

**NORTH METRO TELECOMMUNICATIONS COMMISSION**

**Staff Report  
On  
CenturyLink Cable Franchise Application**

By

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## Executive Summary

This Report addresses the application for a cable television franchise to Qwest Broadband Services, Inc., doing business as CenturyLink (“CenturyLink”), a wholly owned subsidiary of CenturyLink, Inc. and its subsidiaries. CenturyLink filed a franchise application with the North Metro Telecommunications Commission (the “NMTC”) on February 12, 2015, requesting a franchise to provide cable services with each of the member cities of the NMTC.

The NMTC held a public hearing on February 18, 2015. The public hearing remained open until February 27, 2015, to allow the public additional time to comment on the application, at which time the public hearing closed. Following the close of the public hearing, the NMTC Executive Director commenced review of the application. Mike Bradley of Bradley Hagen & Gullikson, LLC, long-time outside counsel to the NMTC on cable franchising matters, assisted in the review and drafting of this Report.

Upon review of the public record on CenturyLink’s application materials, it is the NMTC Executive Director’s recommendation that staff now be directed to negotiate a cable franchise with CenturyLink, consistent with this Report. The Executive Director anticipates that the resulting competition between CenturyLink and Comcast will benefit cable subscribers through better service, lower rates, and improved programming choices.

It is recommended that any CenturyLink cable franchise contain commitments that taken as a whole are comparable (but not necessarily identical) to those in the existing cable franchise. This approach should permit the NMTC to promote its interest in developing competition for cable service, while preventing CenturyLink or the incumbent cable franchise holder, Comcast, from obtaining an unfair competitive advantage. A cable franchise is a valuable privilege to use the public rights-of-way to provide residents cable service. Any franchise, while recognizing that CenturyLink would be the second wire-line franchised cable operator, must adequately address the following issues:

- Adequate protections to the public to prevent economic redlining or “cherry picking.”
- Fair and Reasonable build-out requirements with the goal of CenturyLink providing competitive cable services throughout the entire NMTC within a reasonable time and in an equitable manner.
- Provisions consistent with Level Playing Field requirements under applicable law addressing:
  - Area to be served
  - Public, Educational, and Governmental (“PEG”) Television
  - Payment of a Franchise Fee
- Indemnification from any litigation resulting from the grant of a franchise.

If the NMTC Executive Director’s recommendation is adopted by the NMTC, NMTC staff should be directed to commence negotiating a cable franchise with CenturyLink immediately. Following negotiations, the NMTC will make a recommendation to its member cities for final action. If a franchise ordinance is recommended, the member cities should schedule a public hearing on the proposed cable franchise ordinance. The NMTC member cities

may act on the cable franchise ordinance any time seven days following the public hearing on the cable franchise ordinance. At the time of any NMTC member city decision to award a cable franchise by ordinance or to deny the award of a cable franchise, it will need to make findings of fact in support of its decision.

## Section 1 The CenturyLink Application and Public Record

In the summer of 2014, CenturyLink publically announced that it would begin offering 1 Gig internet service in the Twin Cities area. Shortly afterwards, CenturyLink approached the North Metro Telecommunications Commission (“NMTC”) about obtaining a cable franchise. In January, 2015, CenturyLink informed NMTC staff that it was prepared to apply for a cable franchise with the NMTC’s member cities. The NMTC then published a Notice of Intent to Franchise in compliance with the Minnesota Cable Act.<sup>1</sup> See **Exhibit 1**.

CenturyLink submitted a timely franchise application on February 12, 2015, to the NMTC. See **Exhibit 2**. The NMTC then issued a request of information, to which CenturyLink responded. See **Exhibits 3 and 4**. A public hearing was held before the NMTC on February 18, 2015, where additional public testimony and comments were received by the NMTC. See **Exhibit 5**.<sup>2</sup> The purpose of this report is to review the CenturyLink application in light of the public record and recommend whether NMTC staff should be directed to negotiate a cable franchise with the company.

