Quad Cities Cable Communications Commission

Anoka City Hall – Council Work Session Room

September 15, 2016, 9:30 AM

Agenda

1. **Call to Order**
2. **Roll Call**
3. **Approval of Agenda**
4. **Work Session Items**
   - 4.1. CenturyLink Franchise Review
   - 4.2. Annual programming guidelines (continued)
   - 4.3. Other
5. **Adjourn**

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MEMORANDUM

DATE: September 9, 2016
TO: Karen George, Quad Cities Cable Communications Commission
FROM: Bob Vose
RE: CenturyLink Franchise

This Memorandum addresses the cable television franchise application submitted by Qwest Broadband Services, Inc. d/b/a CenturyLink ("CenturyLink"). CenturyLink is a wholly-owned subsidiary of CenturyLink, Inc. a publicly-traded, Fortune 500 company headquartered in Louisiana.

Background

In 2010, CenturyLink, Inc. merged with Qwest Communications International, Inc. ("Qwest") acquiring all of Qwest's subsidiary companies and operations. This included Qwest Communications Services, Inc. and its subsidiary Qwest Corporation, a large local exchange telephone service provider in Minnesota. Qwest Corporation, the applicant's affiliate, owns and operates telephone facilities in the member cities subject to local rights-of-way ordinances in addition to other applicable local, state and federal laws.

CenturyLink seeks authorization to provide cable service in the member cities over its affiliate's telephone network. Minnesota Statutes, Chapter 238 ("Chapter 238"), establishes the process for considering issuance of cable franchises. As required by Chapter 238, the Commission published notices of intent on the member cities' behalf to initiate the process for considering issuance of franchises. CenturyLink filed an application dated June 3, 2015.

Chapter 238 requires a public hearing affording reasonable notice and an opportunity for all interested parties to be heard regarding any franchise application.[1] Any franchise that is ultimately issued must include:

[1] Minn. Stat. § 238.081, Subd. 6.

> a provision that the franchisee's technical ability, financial condition, and legal qualification were considered and approved by the franchising authority in a full public proceeding that afforded reasonable notice and a reasonable opportunity to be heard;[2]

The public hearing requirement is significant because cable franchising is a "quasi-judicial" process.[3] Among other things, the public hearing affords an incumbent cable operator the opportunity to present evidence and argument concerning its existing franchise obligations or an applicant's qualifications to receive a competitive franchise.

The Commission gave the required notice and subsequently conducted the statutorily-required public hearing on June 18, 2015. At the hearing, representatives for CenturyLink gave a presentation describing the company's qualifications and plans to offer "Prism" video service. The incumbent cable provider, Comcast, provided written comments dated June 17, 2015 concerning CenturyLink's application.

Current Status

We have completed review of CenturyLink's application and franchise negotiations with the company. As explained below, CenturyLink's application can be approved and the proposed franchise(s) may be adopted.

ANALYSIS

1. Level Playing Field Law

CenturyLink's application includes a multi-page discussion about federal preemption of Minnesota's level playing field law, Minn. Stat. § 238.08 ("LPF law"), which provides:

> [n]o municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and 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 fees.[4]

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[2] Minn. Stat. § 238.084, Subd. 1(l).

[3] *In re Application of Dakota Telecommunications Group*, 590 N.W.2d 644, 647-8 (Minn. App. 1999) (citing, *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414-15 (Minn. 1981).

> Quasi-judicial proceedings involve an investigation into a disputed claim that weighs evidentiary facts, applies those facts to a prescribed standard, and results in a binding decision. In granting a cable television franchise, the Cable Act requires that franchise proposals contain specific information and a public hearing be held affording reasonable notice and opportunity to be heard. Minn. Stat. § 238.081, subds. 4, 6. This procedure involves testimonial and documentary evidence, and results in a binding decision.

Id. (case citations omitted).

[4] Minn. Stat. § 238.08, Subd. 1(b).

