



## Request for City Council Committee Action from the Department of Communications

**Date:** April 24, 2015

**To:** Council Member John Quincy, Chair of Ways & Means

**Subject:** CenturyLink cable franchise application

**Recommendation:** That the Ways & Means Committee (1) hold a public hearing on the proposed CenturyLink cable television franchise ordinance; (2) take action to recommend approval or denial of the proposed CenturyLink cable television franchise ordinance by the City Council; (3) direct staff to prepare findings consistent with the Committee's recommendation; and, (4) if the franchise ordinance is approved, authorize the proper City officials to execute a cable television franchise agreement with CenturyLink.

**Previous Directives:** March 20, 2015, City council (1) received and filed the Cable Officer's Report on the CenturyLink cable franchise application, (2) directed staff to engage in negotiations with CenturyLink regarding a cable franchise, consistent with the cable officer's report, and (3) and gave notice of intent to introduce a cable franchise ordinance.

Feb. 23, 2015, public hearing before Ways & Means on CenturyLink's cable franchise application to the City.

### Department Information

Prepared by: Matt Laible, Communications Department, 612-673-2786

Approved by: \_\_\_\_\_  
Spencer Cronk, City Coordinator, 612-673-3992

Presenter in Committee: Mike Bradley, Bradley Hagen & Gullikson, LLC

### Supporting information

In January, 2015, the City received a cable franchise application from CenturyLink. Comcast Cable currently has a non-exclusive franchise agreement with Minneapolis, which means that other entities can also seek franchises to provide cable service in Minneapolis.

A public hearing on the application was held on Feb. 23, and additional written comment from the public was accepted through Feb. 27. Following the public hearing, staff prepared a Cable Officer Report ("Report"), which recommended that the Council receive and file the Report and direct staff to negotiate a cable franchise with CenturyLink, consistent with the

Report. On March 20, the City Council adopted the recommendation. This action did not approve a franchise.

Deputy City Attorney, Peter Ginder and the City's outside attorney, Mike Bradley, in consultation with Matt Laible, the City's Cable Officer, engaged in cable franchise negotiations with CenturyLink. The attached cable franchise is the product of those negotiations.

In reviewing the CenturyLink cable franchise, there are two primary issues to consider. The first is whether federal law preempts Minnesota's 5-Year Build Statute. Minnesota Statutes Section 238.084, subdivision 1(m) requires all initial franchises to have a provision that requires a cable operator build out its cable system at a rate of 50 plant miles per year and that its cable system be substantially complete within 5 years. As the Report indicated, CenturyLink claims that this 5-Year Build Statute is an unlawful barrier to entry and preempted by federal law and an FCC decision referred to as the 621 Order. The Report also indicated that there is no caselaw in Minnesota directly addressing preemption of the 5-Year Build Statute. The Report concluded that CenturyLink has a good faith basis on its preemption claim and is willing to indemnify the City related to any litigation surrounding the grant of a franchise to CenturyLink. CenturyLink refused to incorporate the language of the 5-Year Build Statute in the proposed franchise, based on its preemption argument. As described below, the proposed CenturyLink franchise ordinance has provisions for a reasonable build-out of the city. The proposed franchise ordinance also has provision for defense and indemnification of the City regarding this issue.

The next issue is whether the CenturyLink franchise contains a reasonable build-out schedule. The franchise ordinance recognizes that CenturyLink has already constructed a legacy communications system throughout the city of Minneapolis, which is capable of providing telephone and internet service. The build-out provisions in the franchise are related to upgrades of the legacy system to make it capable of providing cable service to all city residents. The proposed CenturyLink Franchise addresses build-out as follows:

- Complete Equitable Build-Out. Goal is to build-out the entire city over 5-year term, based on market success, with a significant investment targeted to areas below the median income in the city. See Section 1.2(a)(1).
- Initial Minimum Build-Out Commitment. 15% of the city over two years. See Section 1.2(a)(2).
  - CenturyLink must make its best effort to complete the initial deployment in a shorter period of time.
  - Deployment to households in every Ward.
  - Must include a significant number of households below the medium income of the city.
  - CenturyLink permitted to serve more households than the initial commitment.
- Quarterly Meetings. Starting January 1, 2016, CenturyLink must meet with Cable Officer and show to the City's satisfaction (See Section 1.2(a)(3)):
  - Number of households capable of being served and actually served.
  - Compliance with anti-redlining requirements.

- Maps and documentation “showing exactly where within the city the Grantee is currently providing cable service.”
- Additional Build-Out Based on Market Success. Starting January 1, 2016, CenturyLink build-out commitment will increase if its penetration rate is at least 27.5% in the areas that it is offering service. See Section 1.2(a)(4).
  - Example: If offering service to 60% of the City and CenturyLink has penetration of 30% in that area, then the build-out commitment will increase by 15%, to cover 75% of the city.
  - Additional build-out commitment continues until all households are served.
- Line Extension. No initial mandatory line extension, unless CenturyLink becomes the dominate cable provider. Then the City decides CenturyLink’s build-out schedule, including a density requirement that is the same or similar to Comcast’s density requirement. See Section 1.2(a)(5).