## Section 2 Impact of Competition on Consumers and Challenges to New Entrant

The Federal Communications Commission (“FCC”) is the expert agency in the country on communications issues. It has addressed the impact of competitive cable franchises on consumers. The FCC recognized that, “[n]ew competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market.”<sup>3</sup> According to the FCC, both traditional cable and traditional phone companies are projected to offer customers a “triple play” of voice, high-speed Internet access, and video services over their respective networks. *Id.* When a traditional phone company enters into the marketplace the FCC has found,

*[C]ompetition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings.*

*Id.* at para. 2 (emphasis added). Last year, the FCC found that average prices in communities with effective competition increased less than in communities without effective competition. See *Report on Cable Industry Prices*, DA 14-672, at ¶ 4 (Rel. May 16, 2014). The *Report on Cable*

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<sup>1</sup> See Minnesota Statutes Chapter 238.

<sup>2</sup> The Public Hearing can be found at: <http://173.165.231.193/Cablecast/Public/Show.aspx?ChannelID=1&ShowID=19236>

<sup>3</sup> See *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 ¶ 2 (Rel. March 5, 2007) (the “621” Order) (the “621 Order”). The 621 Order is attached as **Exhibit 6**. The 621 Order was upheld on appeal. See *Alliance for Community Media v. FCC*, 529 F.3d 763 (6<sup>th</sup> Cir. 2008), attached as **Exhibit 7**.

*Industry Prices* found the price per channel for expanded basic service is 13.5 percent lower in effective competition areas. *Id.* at ¶ 16.

The FCC has also recognized some of the challenges of being the second cable operator in the marketplace. In its *621 Order*, the FCC found,

[T]he circumstances surrounding competitive entry are considerably different than those in existence at the time incumbent cable operators obtained their franchises. Incumbent cable operators originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position.

...  
***[A second] entrant cannot assume that it will quickly -- or ever -- amass the same number or percentage of subscribers that the incumbent cable operator captured.***

*621 Order* at ¶ 26 (emphasis added, footnotes omitted). Applicants for competitive cable franchises, unlike an incumbent cable provider, “do not have the promise of revenues from video services to offset the costs of such deployment.” *621 Order* at ¶ 3. The competitor faces “financial risk” and “uncertainty” when entering the market. *Id.* at ¶ 28.

### **Section 3 The Incumbent Franchised Cable Operator – Comcast**

The history of cable franchising within the NMTC goes back to the 1980s. Each member city of the NMTC initially granted a cable communications franchise to Meredith Cable in 1983, by enacting a cable franchise ordinance. *See e.g.* Blaine Ord. No. 83-786. Several changes in ownership, structure and name took place after 1983. Eventually, the franchise was transferred to Comcast in 2002. *See e.g.* NMTC Res. No. 2002-04. In 2002, the franchise was renewed. *See e.g.* Blaine Ord. No. 02-1957. Late last year, the NMTC member cities conditionally approved the transfer of the franchise to GreatLand Connections. *See e.g.* Blaine Res. No. 15-016. If the conditions in the resolution are met, the Comcast franchise will be transferred to a new company called GreatLand Connections. Since the franchise was granted in 1983, no other cable franchise has been granted in any of the member cities.

### **Section 4 The NMTC’s Authority to Franchise**

State law requires that “[a] municipality shall require a franchise or extension permit of any cable communications system providing service within the municipality.” Minn. Stat. § 238.08, Subd. 1(a). The member cities, through a joint powers agreement have delegated certain cable franchising responsibilities to the NMTC, such as commencing the franchising process and recommending cable franchises to the member cities. Each member city retains the authority to franchise. Prior to providing cable service, a cable service provider is required by federal law to obtain a cable franchise from the local franchising authority, in this case each member city of the NMTC. *See* 47 U.S.C. § 541(b)(1).

## **Section 5**

### **Applicable Federal, State and Local Legal Requirements**

The applicable legal requirements for examining an initial franchise application are contained in the Cable Communications Policy Act of 1984, as amended (the “Federal Cable Act”), Chapter 238 of Minnesota Statutes (the “Minnesota Cable Act”), and the City’s Policies and Procedures Governing Application, Review and Recommendations Regarding Grant of Competitive Cable Franchises (the “Competitive Franchising Policies and Procedures”). The specific procedures to be followed in soliciting and reviewing cable franchise applications are contained in the Minnesota Statutes<sup>4</sup> and the Competitive Franchising Policies and Procedures. Substantive criteria the City may use in evaluating applications are set forth in the Competitive Franchising Policies and Procedures and the Federal Cable Act.

