



## MEMORANDUM

To: Northern Dakota County Cable Communications Commission and its Member Cities

From: Brian Grogan, Esq.

Date: February 15, 2016

Re: Competition in Cable Communications Franchising

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### **Executive Summary**

Northern Dakota County Cable Communications Commission ("Commission") consists of the cities of Inver Grove Heights, Lilydale, Mendota, Mendota Heights, Sunfish Lake, South St. Paul, and West St. Paul, Minnesota ("Member Cities"). The Commission and its Member Cities are considering the grant of a competitive cable franchise to Qwest Broadband Services, Inc., d/b/a CenturyLink ("CenturyLink") in a service area for which Comcast holds an existing franchise. This memorandum is intended to assist the Commission and its Member Cities consider the proposed CenturyLink Cable Television Franchise Ordinance ("CenturyLink Franchise") by summarizing the legal issues surrounding its terms that relate to competition in the cable communications industry.

### **Details**

The Commission previously conducted a public hearing regarding CenturyLink's application and qualifications to provide cable communications services to residents of the Member Cities. Commission staff was thereafter directed to negotiate with CenturyLink to seek mutually acceptable terms for the CenturyLink Franchise. Those negotiations are now complete and have resulted in the proposed CenturyLink Franchise enclosed as Exhibit 1. Commission staff has also prepared suggested written "findings of fact," enclosed as Exhibit 2, setting forth the factual and

legal basis for the grant of the CenturyLink Franchise and the impact of relevant State and federal competitive cable franchise laws and regulations.

***Build-out***

To help promote competition in and minimize unnecessary regulatory burdens on the cable communications industry, the Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 and Telecommunications Act of 1996 (the "Cable Act") prohibits local franchising authorities from granting exclusive cable communications franchises or unreasonably refusing to award an additional franchise to a qualified applicant.<sup>1</sup> The Federal Communications Commission ("FCC"), which administers the Cable Act, addressed competitive cable franchising in its 2007 *Report and Order and Further Notice of Rulemaking* (generally referred to as the "621 Order" after its subject, Section 621 of the legislation that became the Cable Act). The 621 Order explained that an unreasonable refusal in contravention of the Cable Act could occur not only by outright denial of a franchise application, but also by creating conditions that operate as de facto denials.

One variety of de facto denial addressed by the 621 Order is the imposition of unreasonable build out requirements that act as a barrier for an additional cable provider to enter a market with an existing franchise:

Build-out requirements deter market entry because a new entrant generally must take customers from the incumbent cable operator . . . . Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment. Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.<sup>2</sup>

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<sup>1</sup> 47 U.S.C. § 541(a)(1).

<sup>2</sup> 621 Order at ¶ 35.

The 621 Order did not prohibit all build out requirements, but instead provided examples of unreasonable build out requirements - and of reasonable ones, such as a small initial deployment and required expansion triggered by market success.<sup>3</sup>

Minnesota Statutes Chapter 238, which establishes statewide cable communications requirements, also addresses build out by requiring "a provision in initial franchises identifying . . . a schedule showing: . . . that construction throughout the authorized franchise area must be substantially completed within five years of the granting of the franchise."<sup>4</sup> CenturyLink takes the position that Minnesota's five-year build out requirement is unreasonable under the 621 Order and is therefore preempted by the federal law. Comcast disagrees and points to the FCC's recent reaffirmation that the 621 Order's rulings "were intended to apply only to the local franchising process and not to franchising laws and decisions at the state level."<sup>5</sup>

The CenturyLink Franchise addresses this issue by requiring a modest initial deployment (at least 15% of the service area within two years) and linking build out requirements to market-success benchmarks that CenturyLink must use its best efforts to meet, but granting the Commission and Member Cities sole discretion to determine, at the end of five years, whether CenturyLink has fulfilled its build out obligations to qualify for renewal of the franchise.<sup>6</sup>

### ***Competitive Equity***

The Minnesota cable communications statutes also contain a general level-playing-field (i.e., "competitive equity") provision that requires that an additional franchise include no terms or conditions "more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational, or governmental access requirements; or (3) franchise

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<sup>3</sup> *Id.* at ¶ 89-90.