The Council may consider whether the Initial Minimum Build-Out Commitment of 15% of the City over two years is reasonable. CenturyLink claimed in its application that it initially would be providing service to a much greater portion of the City. During negotiations however, CenturyLink was concerned about having too high a commitment in the franchise ordinance and that cities in Minnesota and elsewhere would use a greater commitment as a new standard. CenturyLink refused to increase the Initial Minimum Build-Out Commitment above 15%. However, the provisions related to Quarterly Meetings and Additional Build-Out Based on Market Success are designed to quicken and increase CenturyLink’s initial Build-Out Commitment. The franchise also has provisions requiring that residents in all Wards of the city be included in the initial build commitment and that a significant number of households below the medium income of the city also be included in the initial build-out. CenturyLink must also use its best efforts to complete its initial build faster than two years.

Another issue related to the reasonable build-out is whether the penetration rate triggering additional build-out is reasonable. CenturyLink claims that it needs a penetration rate of 27.5% in order to commit to an additional mandatory build in the city. This penetration number is based on internal CenturyLink return on investment models. Given Comcast’s penetration rate in the City is around 40-45%, a penetration rate of 27.5% may be difficult to obtain and, therefore, it is possible that CenturyLink may not be required to build-out more than its initial commitment.

Economic redlining or “cherry picking” was identified as a concern through the public hearing process. As the Report noted, cherry picking is prohibited by the Federal Cable Act. See 47 U.S.C. § 541(a)(3). The proposed CenturyLink franchise prohibits cherry picking, identical to the Comcast franchise. See Section 1.3. To ensure compliance, CenturyLink has an additional \$500 per day penalty/liquidated damage for violating Section 1.3. See Section 5.4(b)(ix).

The Report also described the State’s level playing field statute, which requires competitive cable franchises not to be more favorable or less burdensome than an incumbents franchise as it relates to franchise fees, support of public, educational, and governmental access television and the area served.

CenturyLink is required to pay a franchise fee of 5% of its Gross Revenues. See Section 4.1 (Identical to Comcast Franchise). The Franchise Area is the entire city. See Section 1.2 (Identical to Comcast Franchise). The Public, Educational, and Governmental (“PEG”)

Access Requirements of the CenturyLink franchise meet, and in places exceed, Comcast's franchise commitments. The CenturyLink PEG commitments are summarized as follows:

- Number of Access Channels. CenturyLink will provide 9 Access Channels. See Section 2.1(z) (same number of Access Channels as Comcast).
- Format of Access Channels. CenturyLink will provide all 9 Access Channels in HD if the City sends them in HD format. See Section 2.1(z) (Comcast will provide up to 3 Access Channels in HD over time).
- Electronic Programming Guide. CenturyLink will pay for EPG costs. See Section 2.1(z)(2) (Identical to Comcast).
- Channel Placement. CenturyLink will make all Access Channels accessible at Channel 14 through the "Minneapolis Mosaic." The Access Channels will be physically located at 8001-8009. See Section 2.1(z)(1) (Comcast has no mosaic and is required to have all the HD Access Channels located near the broadcast channels).
- Public Service Announcements. CenturyLink will allow the City to air PSA on non-Access channels during periods of unsold/unused air time. See Section 2.1(z)(4) (Identical to Comcast).
- Video On-Demand. CenturyLink will provide 25 hours of VOD per Access Channel for a total of 225 VOD hours. See Section 2.1(z)(7) (Comcast has a commitment of providing 10 hours, which may increase to 20 over time).
- PEG Support. CenturyLink will pay a PEG Fee in support of the Access Channels of \$1.50 adjusted by CPI starting in 2016. See Section 2.1(aa) (Amount of funding identical to Comcast).

Overall, the CenturyLink cable franchise is substantially similar to the Comcast cable franchise in most respects. The following highlights the differences between the two cable franchises:

- Term. CenturyLink's Franchise term is 5 years. Comcast's term is 12 years.
- Customer Service. CenturyLink has committed to having a customer service office within the city. Comcast has not.
- Indemnification of the City. CenturyLink has an additional indemnification commitment that Comcast does not have.
- Access Channel Commitments. CenturyLink may provide up to 6 more channels in HD than Comcast. CenturyLink is providing over 200 hours more VOD programming than Comcast. PEG support may be used for capital and operational support under the CenturyLink franchise and is silent in the Comcast franchise.
- Cable Service to Public Buildings. CenturyLink will provide service to all outlets at all government buildings with service and equipment. Comcast's commitment is limited to up to 3 outlets at certain government buildings, plus 40 additional HD converter boxes.
- Penalties/Liquidated Damages. CenturyLink franchise has additional damages for violating the Build-Out and Economic Redlining provisions of the franchise that is not in the Comcast franchise.

- Build-Out. CenturyLink Franchise has a reasonable build-out commitment based on market success. Comcast does not have a build-out provision, as it built-out the city many years ago.
- Line Extension. The CenturyLink franchise does not have an immediate line extension requirement. The City will determine a line extension obligation similar to Comcast's line extension if CenturyLink obtains a 50% penetration level in the city. Comcast has a line extension requirement.
- Broad Categories of Service. The CenturyLink franchise requires broad categories of programming service, including culturally diverse programming. The Comcast franchise does not.

Since a cable franchise is granted by ordinance, the City must hold a public hearing on the cable franchise ordinance. This Committee needs to take action and recommend approval or denial of the proposed franchise ordinance to the City Council and should direct staff to draft findings consistent with its recommendation. The City Council may act on the cable franchise ordinance any time seven days following that public hearing. At the time of the City Council decision to award a cable franchise by ordinance, or to deny the award of a cable franchise, it will need to adopt findings of fact in support of its decision.