## **Section 6**

### **State Cable Franchise Application Requirements**

#### **A. The State Cable Franchise Application Process**

The Minnesota Cable Act, found in Minnesota Statutes Chapter 238, lays out the process for granting an additional cable franchise. The following is a summary of the franchising process found in Section 238.081:

- **Publication of Notice.** A notice of intent to franchise must be published once a week for two successive weeks in a newspaper of general circulation. The statute identifies the information required in the notice, such as (1) the name of the municipality making the request; (2) the closing date for submission of applications; (3) a statement of the application fee, if any, and the method for its submission; (4) a statement by the franchising authority of the services to be offered; (5) a statement by the franchising authority of criteria and priorities against which the applicants for the franchise must be evaluated; (6) a statement that applications for the franchise must contain at least the information required by state law; (7) the date, time, and place for the public hearing, to hear proposals from franchise applicants; and (8) the name, address, and telephone number of the individuals who may be contacted for further information.
- **Written Notice.** In addition to publishing the notice of intent to franchise in one or more newspapers, a franchising authority must mail copies of the notice of intent to franchise to any person it has identified as being a potential candidate for a franchise.
- **Deadline for Application Submission.** A franchising authority must allow at least 20 days from the first date of published notice for the submission of franchise proposals. In other words, the deadline for submitting franchise proposals cannot be earlier than 20 days after the date that a jurisdiction’s notice of intent to franchise was first published in a newspaper of general circulation.

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<sup>4</sup> See Minn. Stat. § 238.081, Subd. 1-7.

- **Contents of franchising proposal.** The Minnesota Cable Act requires all franchise applications be signed in front of a notary and that certain information also be included in all franchise applications. Generally, the information includes:
  - Plans for channel capacity;
  - A statement of the television and radio broadcast signals for which permission to carry will be requested from the Federal Communications Commission;
  - A description of the proposed system design and planned operation;
  - Terms and conditions under which particular service is to be provided to governmental and educational entities;
  - A schedule of proposed rates in relation to the services to be provided, and a proposed policy regarding unusual or difficult connection of services;
  - A time schedule for construction of the entire system with the time sequence for wiring the various parts of the area requested to be served in the request for proposals;
  - A statement indicating the applicant's qualifications and experience in the cable communications field, if any;
  - An identification of the municipalities in which the applicant either owns or operates a cable communications system, directly or indirectly, or has outstanding franchises for which no system has been built;
  - Plans for financing the proposed system;
  - A statement of ownership detailing the corporate organization of the applicant; and
  - A notation and explanation of omissions or other variations with respect to the requirements of the proposal.
  
- **Public hearing on franchise.** Each franchising authority must hold a public hearing before the franchising authority affording reasonable notice and a reasonable opportunity to be heard with respect to all applications for a franchise.
  
- **Award of franchise.** Cable franchises may be awarded only by ordinance, after holding any necessary public hearings. A franchise may not be awarded until at least seven days after the public hearing.

## **B. NMTC's Competitive Franchising Policies and Procedures**

The NMTC adopted its "Policies and Procedures Governing Application, Review and Recommendations Regarding Grant of Competitive Cable Franchises," on December 20, 2006 ("Competitive Franchising Policies and Procedures"). See NMTC Resolution 12-20-2006. The Competitive Franchising Policies and Procedures adopted by the NMTC supplement state and federal law.

## **1. NMTC's Application Requirements**

To obtain an initial cable franchise, a written application containing all information required by the Competitive Franchising Policies and Procedures must be filed with the NMTC. Under Section 2, Subd. 3 of the Competitive Franchising Policies and Procedures and state law, the NMTC is required to publish of a Notice of Intent to Franchise that contains the specific requirements governing the submission cable franchise applications. According to the Notice of Intent to Franchise first published by the NMTC on January 16 and 20, 2015 (in 3 different newspapers to cover all of the member cities), all franchise applications were to be filed with the Cable Officer no later than 12:00 p.m. on February 12, 2015.

## **2. Contents of Application**

The NMTC's Competitive Franchising Policies and Procedure largely reflects current State law requirements as listed above. In addition to the provision in State law, the Competitive Franchising Policies and Procedure also require the following:

- A proposed Franchise Agreement;
- Any other information contained in a notice of intent to franchise that may be reasonably necessary to demonstrate compliance with applicable laws and regulations and the requirements of these Policies and Procedures Governing the Receipt and Review of Applications for Additional Cable Franchises; and
- Any additional information that the Commission or its responsible employee(s) may request of the applicant that is relevant to the Commission's and/or a Member City's consideration of the application.