CenturyLink suggests that the LPF law was preempted by orders issued by the Federal Communications Commission (FCC). In its responsive comments, Comcast disputes CenturyLink's argument.[5]

In 2007, the FCC issued an Order and Notice of Proposed Rulemaking addressing competitive cable franchising.[6] The 621 Order addresses the implementation of Section 621(a)(1) of the federal Cable Act.[7] Among other things, Section 621 prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.[8] The 621 Order was challenged and upheld.[9] In January 2015, the FCC reaffirmed the 621 Order on reconsideration.[10]

The FCC found that both traditional cable providers and telephone companies wish to offer customers "triple play" services-- voice, high-speed Internet access, and video. When a phone company enters the cable market, the FCC has determined that competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of services. The FCC has also concluded that the circumstances for competitive entry to the cable market are considerably different than existed when the incumbent cable operators obtained their franchises. Incumbent cable operators were initially the sole providers of cable and gained a high percentage of potential subscribers in the local market. A second entrant is less likely, or even unlikely, to gain the same percentage of subscribers. The competitor faces greater "financial risk" and "uncertainty" than did the incumbent when it entered the market.[11]

As a result, the FCC found that level playing field requirements generally, and system build-out requirements specifically, can be an obstacle when phone companies seek to deploy competitive video services. Although phone companies already have facilities deployed, they still must upgrade existing plant to enable the provision of video service which often requires significant investment.[12]

Based on this reasoning, the 621 Order restricted local level playing field requirements and prohibited imposition of unreasonable build-out requirements on competitors. The FCC further found that the imposition of "up-front" PEG and I-Net support obligations, or obligations that

[5] CenturyLink has received similar franchises from dozens of Minneapolis-St. Paul metro cities in which Comcast is the incumbent cable operator. Comcast made similar comments in many of these cites, however, Comcast has not appealed the grant of such franchises to CenturyLink. The deadline for such litigation has apparently expired.
[6] *In the Matter of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, MB Docket No. 05-311, (rel. March 5, 2007) (the "621 Order").
[7] 47 U.S.C. § 541(a)(1).
[8] 47 U.S.C. § 552(a)(2). Federal law also provides that a local franchising authority: "shall allow . . . [an] applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area . . . " 47 U.S.C. § 541(a)(4). Federal law further prohibits redlining, stating: "[i]n awarding a franchise or franchises, a franchising authority shall ensure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3).
[9] *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).
[10] *Order on Reconsideration* (rel. Jan. 21, 2015).
[11] See generally, 621 Order at ¶ 28.
[12] See generally, 621 Order at ¶ 35.

exceed the incumbent's obligations, are unreasonable, while pro rata sharing arrangements are reasonable.

However, the 621 Order does not appear to preempt Minnesota's LPF law. The 621 Order did not "preempt state law or state level franchising decisions . . ."[13] Rather, the FCC "expressly limit[ed] . . . [its] findings and regulations in this Order to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority."[14] Local requirements are preempted to the extent they conflict with the FCC's guidance in the 621 Order and are not "specifically authorized by state law."[15]

The LPF law is a "state law or state level franchising decision" under the 621 Order. The LPF law prohibits local action by mandating that municipalities refrain from granting certain more beneficial terms in "an additional franchise" if there is "an existing franchise." CenturyLink has not explained how the LPF law constitutes a "local franchising action" that is preempted rather than a "state law" that is expressly preserved. If, however, Comcast's franchise were to contain independent level playing field obligations, the 621 Order would preempt such provisions as they are not "specifically authorized" by the LPF law or other state law.

2. Compliance with Level Playing Field Law

The franchise terms negotiated with CenturyLink comply with the LPF law.[16] The terms regarding: (1) the area served; (2) public, educational, or governmental access requirements; and (3) franchise fees, are as follows:

<u>Service Area</u>

CenturyLink proposes a "market success" approach to cable service deployment. Specifically, CenturyLink would make service available to at least 15% of each city's households during the first 2 years after issuance of franchises, and make best efforts to complete such deployment faster. CenturyLink will further be required to offer service to any and all households capable of receiving such service initially. System technical information disclosed to commission representatives suggests that the percentage of households able to receive service initially may materially exceed 15% of each member's households. CenturyLink's deployment must be equitable and must include households below the median income.

