

ORDINANCE NO. 2016-08-078

AN ORDINANCE WAIVING RIGHT OF FIRST REFUSAL TO PURCHASE ASSETS

(Waiver of the City of Urbana's Right to Purchase Those UC2B Fiber Optic Network Assets Located within The City of Urbana's Corporate Boundaries and which are Operated by iTV-3, Inc.)

WHEREAS, the City of Urbana ("Urbana") is a home rule unit of local government pursuant to Article VII, Section 6, of the Illinois Constitution, 1970, and may exercise any power, whether legislative or administrative, and perform any function pertaining to its government and affairs not otherwise expressly reserved to the State of Illinois by legislation; and

WHEREAS, in August 2009, the University of Illinois ("University") submitted a proposal to the U.S. Department of Commerce seeking financial assistance in order to create and construct a high speed fiber optic network within the City of Urbana and the City of Champaign ("Champaign") to be known as the Urbana-Champaign Big Broadband project ("UC2B Network"); and

WHEREAS, in September 2009, Urbana, Champaign and the University entered into and executed an Intergovernmental Agreement ("IGA") which provided for the organization of the Urbana-Champaign Big Broadband Consortium ("Consortium") in order to create and construct the UC2B Network should the federal government approve the University's request for financial assistance to create and construct the UC2B Network; and

WHEREAS, in February 2010, the U.S. Department of Commerce awarded the University a grant of up to \$22,534,776 for the creation and construction of the UC2B Network; and

WHEREAS, in November 2010, the Illinois Department of Commerce and Economic Opportunity awarded the University a \$3,500,000 grant to construct the UC2B Network; and

WHEREAS, Urbana and Champaign provided local funding and/or in-kind value for the construction of the UC2B Network; and

WHEREAS, the Consortium commenced, undertook, and completed creation and construction of the UC2B Network in accordance with the terms and conditions of the U.S. Department of Commerce and the State of Illinois grants which included laying optical fiber within a number of low income neighborhoods (census tracts); and

WHEREAS, the Consortium members began operating the UC2B Network but ultimately decided to form a not-for-profit corporation to take over the operation, maintenance and expansion of the UC2B Network; and

WHEREAS, on August 16, 2013, the Urbana Champaign Big Broadband NFP (the "NFP") was incorporated; and

WHEREAS, the U.S. Department of Commerce was given a 77% lien interest in those physical assets of the UC2B Network which were acquired and installed using the federal grant funds; and

WHEREAS, on or about September 20, 2013, the U.S. Department of Commerce (the National Telecommunications and Information Administration) approved the University's request to assign and transfer the operation, maintenance and expansion of and to grant indefeasible rights of use in and to the UC2B Network to the NFP; and

WHEREAS, sometime after September 20, 2013, the Consortium members transferred and assigned their rights to operate, maintain and expand and to grant indefeasible rights of use in and to the UC2B Network to the NFP while retaining any and all ownership rights in and to the physical assets which comprise the UC2B Network as of the immediate aforesaid date; and

WHEREAS, sometime prior to February 28, 2014, the NFP decided to seek a partner which would have the financial and staff resources and ability to operate, maintain and expand the UC2B Network with the goal of expanding the same throughout Urbana and Champaign; and

WHEREAS, on or about February 28, 2014, the NFP and iTV-3, Inc. ("iTV-3") entered into an agreement ("NFP Agreement") which, *inter alia*, transferred the NFP's right to operate, maintain and expand and grant indefeasible rights of use in and to the UC2B Network to iTV-3; and

WHEREAS, Paragraph 8 of the NFP Agreement states:

iTV-3 further agrees that, in the event it or any affiliated entity plans to sell the iTV-3 affiliate for Champaign and Urbana or assign or sell interests in the Assets, the cities of Champaign and Urbana (hereinafter called "the Cities") will have right of first refusal to purchase iTV-3's interests in their

respective communities at market price, as determined by an arms-length, written offer to purchase made to iTV-3 or its affiliate. Within 30 days of a written request by the Cities, iTV-3 shall promptly provide them all of the information they request in order to make an informed decision as to whether to exercise this right. The Cities shall have 30 days following provision by iTV-3 of the requested information to choose whether to exercise the right.