<sup>4</sup> Minn. Stat. § 238.084, subd. 1(m).

<sup>5</sup> 621 Order at ¶ 7, cited in letter dated April 15, 2015

<sup>6</sup> CenturyLink Franchise §§ 2.8 and 2.10.

fees.<sup>7</sup> Minnesota courts have interpreted this provision as requiring "substantially similar" - rather than identical - terms.<sup>8</sup> Several attempts have been made to ensure that the CenturyLink Franchise is substantially similar to Comcast's existing franchise: first, the Comcast franchise served as the base document for negotiation of the CenturyLink Franchise; second, the franchise fee percentage required by the CenturyLink Franchise is identical to that required by Comcast's franchise; third, the geographic area (after complete build-out) of the CenturyLink Franchise matches the area specified in Comcast's franchise; and fourth, the CenturyLink Franchise requires CenturyLink to require substantially similar—if not greater—public, educational, and governmental access.

***Findings of Fact***

As previously indicated, whether the Commission and Member Cities ultimately grant or deny the proposed CenturyLink Franchise, it must examine all of the evidence presented to it, weigh the facts, and apply the correct legal standards. Enclosed as Exhibit 2 are draft findings of fact generally supporting a decision to approve the CenturyLink Franchise. With the caveat that best practices dictate that the final findings of fact should respond to any evidence or argument against approval, the attached findings of fact may serve as a useful starting point if a Member City elects to grant the CenturyLink Franchise.

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<sup>7</sup> Minn. Stat. § 238.08, subd. 1(b).

<sup>8</sup> See *WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 396 (Minn. Ct. App. 2003).

**EXHIBIT 1**

**CenturyLink Franchise**

**EXHIBIT 2**

**Findings of Fact**

Exhibit 2

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**CITY OF \_\_\_\_\_, MINNESOTA**  
**RESOLUTION NO. \_\_\_\_\_**

**Regarding an Ordinance Granting a Competitive Cable Franchise  
to Qwest Broadband Services, Inc., d/b/a CenturyLink**

**RECITALS:**

**WHEREAS**, the City of \_\_\_\_\_, Minnesota makes the following FINDINGS OF FACT:

1. In February 2015, Qwest Broadband Services, Inc., d/b/a CenturyLink, Inc. (“CenturyLink”) requested that the City of \_\_\_\_\_, Minnesota (“City”) initiate proceedings to consider awarding it a franchise to provide cable communications services in the City (“Service Territory”).
2. Comcast of St. Paul, Inc. (“Comcast”) holds a non-exclusive cable communications franchise for the Service Territory (“Comcast Franchise”).
3. The Comcast Franchise, which the City last renewed on or about April 1, 2000, is currently the only cable communications franchise for the Service Territory.
4. The monopoly held by a sole cable communication provider in a particular market is a barrier to entry for additional providers, which does not have a captive market but must instead “win” every subscriber.<sup>1</sup>
5. The presence of a second cable operator in a market improves the quality of service offerings and drives down prices by approximately fifteen percent (15%).<sup>2</sup>
6. On March 8, 2015 and March 15, 2015, the Northern Dakota County Cable Communications Commission (“Commission”), which the City is a member of, published a Notice of Intent to Franchise a Cable Communications System (“Notice”) in the South-West Review, a newspaper of general circulation in the Service Territory.
7. The Notice indicated that the Commission was soliciting franchise applications and provided information regarding the application process, including that applications were required to be submitted on or before March 31, 2015 and that a public hearing to hear proposals from applicants would be held by the Commission on April 15, 2015 at 7:00 PM.
8. The Commission also mailed copies of the Notice and application materials to CenturyLink and Comcast.<sup>3</sup>

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<sup>1</sup> *In the Matter of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, at ¶ 138 (Rel. Mar. 5, 2007) (“621 Order”).*

<sup>2</sup> *Id.* at ¶¶ 2, 50.