## **Section 7 Federal Law**

### **A. The Federal Cable Act**

As the FCC noted in its *621 Order*, local franchising authorities may not unreasonably deny an additional competitive franchise to potential competitors who are ready and able to provide service in order “[t]o encourage more robust competition in the local video marketplace...” See *621 Order* at ¶ 7; and 47 U.S.C. § 541(a)(1). In awarding a franchise, a local franchising authority may establish construction schedules and construction requirements,<sup>5</sup> and may require adequate assurances that an applicant:

1. Will provide adequate public, educational and governmental access channel capacity, facilities or financial support; and

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<sup>5</sup> See 47 U.S.C. § 552(a)(2).



2. Possesses the financial, technical and legal qualifications to provide cable service.

47 U.S.C. § 541(a)(4)(B)-(C).

A local franchising authority must also 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)(A). Additionally, in awarding a franchise, a local franchising authority must assure 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). Stated differently, a local franchising authority cannot allow a cable service provider to engage in economic redlining or "cherry-picking."

### **B. 621 Order – Competitive Cable Franchising**

In 2007, the Federal Communications Commission (the "FCC" or the "Commission") released a *Report and Order and Further Notice of Proposed Rulemaking* addressing competitive cable franchising.<sup>6</sup> It is sometimes referred to as the "621 Order" because it addresses the implementation of Section 621(a)(1) of the Federal Cable Act.<sup>7</sup> Section 621(a)(1), among other things, prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.

### **C. 621 Order – Applicability to State Laws**

By its terms, the *621 Order* applies only to new entrants.<sup>8</sup> According to the FCC, the *621 Order* does "not preempt state law or state level franchising decisions . . ."<sup>9</sup> 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."<sup>10</sup> In this regard, local laws, regulations, practices and agreements are preempted to the extent that they conflict with the FCC's rules or guidance adopted in the *621 Order* and are not "specifically authorized by state law."<sup>11</sup> The FCC recently clarified the *621 Order* in *Implementation 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*, Order on Reconsideration (Rel. Jan. 21, 2015) ("We clarify that those rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level").<sup>12</sup>

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<sup>6</sup> See FN 3.

<sup>7</sup> Section 621(a)(1) is codified at 47 U.S.C. § 541(a)(1).

<sup>8</sup> See, e.g., *621 Order* at ¶¶ 18 and 139.

<sup>9</sup> *Id.* ¶ 126.

<sup>10</sup> *Id.* at ¶ 1, n. 2.

<sup>11</sup> *621 Order* at ¶ 126.

<sup>12</sup> See **Exhibit 8**, at ¶ 7.

#### D. **621 Order – Impact of Build-out Requirements on Competition and Consumers**

The FCC has concluded that in many cases, build-out requirements “deter competition and deny consumers a choice.” *621 Order* at ¶ 37. Additionally, build-out mandates may also directly contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the FCC to “remov[e] barriers to infrastructure investment” to encourage the deployment of broadband services “on a reasonable and timely basis.” *Id.* at ¶ 41.

The FCC has recognized that “build-out issues are one of the most contentious between LFAs and prospective new entrants, and that build-out requirements can greatly hinder the deployment of new video and broadband services.” *621 Order* at ¶ 31. According to the FCC large incumbent local exchange carriers (“LECs”), “view build-out requirements as the most significant obstacle to their plans to deploy competitive video and broadband services.” *Id.* While an incumbent LEC already has telecommunications facilities deployed over large areas, it still must upgrade its existing plant to enable the provision of video service, which often requires a significant investment of capital. *Id.* at ¶ 38.

The FCC also found in its *621 Order* that build-out requirements can substantially reduce competitive entry.” *Id.* at ¶ 32. According to the FCC,

Build-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. 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.