(The "right of first refusal" granted to Urbana and Champaign in Paragraph 8, hereinafter referred to as "RFR"); and

WHEREAS, iTV-3 took over the operation, maintenance and expansion of the UC2B Network; and

WHEREAS, iTV-3 and Urbana entered into and executed a Cable Television Franchise Agreement ("Cable Agreement") dated December 15, 2014, whereby iTV-3 was granted the right to provide cable television service to those Urbana residents and businesses which subscribed to the service which iTV-3 would make available; and

WHEREAS, iTV-3, pursuant to the Cable Agreement, commenced providing cable service over the UC2B Network; and

WHEREAS, Champaign entered into a substantially similar cable franchise agreement with iTV-3; and

WHEREAS, on or around February 12, 2016, iTV-3 notified the NFP and the NFP notified Urbana and Champaign that iTV-3 and Countrywide Broadband, LLC ("CWB") had entered into and executed an asset purchase agreement ("APA") whereby iTV-3 agreed to sell and CWB or an affiliate created by CWB (iTV-3, LLC)(CWB and iTV-3, LLC, collectively, "CWB") agreed to purchase all of iTV-3's assets wherever located including, but not necessarily limited to, those located in Urbana and Champaign; and

WHEREAS, Urbana received a notice from iTV-3 and CWB of CWB's intent to acquire iTV-3's cable franchise with Urbana which notice was included in a Federal Communications Commission Form 394 ("FCC 394"); and

WHEREAS, Champaign received the same notice and FCC 394 from CWB and iTV-3 regarding CWB's intent to acquire iTV-3's cable franchise with Champaign; and

WHEREAS, federal regulations (47 CFR 76.502) provide that Urbana has 120 days from the date of receipt of FCC 394 in which to decide whether or not to grant iTV-3's request to assign and transfer the Cable Agreement to CWB; and

WHEREAS, in a letter dated July 25, 2016, CWB notified Urbana and Champaign of CWB's withdrawal of its applications (FCC 394s) to acquire the above-referenced cable franchises; and

WHEREAS, NFP and CWB have agreed in a memorandum of understanding ("MOU") on terms which the NFP believes are acceptable and which the NFP has recommended to Urbana, Champaign and the University to approve (Exhibit); and

WHEREAS, the Urbana and Champaign City Attorneys and the University's attorney have recommended modifications to the terms contained in the MOU and CWB has accepted those recommendations; and

WHEREAS, the MOU provides that the NFP will recommend to Urbana and Champaign that they waive their respective RFRs; and

WHEREAS, the City of Urbana City Council now deems it appropriate to waive Urbana's RFR as provided in Paragraph 8 of the NFP Agreement; and

WHEREAS, any waiver of Urbana's RFR provided for in this Ordinance shall apply to and be limited only to the transaction between iTV-3 and CWB on terms which are substantially similar to those contained in the MOU.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF AND FOR THE CITY OF URBANA, CHAMPAIGN COUNTY, ILLINOIS, as follows:

Section 1.

The City Council shall and hereby does waive Urbana's RFR to purchase those iTV-3 assets which are located in Urbana but which are not already owned by Urbana or the University which right is provided for in Paragraph 8 of the NFP Agreement.

Section 2.

The waiver of Urbana's RFR provided for in Section 1 of this Ordinance shall be deemed effective only if and when the NFP and CWB execute an agreement which contains substantially the terms and conditions provided for in the MOU and to or for

no other transaction unless expressly provided for in a separate ordinance adopted by the City of Urbana City Council.

Section 3.

Notwithstanding Sections 1 and 2 herein, the City Council does not waive any option to purchase those UC2B Network assets which are located in Urbana but which are not already owned by Urbana or the University which purchase right is provided for in Paragraph 11 of the MOU approved by CWB and the NFP or in any subsequent agreement entered into by and between CWB and the NFP which contains one or more purchase options in favor of Urbana which is or are similar to the purchase options appearing in said MOU Paragraph 11.

Section 4.

The City Council recognizes that no action on its part is required concerning CWB's acquisition of the cable franchise agreement between iTV-3, Inc. and Urbana since CWB has withdrawn its application to acquire said cable franchise and, therefore, no such action is taken.

This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED BY THE CITY COUNCIL this ____ Day of _____, 2016 with the "ayes" and "nays" being recorded as follows:

AYES: _____.

NAYS: _____.

ABSTENTIONS: _____.

Phyllis D. Clark, City Clerk.

APPROVED by the Mayor this _____ Day of _____, 2015.

Laurel Lunt Prussing, Mayor.