To track compliance, CenturyLink must meet each quarter with the commission to present maps and other information showing:

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[13] 621 Order at ¶ 126.
[14] Id. at ¶ 1, n. 2.
[15] Id. at ¶ 126.
[16] The LPF law would likely be interpreted to require "similar," not identical, franchise obligations. *See, WH Link v. City of Otsego,* 664 N.W.2d 390, 396 (Minn. Ct. App. 2003); *Cable TV Fund 14A v. City of Naperville,* 1997 U.S. Dist. LEXIS 7336, * 37-38 (N.D. IL 1997); *Comcast Cablevision of New Haven, Inc. v. Connecticut Department of Public Utility Control,* 1996 Conn. Super. LEXIS 2927, *7 (1996); and *United Cable Television Corporation v. Connecticut Department of Public Utility Control* 1994 Conn. Super. LEXIS 2222 (1994).

- All households in the City;
- The number and location of households able to receive service;
- The number and location of households actually taking service, and
- Comparative information showing the change/increase in service availability from prior quarters.

Thereafter, if CenturyLink actually provides service to at least 27.5% of the households it is capable of serving, the service obligation increases to include an additional 15% of the total households which must be activated within 2 years. CenturyLink must try to complete deployment within a shorter period of time. This additional build-out continues until every household is served.

CenturyLink's approach is consistent with the 621 Order which suggested that it would be reasonable for a local franchising authority to consider benchmarks requiring a new entrant to increase its build-out after a reasonable time, taking into account the new entrant's market success or market penetration.[17] Comcast noted that its franchise requires service availability everywhere with sufficient development density (35 homes per cable mile overhead; 40 homes per cable mile buried). Comcast did not indicate what areas this requires be served, what areas it actually serves, or either the locations of homes passed and customers served or the overall percentage of households served. Thus, there is no basis to conclude that CenturyLink's proposed obligations violate the LPF law.

In addition to the LPF law, Chapter 238 requires that "initial franchises" include a schedule showing:

> ***
> (3) that construction throughout the authorized franchise area must be substantially completed within five years of the granting of the franchise;[18]

CenturyLink's application seemingly asserts that this requirement is also preempted. Comcast's responsive comments do not raise a question or concern about CenturyLink's compliance with the 5-year substantial completion requirement. Comcast's comments refer only to the LPF law.

CenturyLink's proposed franchise provides (4.3.1(i)) that the "Grantee aspires to provide Cable Service to all households in the City within five (5) years of the Effective Date." The Franchise also contains several provisions indicating that it is granted pursuant to

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[17] 621 Order, ¶ 89.
[18] Minn. Stat. § 238.084, Subd. 1(m).

applicable law, and that the Grantee must comply with all provisions of applicable law.[19]

Finally, CenturyLink will be required to indemnify the cities and commission generally, but the company must also enter a separate indemnification agreement covering any claim arising out of the grant of a franchise to CenturyLink. This additional indemnification:

> includes any claims by the incumbent cable operator against the City that the terms and conditions of this Franchise are less burdensome than the incumbent's franchise, or that this Franchise does not satisfy the requirements of applicable state law(s).

Accordingly, the commission and cities are legally protected from claims associated with CenturyLink's "market success" build out obligations.

PEG Access

In all material respects, CenturyLink has agreed to PEG access requirements that equal or exceed the PEG support provided by Comcast. CenturyLink has agreed to pay PEG support in the amount of 3% of its gross revenues. This arrangement mimics the Comcast's current PEG funding arrangement. Comcast's arrangement is, however, somewhat more complicated.

CenturyLink will also provide the same number of PEG channels (7), but will additionally offer such channels in high definition (HD) digital format to the extent the programming is provided in that format. CenturyLink will agree to other appropriate PEG technical quality standards. CenturyLink will also provide fiber connections and facilities to replace or augment I-Net connections previously provided by Comcast, some of which are failing.

Franchise Fees

CenturyLink will agree to a 5% franchise fee based on language that largely mirrors the language in Comcast's franchise. The definition of "gross revenues" is identical and CenturyLink's franchise will language recently negotiated with Comcast to clarify how franchise fees are calculated where cable service revenues subject to the fee are bundled with telephone or internet access services not subject to the fee at a discount. The language requires that the discount be allocated fairly in proportion to the cost for the services individually.