9. On March 31, 2015, the Commission received an application from CenturyLink (the “CenturyLink Application”). The Commission did not receive any other applications.
10. As provided by the Notice, on April 15, 2015 the Commission held a public hearing during the Commission’s regularly scheduled meeting to consider CenturyLink’s application and qualifications.
11. On April 15, 2015, Comcast submitted a letter to the City setting forth its position regarding the CenturyLink Application (“Comcast Letter”).<sup>4</sup>
12. The Comcast Letter expresses concern about CenturyLink’s proposal and how CenturyLink will be held to particular provisions of the existing Comcast Franchise.<sup>5</sup>
13. The Comcast Letter also summarizes Comcast’s position regarding build-out requirements and other proposed terms related to competition in the cable industry.<sup>6</sup>
14. During the April 15, 2015 hearing, CenturyLink presented its proposal and all other interested parties were provided an opportunity to speak and present information to the Commission regarding the CenturyLink Application.
15. Following the hearing, the law firm of Moss & Barnett, a Professional Association prepared a report, dated May 29, 2015 (“Franchise Report”), reviewing and analyzing the applicable franchising procedures, the CenturyLink Application and other information provided by CenturyLink in connection with the April 15, 2015 public hearing.<sup>7</sup>
16. The Franchise Report identifies and discusses federal and state legal requirements relevant to the City’s consideration of the CenturyLink Application, including laws pertaining to franchising procedures and competition between providers.<sup>8</sup>
17. The Franchise Report also analyzes information provided by CenturyLink to establish its qualifications to operate a cable communications franchise in the Service Territory.<sup>9</sup>

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<sup>3</sup> Notice by the Northern Dakota County Cable Communications Commission of Its Intent to Consider An Application for a Franchise and Request for Proposals - Official Application Form.

<sup>4</sup> See , April 15, 2015 letter from Emmett V. Coleman to Jodie Miller, Executive Director for the Commission, regarding CenturyLink Video Franchise Application.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> Report to the Northern Dakota County Cable Communications Commission Regarding Qwest Broadband Services, Inc. d/b/a/ CenturyLink – Proposal for a Cable Communication Franchise, May 29, 2015.

<sup>8</sup> Franchise Report at 2-9.

<sup>9</sup> *Id.* at 11-12.

18. At its meeting on June 3, 2015, the Commission considered the Franchise Report, along with the information and documentation it had received regarding the CenturyLink Application, and adopted a resolution finding and concluding that the CenturyLink Application complied with the requirements of Minn. Stat. § 238.081 and that CenturyLink is legally, technically, and financially qualified to operate a cable communications system within the Service Territory.
19. As a result of its determination that CenturyLink complied with all application requirements and is a qualified applicant, the Commission authorized Commission staff to negotiate with CenturyLink to attempt to reach mutually acceptable terms for such a franchise.
20. In Minnesota, both State and federal law govern the terms and conditions of an additional cable communications franchise in an already-franchised service area.<sup>10</sup>
21. The franchising authority may not grant an exclusive franchise or unreasonably refuse to award an additional competitive franchise.<sup>11</sup>
22. The franchising authority must allow an applicant reasonable time to become capable of providing cable service to all households in the service area.<sup>12</sup>
23. The franchising authority may grant an additional franchise in an already-franchised service area if the terms and conditions of the additional franchise are not “more favorable or less burdensome than those in the existing franchise” regarding the area served, the PEG access requirements, and franchise fees.<sup>13</sup>
24. The additional franchise must also include, among other things, “a schedule showing . . . that the construction throughout the authorized franchise area must be substantially completed within five years of the granting of the franchise.”<sup>14</sup>
25. In order to ensure that any additional franchise granted to CenturyLink would contain substantially similar service area, PEG access requirements, and franchise fees to the Comcast Franchise, the Commission used the Comcast Franchise as the base document for its negotiations.
26. On [\_\_date\_\_], the City Council gave notice that it intended to introduce an ordinance granting a cable communications franchise to CenturyLink.
27. Copies of the CenturyLink Franchise were made available to the public, including Comcast, on [\_\_date\_\_].

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<sup>10</sup> See 47 U.S.C. § 541(a)(1); Minn. Stat. §§ 238.08, .084; *see also* Franchise Report at 2-8.

<sup>11</sup> 47 U.S.C. § 541(a)(1).

<sup>12</sup> 47 U.S.C. § 541(a)(4).

<sup>13</sup> Minn. Stat. § 238.08, subd. 1(b).

<sup>14</sup> Minn. Stat. § 238.84, subd. 1(m).

