the City or its elected officials, agents, contractors, employees, attorneys, predecessors, successors and assigns, and each of them, arising out of or in connection with the Dispute.

8. **No Admission of Liability.** Each Party acknowledges and agrees that this Agreement accomplishes the compromise of disputed claims and neither this Agreement nor any negotiations or proceedings connected with this Agreement shall be considered, offered, received as or deemed to be evidence of an admission on the part of any party hereto of any fact, allegation, claim, statement, culpability, liability or wrongdoing whatsoever, whether as alleged in connection with the Dispute or otherwise. Any liability, wrongdoing or error is expressly denied by each Party to this Agreement and this Agreement is without prejudice to any Party's claims or defenses in any future proceedings between the Parties to this Agreement, except to the extent that such claim or defense is inconsistent with the express promises herein.

9. **Waiver of Unknown Claims.** Each Party hereby acknowledges that each Party is aware that such Party may later discover facts in addition to or different from those which such Party now knows or believes to be true with respect to the claims that comprise the Dispute and that it is such Party's intention, notwithstanding, to fully, finally and forever, settle and release all of the claims released by this Agreement, known or unknown, suspected or unsuspected, which now exist, or previously existed between the Parties, with the exception of facts concealed by fraud on the part of either party. In furtherance of such intention, the releases given in this Agreement shall be and shall remain in effect as a full and completed release, notwithstanding the discovery or existence of any such additional or different facts, unless it is discovered that material facts have been fraudulently concealed. The Parties, further, accept and assume the risk that such facts may turn out to be different from the facts now known or believed to be true by the parties and agree that the releases given in this Agreement shall remain in all respects effective and shall not be subject to termination or rescission by reason of any such difference in fact.

10. **Confidentiality.** The terms of the Agreement shall be confidential. However, any Party hereto may disclose the terms or conditions of this Agreement to said party's respective attorneys or accountants who shall be bound by the provisions of this section; or, where, as the case may be, disclosure is required pursuant to the Texas Public Information Act or any other state or federal laws governing the obligation of municipalities to respond to information requests; or, upon subpoena, order or other formal request in a proceeding, to any local, state or federal governmental agency or court having jurisdiction to order disclosure of this Agreement or any of its terms or conditions.

11. **Non-Disparagement.** The Parties shall make reasonable efforts to provide notice to their employees, agents and representatives that, in response to any inquiry by a member of the media, press or public, they are to advise that the matter was resolved to the satisfaction of the Parties, and that they should refrain from making any public statements (or authorizing any statements) that are disparaging to the reputation or business of one another. The foregoing obligation to make reasonable efforts shall be fulfilled by providing written notice, including by e-mail, to such employees agents and representatives at or around the Effective Date of this Agreement. This paragraph does not create any ongoing obligations once such notice has been provided.

12. **Representations and Warranties.**

(a) Each of the Parties to this Agreement hereby represents and warrants that such Party has not heretofore assigned or transferred, or purported to assign or transfer, to any

person whomsoever any of the claims, demands, grievances, liabilities, debts, accounts, obligations, costs, expenses, liens, actions or causes or action that are released by the terms of this Agreement. Each Party to this Agreement further agrees to indemnify and hold harmless any other Party from and against the assertion by any third party of any such claims, demands, grievances, liabilities, debts, accounts, obligations, costs, expenses, liens, actions or causes of action, including reasonable attorneys' fees and costs incurred, arising out of or in connection with any such assignment or transfer by such Party.

(b) Each person executing this Agreement on behalf of a corporation or other legal entity warrants that he or she holds the position indicated beneath his or her signature and that he or she has been duly authorized by said corporation or other legal entity to execute this Agreement on its behalf.

13. **Miscellaneous.**

(a) **Independent Advice.** Each Party to this Agreement acknowledges and agrees that such Party to this Agreement has been represented throughout the negotiation and documentation by attorneys of the Party's choice and has been advised by such attorneys with respect to this Agreement and the effect of the releases given in this Agreement. Each party to this Agreement further acknowledges and agrees that such Party has read this Agreement, knows the contents of this Agreement and in executing this Agreement has relied solely on the Party's own judgment, belief and knowledge, and the advice and recommendations of the party's attorneys and other advisers, concerning this Agreement, and has not been induced to enter into this Agreement by any representation or statement of any other party not expressly contained in this Agreement.