*621 Order* at ¶ 35 (Footnotes omitted). Therefore,

***Due to the risk associated with entering the video market, forcing new entrants to agree up front to build out an entire franchise area too quickly may be tantamount to forcing them out of -- or precluding their entry into -- the business.***

*621 Order* at ¶ 35 (Footnotes omitted). In analyzing the impact of build-out requirements on consumers, the FCC found that in many cases it adversely affects consumer welfare. *621 Order* at ¶ 36. The Department of Justice commented that “imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices. *Id.* Non-profit research organizations the Mercatus Center and the Phoenix Center each concluded that ***build-out requirements imposed on competitive cable entrants only benefit an incumbent cable operator.*** *Id.* Historically, the greatest difference in pricing occurred where there was wireline

overbuild competition. In those situations, average monthly cable rates were 20.6 percent lower than the average for markets deemed noncompetitive. *Id.*

#### **E. FCC 621 Order - Federal Preemption of Unreasonable Build-Out Mandates**

In the *621 Order*, the FCC declared “it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates.”<sup>13</sup> The *621 Order* does not expressly prohibit full municipal build-out requirements, if they are reasonable (which will depend on local circumstances). Although the FCC did not definitively define what constitutes an “unreasonable build-out” mandate, it did list examples of both reasonable and unreasonable build-out requirements.

##### a. Examples of Unreasonable Build-Out Requirements.

The FCC’s examples of unreasonable build-out mandates include:

- requiring a new entrant to serve everyone in a franchise area before it has begun to serve anyone;
- requiring facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun to provide cable service;
- requiring more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that afforded to the incumbent;
- requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve;
- requiring a new entrant to build out to and service buildings or developments to which the entrant cannot obtain access on reasonable terms or which cannot be reached using standard technologies; and
- requiring a new entrant to build out to and provide service to areas where it cannot obtain reasonable access to and use of public rights-of-way.<sup>14</sup>

##### b. Examples of Reasonable Build-Out Requirements.

The FCC notes that it would seem reasonable for a local franchising authority to consider benchmarks requiring the new entrant to increase its build-out after a reasonable time, taking into account the new entrant’s market success.<sup>15</sup> The FCC also opined that it would seem reasonable to establish build-out requirements based on a new entrant’s market penetration.<sup>16</sup>

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<sup>13</sup> *621 Order* at ¶ 89.

<sup>14</sup> *Id.* at ¶¶ 89-90.

<sup>15</sup> *Id.* at ¶ 89.

<sup>16</sup> *Id.*

## **F. 621 Order - PEG and Institutional Networks**

The *621 Order* concludes that “LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net” and that doing so constitutes an unreasonable refusal to award a franchise.<sup>17</sup> With regard to PEG channel capacity, the FCC determined that it would be unreasonable “to impose on a new entrant more burdensome PEG carriage obligations that it has imposed on the incumbent cable operator.”<sup>18</sup> Overall, the FCC found that PEG support must be both “adequate and reasonable.”<sup>19</sup> Adequacy is defined by the FCC as “satisfactory or sufficient.”<sup>20</sup> The *621 Order* does provide some examples of unreasonable PEG and Institutional Network support obligations,<sup>21</sup> including:

- Completely duplicative PEG and I-Net requirements;<sup>22</sup>
- Payment of the face value of an I-Net that will not be constructed; and
- Requirements that are in excess of the incumbent cable operator’s obligations.

According to the FCC, *pro rata* cost sharing of current (as opposed to future) PEG access obligations is *per se* reasonable.<sup>23</sup> In the event that *pro rata* cost sharing is utilized, PEG programming providers must permit a new entrant to interconnect with existing PEG video feeds.<sup>24</sup> The new entrant must bear the cost of interconnection.

## **G. 621 Order – Local Level Playing Field Requirements**

Local level playing field requirements are generally preempted by the *621 Order*.<sup>25</sup> This could mean that level playing field provisions (commonly called “Competitive Equity” in local Comcast franchises) included in existing cable franchise ordinances are preempted.

## **Section 8 State and Local Law**

### **A. State Level Playing Field Statute**

While under federal law, a franchising authority may not unreasonably refuse to award an additional competitive franchise, Minnesota state law further restricts a franchising authority's ability to franchise with a level playing field provision that reads as follows:

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<sup>17</sup> *Id.* at ¶ 110.

<sup>18</sup> *Id.* at ¶ 114.

<sup>19</sup> *Id.* at ¶ 115.

<sup>20</sup> *Id.* at ¶ 112.

<sup>21</sup> *Id.* at ¶ 119.