In sum, the franchise terms negotiated with CenturyLink comply with the LPF law.

3. CenturyLink's Qualifications

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[19] See e.g., Section 2.2.1.

CenturyLink's application includes information addressing the company's financial, technical, and legal qualifications and those of its ultimate corporate parent, CenturyLink, Inc. Chapter 238 does not establish standards for reviewing information submitted in relation to a franchise applicant's qualifications. Any franchise issued is simply required to reflect that the franchisee's qualifications have been considered and approved after a public hearing.

Municipalities across the country generally review a cable franchise applicant's financial, technical and legal qualifications. In the 621 Order, the FCC indicated that where a local exchange telephone company that has received the required telephone authority from the relevant state agency is seeking a cable franchise, municipalities should not spend a significant effort evaluating the fitness of such applicant to access public rights-of-way to provide cable service.[20] CenturyLink's affiliate has received a certificate of public convenience and necessity from the Minnesota Public Utilities Commission.

No challenge to CenturyLink's qualifications was raised by Comcast or any other party. A summary of the company's qualifications follows:

Legal

CenturyLink is authorized to do business in the state of Minnesota.[21] CenturyLink represents that it will make all appropriate filings and preparations prior to offering cable service.

Technical

CenturyLink's application indicates that its affiliate, Qwest Corporation d/b/a CenturyLink, is certificated by the Minnesota Public Utilities Commission to provide telephone service, and that such company does provide telephone service in the member cities. The application describes CenturyLink's technical plans for providing video over that telephone infrastructure.

The application, Ex. D, represents that CenturyLink or its affiliates are authorized to operate cable systems in several local or statewide markets, and we are aware that since filing of the application CenturyLink has obtained dozens of local franchises in this metropolitan market. The application identifies an experienced management team for CenturyLink's cable operations, and the state-of-the-art IPTV-based delivery platform that will be utilized.

Financial

CenturyLink and its affiliates employ 3,000 people in Minnesota. CenturyLink's parent, CenturyLink, Inc., is a large publicly-traded telecommunications company. The application refers to the most recent 10-K. This and other SEC filings are publicly available on-line. The application indicates that the company had operating revenues in excess of $18B for the fiscal

[20] See, 621 Order at ¶ 23.
[21] A summary of CenturyLink's filings with the Minnesota Secretary of State can be viewed at: https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=6c15b40a-a5d4-e011-a886-001ec94ffe7f.

year ended 2013. The application further represents that CenturyLink will not require any unique funding sources or borrowing to deploy its cable service. Additionally, the franchise will require CenturyLink to:

- pay a 5% franchise fee and provide 3% PEG support;
- post a $100,000 performance bond and a $25,000 letter of credit and be subject to specified sanctions for various potential franchise violations;
- provide insurance of at least $1,500,000 (the City's statutory limit on liability) per person, and $2,000,000 aggregate;
- indemnify the City from suits or liabilities arising out of cable operations, the franchise, or a franchise breach, and specifically indemnify the commission and cities against any claim by Comcast.

CenturyLink's affiliate currently has rights to access rights-of-way and has constructed a telephone system and provides telephone and internet access services in the cities. It is difficult to conceive of a scenario in which granting a cable franchise to CenturyLink with the foregoing requirements would increase risks to the commission, cities, or public resources.

CONCLUSION

As required by Chapter 238, CenturyLink provided a complete franchise application. The application information and franchise terms we have negotiated address CenturyLink's qualifications to receive a cable franchise. We see no legal impediment to approving CenturyLink's application and issuing the franchise.

QCCCC Work Session Item

CenturyLink Franchise Summary

September 12, 2016

To: Commissioners

From: Robert J. V. Vose, Attorney, Kennedy & Graven, Chartered

Subject: CenturyLink Franchise Summary

The Quad Cities Cable Communications Commission, on behalf of the member cities Andover, Anoka, Champlin, and Ramsey, has accepted from CenturyLink (parent Company Qwest Broadband Services, Inc.) an application to provide cable television services in the Quad Cities service area. Commission staff and legal counsel have engaged in negotiations with CenturyLink officials crafting a draft franchise agreement that encompasses like features and obligations as the Comcast franchise agreement. The proposed CenturyLink franchise will allow market competition offering cable television services currently serviced by incumbent operator Comcast.