(b) **Successors and Assigns.** This Agreement shall be binding on Spectrum and its agents, contractors, employees, attorneys, predecessors, successors, and assignees, and each of them, including but not limited to any voluntary or involuntary successor or assign in whole or in part of: (i) the state-issued certificates of franchise authority (and any local franchises) held by Spectrum to operate in the City as the same may be renewed or extended; or (ii) the system controlled or operated by Spectrum; (iii) the subscribers or customers serviced by Spectrum; or (iv) a direct or indirect agreement with Spectrum or its affiliates to provide cable service subject to franchise and PEG fees in the City.

(c) **Integration.** The Parties acknowledge that this Agreement sets forth the entire agreement between the Parties relating to the subject matter of this Agreement.

(d) **Additional Actions.** The Parties agree to take such other action as may be provided herein or reasonably required to carry out the terms of this Agreement.

(e) **Titles and Captions.** Titles and captions contained in this Agreement are inserted as a matter of convenience and for reference and are not intended and shall not be construed to define, limit, extend or otherwise describe the scope of this Agreement or any provision of this Agreement.

(f) **Waiver.** No breach of any provision of this Agreement can be waived unless in writing. Waiver of any one breach of this Agreement shall not be deemed to be a waiver of any other breach of that or any other provision of this Agreement.

(g) **Modification and Amendment.** No modification of any of the terms or provisions of this Agreement shall be binding on any Party to this Settlement Agreement unless made in writing and signed by a duly authorized representative of such Party and in the case of a modification intended to bind the City, approval of the modification by the City's city council.

(h) **Agreement to be Governed by Texas Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

(i) **No Construction.** No Party to this Agreement or such Party's attorney shall be deemed to be the drafter of this Agreement for purposes of interpreting or construing any of the provisions of this Agreement. This Agreement shall be interpreted in accordance with the fair meaning of its language and not strictly for or against any of the Parties to this Agreement.

(j) **Execution in Counterparts.** This Agreement may be executed in any number of copies by the Parties to this Agreement on separate counterparts and will become effective upon signature by all Parties upon one of more such counterparts.

IN WITNESS WHEREOF, the Parties hereto have executed and delivered this Agreement as of the dates shown below.

DATED: _____

SPECTRUM GULF COAST, LLC,
FORMERLY KNOWN AS TIME
WARNER CABLE TEXAS, LLC,
BY CHARTER COMMUNICATIONS,
INC., ITS MANAGER

By: _____

Its: _____

DATED:_____

CITY OF SAN ANTONIO, TEXAS

By:_____

Its:_____

APPROVED AS TO FORM:

Counsel for the City

Jane E. Bockus
Texas Bar No. 02541700
Melanie L. Fry
State Bar No. 24069741
Bonnie K. Kirkland
Texas Bar No. 24074539
DYKEMA GOSSETT, PLLC
112 East Pecan Street, Suite 1800
San Antonio, Texas 78205
Tel. (210) 554-5500
Fax (210) 226-8395
mbernard@dykema.com
jbockus@dykema.com
mfry@dykema.com
bkirkland@dykema.com

APPROVED AS TO FORM:

Counsel for Spectrum Gulf Coast, LLC

Paul A. Werner
Abraham J. Shanedling
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 Pennsylvania Ave., N.W., Suite 100
Washington, D.C. 20006-6801
Tel. (202) 747-1931
Fax (202) 747-3817
pwerner@sheppardmullin.com
ashanedling@sheppardmullin.com

Amanda Cottrell (Texas Bar No. 24064972)
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2200 Ross Avenue, 24th Floor
Dallas, Texas 75201
Tel. (469) 391-7400
Fax (469) 391-7401
acottrell@sheppardmullin.com