<sup>22</sup> The *621 Order* does appear to say that duplication is permissible if required for public safety purposes. *Id.* In addition, the FCC clarified that “an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities.” *Id.*

<sup>23</sup> *621 Order* at ¶ 120.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶ 138.

No 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.*

Nothing in this paragraph prevents a municipality from imposing additional terms and conditions on any additional franchises.

Minn. Stat. § 238.08, subd. 1(b) (emphasis added). This language does not mean that the language or terms of a franchise must be the same between competitors. *See WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 396 (Minn. Ct. App. 2003) (more favorable or less burdensome interpreted as “substantially similar”).

## **B. The 5-Year Build Statute**

The Minnesota Cable Act also has a section that addresses franchise requirements for all local franchises. One of those provisions requires:

- (m) a provision in initial franchises identifying the system capacity and technical design and a schedule showing:
  - (1) that construction of the cable communications system must commence no later than 240 days after the granting of the franchise;
  - (2) that construction of the cable communications system must proceed at a reasonable rate of not less than 50 plant miles constructed per year of the franchise term;
  - (3) that ***construction throughout the authorized franchise area must be substantially completed within five years*** of the granting of the franchise; and
  - (4) that the requirement of this section be waived by the franchising authority only upon occurrence of unforeseen events or acts of God;

*See* 238.084, Subd. 1(m) (emphasis added). It is the position of CenturyLink that the 5-Year Build Statute is a barrier to entry and is preempted by the Federal Cable Act. *See* Exhibit 3 at ¶¶ 28-31 and Section 11(C) below.

### **C. Comcast Cable Franchise**

In addition to federal and state law, local law also must be considered. The local law applicable to the application for an additional franchise is the current franchise with the incumbent franchised cable operator, Comcast.

The Comcast cable franchise addresses competitive franchises in section 2.2.3, which states:

2.2.3 This Franchise and the right it grants to use and occupy the Rights-of-Way shall not be exclusive and this Franchise does not, explicitly or implicitly, preclude the issuance of other franchises or similar authorizations to operate Cable Systems within the City. Provided, however, that the City shall not authorize or permit itself or another Person or governmental body to construct, operate or maintain a Cable System on material terms and conditions which are, taken as a whole, more favorable or less burdensome than those applied to the Grantee.

### **Section 9 Issues Raised by the Public**

The public was allowed to testify at the public hearing and the NMTC left the public hearing open for over one week for the purpose of allowing the public to submit written comments. There was testimony from a citizen and Comcast at the public hearing. Other than a letter from Comcast, no additional written comments were submitted.

#### **A. Economic Redlining or Cherry Picking.**

One member of the public testified at the public hearing that it would be unfair for the incumbent cable operator to be required to build out an entire franchise area, but not a new company like CenturyLink.<sup>26</sup>

#### **B. Issues Raised By the Incumbent Franchised Cable Operator - Comcast**

The letter from Comcast submitted into the record at the public hearing raised the following issues:

- Concern about whether CenturyLink will have similar franchise commitments as Comcast. Exhibit 5 at pp. 1-2.
- An expectation that “the same level of due diligence and scrutiny that the NMTC would and has applied to Comcast and its predecessors' will also be applied to CenturyLink.” *Id.* at p. 2.

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<sup>26</sup> Public Hearing at 27:50. *See* FN 2 above.

- Concern with “CenturyLink’s build-out commitment that appears to stand in direct conflict with state law.” *Id.* at 3.

Comcast also indicated that CenturyLink’s record in other markets raised a concern that CenturyLink’s build-out will be based upon income considerations of the selected areas. Exhibit 5 at p. 3. However, no additional proof of that statement was submitted.

In raising one of the issues above, Comcast suggested that the competitive franchise application process should essentially be the same as prior Comcast renewals and transfers. *See* Exhibit 5 at p. 2. However, the FCC in its *621 Order* found,

[I]ncumbent cable operators’ purported success in the franchising process is not a useful comparison in this case. Today’s large MSOs obtained their current franchises by either renewing their preexisting agreements or by merging with and purchasing other incumbent cable franchisees with preexisting agreements. For two key reasons, their experiences in franchise transfers and renewals are not equivalent to those of new entrants seeking to obtain new franchises. First, *in the transfer or renewal context, delays in LFA consideration do not result in a bar to market entry*. Second, in the transfer or renewal context, the LFA has a vested interest in preserving continuity of service for subscribers, and will act accordingly.