28. On [date], the City Council introduced Ordinance No. \_\_\_\_\_, an Ordinance of the City of \_\_\_\_\_ Granting a Cable Communications Franchise to Qwest Broadband Services, Inc. d/b/a CenturyLink (“CenturyLink Franchise”).
29. The CenturyLink Franchise encompasses the same Service Territory encompassed by the Comcast Franchise.<sup>15</sup>
30. The franchise fee percentage required by the CenturyLink Franchise is identical to that required by the Comcast Franchise.<sup>16</sup>
31. The PEG access requirements in the CenturyLink Franchise mandate certain obligations, such as HD channel capacity for all PEG channels that go beyond the commitments made in the Comcast franchise.<sup>17</sup>
32. The City recognizes that CenturyLink, which currently offers no cable communications services in the Service Territory, cannot justify a large initial deployment because it “realistically cannot count on acquiring a share of the market similar to Comcast’s share . . . [and] must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.”<sup>18</sup>
33. The CenturyLink Franchise therefore requires CenturyLink’s initial deployment to be capable of serving at least fifteen percent (15%) of the living units in the Service Territory within two (2) years. CenturyLink is further required to commit a significant portion of its initial investment to areas below the median income within the City.<sup>19</sup>
34. The CenturyLink Franchise permits the City to monitor CenturyLink’s progress and compliance with build-out requirements via quarterly meeting and accelerates the build-out schedule if CenturyLink has market success, with the goal and expectation that build-out will be substantially complete before the CenturyLink Franchise’s five (5) year term expires.<sup>20</sup>
35. During its regularly scheduled meeting on [date], the City Council will hold a public hearing at which all interested parties are provided an opportunity to speak and present information regarding the proposed CenturyLink Franchise.

**WHEREAS**, the City has considered these facts and the cable-related needs and interests of the community:

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<sup>15</sup> CenturyLink Franchise §2.7; Comcast Franchise § 2.8.

<sup>16</sup> CenturyLink Franchise §8.3; Comcast Franchise § 8.3.

<sup>17</sup> CenturyLink Franchise §6 and Exhibit A; Comcast Franchise § 6 and Exhibit B.

<sup>18</sup> 621 Order at ¶ 35.

<sup>19</sup> CenturyLink Franchise §2.8.

<sup>20</sup> CenturyLink Franchise §2.9- 2.10.

**NOW THEREFORE**, the City Council for the City of \_\_\_\_\_, Minnesota hereby resolves as follows:

1. The foregoing findings are adopted as the official findings of the City Council and made a part of the official record.
2. The City has authority to adopt an ordinance granting a cable communications franchise to CenturyLink for the Service Territory.
3. The City may not unreasonably refuse to award a competitive cable communications franchise to CenturyLink.
4. The City and its residents will benefit from adoption of the CenturyLink Franchise, which will introduce facilities-based competition into the cable communications market in the Service Territory and thereby reduce costs to consumers and increase the quality and availability of services.
5. CenturyLink is legally, technically, and financially qualified to operate a cable communications system in the Service Territory and has complied with all application requirements.
6. The City has complied with all franchise application requirements imposed by State and federal law, including those identified herein or in the Franchise Report.
7. The terms and conditions of the CenturyLink Franchise pertaining to service area, a PEG access requirement, and franchise fees are not more favorable or less burdensome than the corollary terms of the Comcast Franchise.
8. The CenturyLink Franchise's initial deployment requirement of fifteen percent (15%) within two (2) years and five (5) year timeline for substantially completing build-out provides a reasonable period of time for CenturyLink to become capable of reaching full deployment and is therefore consistent with both State and federal law.
9. The Ordinance Granting a Cable Communications Franchise for Qwest Broadband Services, Inc., d/b/a CenturyLink is formally and finally adopted.
10. The City finds and concludes that its actions are appropriate, reasonable, and consistent in all respects with the mandates set forth in Chapter 238 of Minnesota Statutes and applicable provisions of federal law, including 47 U.S.C. § 541(a).

PASSED AND ADOPTED in regular session of the City Council of the City of \_\_\_\_\_, Minnesota this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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Mayor of the City of \_\_\_\_\_

ATTEST:

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City Clerk