This memo outlines the terms of the drafted franchise agreement to be presented at the September 15, 2016 commission work session.

Level Playing Field

Franchise Fees

CenturyLink required to pay a franchise fee of 5% of its Gross Revenues. Includes language address "bundling" and interest (10% per annum) on underpayments.

Public, Educational, and Governmental Access Requirements

Number of Access Channels
CenturyLink will provide 7 Access Channels (comparable to number of Access Channels as Comcast).

Format of Access Channels
CenturyLink will provide all Access Channels in HD if the City sends them HD format (exceeds Comcast's commitment).

Electronic Programming Guide
CenturyLink will provide EPG capabilities to each member city (similar to Comcast).

Channel Placement
CenturyLink will make all Access Channels accessible at Channel 40 through the "Quad Cities Mosaic."

PEG Support
CenturyLink will pay a PEG Fee in support of the Access Channels of 3% of gross cable revenues (equivalent to the amount of PEG funding Comcast passes through to its subscribers).

Area Served
The Franchise Area is the entire boundary of each member city. Market success-based expansion.

<u>Build-Out</u>
Complete Build-Out Goal
Goal is to Build-Out each member city entirely over a five (5) year term based on market success, with significant investment targeted to areas below the median income.

Initial Minimum Built-Out Commitment
15% of each member city over two years:
- Best effort to complete the initial deployment in a shorter period of time.
- Equitable deployment to households throughout each member city.
- Must include a significant number of households below the median income.
- CenturyLink permitted to serve more households.

Quarterly Meetings
Starting this year, CenturyLink must meet with the Commission and show:
- 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
Build-Out commitment increases if penetration rate is at least 27.5% in the areas that it is offering service.
- Example: If offering service to 60% of the member city and CenturyLink has penetration of 30% of that area, then the Build-Out commitment will increase 15% to 75% of the member city.
- Additional Build-Out commitment continues until all households served.

Complimentary Internet

CenturyLink will provide Internet service to the commission and up to 5 static IP addresses at the highest speed capable at the location.

Twin Cities Metro-Wide PEG Interconnect

CenturyLink will provide the ability for all cities in the Metro Area to share live programming.

- For example, if Anoka High School is playing a game against Coon Rapids High School, the Commission will be able to take the live feed being produced in Coon Rapids and play it over the channel in Anoka.
- Opportunity for collaborative programming, benefiting local and regional subscribers.

Complimentary Service

All City Halls and all other institutions receiving free Comcast service may receive complimentary Prism TV service. Member cities are responsible for the inside wiring. Will not duplicate Comcast service except at City Hall.

Comparison to other terms in Comcast Franchise

Substantially Similar

CenturyLink Franchise and Comcast Franchise are identical in most respects.

Term

CenturyLink's Franchise term is 10 years. Comcast's term was 15 years, which has been extended.

Customer Service

CenturyLink has committed to having a customer service office within the Commission area. All other obligations same as Comcast.

Indemnification of the City.

CenturyLink has an additional indemnification commitment that Comcast does not have.

Access Channel Commitments

CenturyLink may provide more channels in HD than Comcast. PEG support may be used in Commission's discretion. PEG support of 3% is expected to equal or exceed Comcast's somewhat differing calculation.

Cable Service to Public Buildings

CenturyLink will provide service to up to 7 boxes at City Halls and 5 additional "wild card" set top boxes and up to 3 at all other government buildings with service and equipment. Comcast's commitment is more limited.

Penalties/Liquidated Damages

CenturyLink Franchise requires $100,000 performance bond and $25,000 letter of credit.

Build-Out

CenturyLink Franchise has a reasonable build-out commitment based on market success. Comcast service obligation based on housing density.

Twin Cities Metro Interconnect

The CenturyLink Franchise requires CenturyLink to provide a metro-wide interconnect for the sharing of PEG programming. This is different than Comcast's commitments related to PEG and the Institutional Network.

Complimentary Internet Service

CenturyLink has also agreed to provide complimentary Internet services to one location. Comcast does not have such a commitment.