

MEMORANDUM

To: City Council of the City of St. Paul, Minnesota
From: Brian Grogan
Date: October 13, 2015
Re: Competition in Cable Communications Franchising

Executive Summary

The City of St. Paul, Minnesota ("City") is considering granting 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 City Council ("Council") in its consideration of the proposed Ordinance Granting a Competitive Cable Franchise for Qwest Broadband Services, Inc., d/b/a CenturyLink ("CenturyLink Franchise") by summarizing the legal issues surrounding its terms that relate to competition in the cable communications industry.

Details

The Council has previously adopted a resolution finding CenturyLink to be legally, technically, and financially qualified to provide cable communications services to residents of the City. In connection with that finding, the Council authorized City staff to negotiate with CenturyLink to determine if mutually agreeable terms for such a franchise could be reached. Those negotiations are now complete and have resulted in the proposed CenturyLink Franchise enclosed as Exhibit 1. City staff has also prepared for the Council's review and consideration, 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.¹ 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.²

¹ 47 U.S.C. § 541(a)(1).

² 621 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.³

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.”⁴ 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.”⁵

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 City 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.⁶

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 *Id.* at ¶ 89-90.

⁴ Minn. Stat. § 238.084, subd. 1(m).

⁵ 621 Order at ¶ 7, cited in Letter, dated May 4, 2015

⁶ CenturyLink Franchise §§ 106(a), 108(2)-(5).

(3) franchise fees.”⁷ Minnesota courts have interpreted this provision as requiring “substantially similar”—rather than identical—terms.⁸ 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 fees required by the CenturyLink Franchise are identical to those 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 Council ultimately grants or denies 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 1 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 the Council elects to grant CenturyLink the franchise it seeks.

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⁷ Minn. Stat. § 238.08, subd. 1(b).

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

Findings of Fact

The City of St. Paul, Minnesota makes the following FINDINGS OF FACT:

1. In March 2015, Qwest Broadband Services, Inc., d/b/a CenturyLink, Inc. (“CenturyLink”) requested that the City of St. Paul, 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 (“Comcast”) holds a non-exclusive cable communications franchise for the Service Territory (“Comcast Franchise”).
3. The Comcast Franchise, which the City last renewed on April 22, 2015, 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.¹
5. The presence of a second cable operator in a market improves the quality of service offerings and drives down prices by approximately 15%.²
6. On March 30, 2015 and April 6, 2015, the City published a Notice of Intent to Franchise a Cable Communications System (“Notice”) in the St. Paul Legal Ledger, a newspaper of general circulation in the Service Territory.
7. The Notice indicated that the City was soliciting franchise applications and provided information regarding the application process, including that applications were required to be submitted on or before April 24, 2015 and that a public hearing to hear proposals from applicants would be held May 6, 2015 at 3:30 PM.
8. The City also mailed copies of the Notice and application materials to CenturyLink, and Comcast.³
9. On April 24, 2015, the City received an application from CenturyLink (the “CenturyLink Application”). The City did not receive any other applications.
10. As provided by the Notice, on May 6, 2015 the City held a public hearing during the City Council’s regularly scheduled meeting to consider CenturyLink’s application and qualifications.
11. On May 4, 2015, Comcast submitted a letter to the City setting forth its position regarding the CenturyLink Application (“Comcast Letter”).⁴

¹ *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”).

² *Id.* at ¶¶ 2, 50.

³ Notice by the City of Saint Paul, Minnesota of Its Intent to Consider An Application for a Franchise and Request for Proposals - Official Application Form

12. The Comcast Letter expresses concern about how CenturyLink's proposal compared to particular provisions of the existing Comcast Franchise.⁵
13. The Comcast Letter also summarizes Comcast's position regarding build-out requirements and other proposed terms related to competition in the cable industry.⁶
14. During the hearing, CenturyLink presented its proposal and all other interested parties were provided an opportunity to speak and present information to the City Council 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 City's franchising procedures, the CenturyLink Application and other information provided by CenturyLink in connection with the May 6, 2015 public hearing.⁷
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.⁸
17. The Franchise Report also analyzes information provided by CenturyLink to establish its qualifications to operate a cable communications franchise in the Service Territory.⁹
18. At its meeting on June 10, 2015, the City Council considered the Franchise Report, along with the information and documentation it had received regarding the CenturyLink Application, and adopted Resolution 15-1012 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 City Council authorized City 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.¹⁰
21. The franchising authority may not grant an exclusive franchise or unreasonably refuse to award an additional competitive franchise.¹¹

⁴See, May 4, 2015 letter from Karly Baraga Werner to Mike Reardon regarding CenturyLink Video Franchise Application.

⁵ *Id.* at 2.

⁶ *Id.* at 1-2.

⁷ Report to the City of St. Paul, Minnesota Regarding Qwest Broadband Services, Inc. d/b/a/ CenturyLink – Proposal for a Cable Communication Franchise, May 29, 2015.

⁸ Franchise Report at 2-9.

⁹ *Id.* at 11-12.

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

22. The franchising authority must allow an applicant reasonable time to become capable of providing cable service to all households in the service area.¹²
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.¹³
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.”¹⁴
25. In order to ensure that any additional franchise granted to CenturyLink would contain substantially similar service area, PEG access requirement, and franchise fees to the Comcast Franchise, the City used the Comcast Franchise as the base document for its negotiations.
26. On May 6, 2015, the City Council gave notice that it intended to introduce an ordinance granting a cable communications franchise to CenturyLink.
27. On October 21, 2015, the City Council introduced Ord 15-55, An Ordinance of the City of St. Paul Granting a Cable Communications Franchise to Qwest Broadband Services, Inc. d/b/a CenturyLink (“CenturyLink Franchise”).
28. Copies of the CenturyLink Franchise were made available to the public, including Comcast, on October 15, 2015.
29. The CenturyLink Franchise encompasses the same Service Territory encompassed by the Comcast Franchise.¹⁵
30. The franchise fees required by the CenturyLink Franchise are identical to those required by the Comcast Franchise.¹⁶
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.¹⁷
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 .

¹¹ 47 U.S.C. § 541(a)(1).

¹² 47 U.S.C. § 541(a)(4).

¹³ Minn. Stat. § 238.08, subd. 1(b).

¹⁴ Minn. Stat. § 238.84, subd. 1(m).

¹⁵ CenturyLink Franchise § 108(1); Comcast Franchise § 108.

¹⁶ CenturyLink Franchise §109; Comcast Franchise § 109.

¹⁷ CenturyLink Franchise §§304-05; Comcast Franchise § 304-305.

. . [and] must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.”¹⁸

33. The CenturyLink Franchise therefore requires CenturyLink’s initial deployment to be capable of serving at least 15% of the living units in the Service Territory within two years. CenturyLink is further required to commit a material and substantial portion of its investment and its deployment of cable services in the City to census areas with the highest percentage of households in the lowest income quartile.¹⁹
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-year term expires.²⁰
35. During its regularly scheduled meeting on November 4, 2015, the City Council held a public hearing at which all interested parties were provided an opportunity to speak and present information regarding the proposed CenturyLink Franchise.

¹⁸ 621 Order at ¶ 35.

¹⁹ CenturyLink Franchise §108(b).

²⁰ CenturyLink Franchise §§106(a), 108(2)-(5).