*621 Order* at ¶ 29 (Footnotes omitted). The NMTC is following the process set forth in Minnesota Statutes Section 238.081. The statute does not include considering an incumbent’s prior renewals and transfers.

## **Section 10 Review of CenturyLink Cable Franchise Application**

The NMTC Executive Director is responsible for reviewing cable franchise applications. The Executive Director has reviewed the application and the entire public record, as well as all relevant factors and applicable federal, state and local standards for reviewing a cable franchise application.

### **1. The NMTC has substantially complied with state and local cable franchising application requirements.**

**Publication of Notice.** The NMTC fully complied with the state requirements (listed above) for publishing a notice of intent to franchise. *See Exhibit 1.* There were no objections to the NMTC’s publication of the notice of intent to franchise. The local Competitive Franchising Policies and Procedures call for a notice of intent to franchise be published after receipt of an application. The state law anticipates publishing a notice of intent to franchise before receiving an application. For example, the notice of intent to franchise must indicate a deadline for receiving applications. Therefore, it was reasonable for the NMTC to publish a notice of intent

to franchise once CenturyLink informed the NMTC that it was prepared to submit and application. The publication of the notice of intent to franchise substantially complies with both state and local requirements.

**Written Notice.** The NMTC was not aware of any other companies that were interested in applying for a cable franchise. Therefore, no companies, other than CenturyLink, received written notice of the NMTC's notice of intent to franchise. There were no objections to the NMTC's provision of written notice to potential candidates for a cable franchise.

**Deadline for Application Submission.** The NMTC allowed more than 20 days from the first date of published notice for the submission of franchise applications. *See Exhibit 1.* There were no objections to the cable franchise application deadline set by the NMTC.

**Public hearing on franchise.** The NMTC held a public hearing on February 18, 2015, which afforded reasonable notice and a reasonable opportunity to be heard with respect to the CenturyLink cable franchise application. No objections were made concerning the manner in which the NMTC held the public hearing.

**Award of franchise.** In the event a NMTC member city decides to enter into a franchise agreement with CenturyLink in the future, a NMTC member city must award the cable franchise by ordinance. In that event, while the NMTC has held a public hearing on the cable franchise application, it is recommended that there be a subsequent public hearing if a cable franchise agreement is agreed upon and a cable ordinance is introduced. A cable franchise may not be awarded until at least seven days after the public hearing on the cable franchise ordinance.

## **2. CenturyLink's application substantially complies with state and local application requirements.**

**Contents of franchising proposal.** It was CenturyLink's responsibility to comply with all of the application requirements in State Law. The application was submitted timely, included the applicable application fee, and signed before a notary. *See Exhibit 2* (CenturyLink Cable Franchise Application). Upon review of the CenturyLink cable franchise application, CenturyLink has substantially complied with the following State application requirements without objection:

- Plans for channel capacity. *See Exhibit 2* at p. 1.
- A statement of the television and radio broadcast signals for which permission to carry will be requested from the Federal Communications Commission. *See Exhibit 2* at p. 2 and Exhibit 3 at ¶ 8.
- A description of the proposed system design and planned operation. *See Exhibit 2* at pp. 2-3 and Exhibit 3 at ¶¶ 11-16.
- Terms and conditions under which particular service is to be provided to governmental and educational entities. *See Exhibit 2* at pp. 3-4 and Exhibit 3 at ¶¶ 17-22.



- A schedule of proposed rates in relation to the services to be provided, and a proposed policy regarding unusual or difficult connection of services. *See* Exhibit 2 at p. 4 and Exhibit 3 at ¶¶ 23-27.
- A statement indicating the applicant's qualifications and experience in the cable communications field, if any. *See* Exhibit 2 at pp. 4-5 and Exhibit 3 at ¶¶ 6, and 35-36.
- An identification of the municipalities in which the applicant either owns or operates a cable communications system, directly or indirectly, or has outstanding franchises for which no system has been built. *See* Exhibit 2 at p. 4 and Exhibit 3 at ¶ 37.
- Plans for financing the proposed system. *See* Exhibit 6 at p. 5 and Exhibit 3 at ¶ 38.
- A statement of ownership detailing the corporate organization of the applicant. *See* Exhibit 2 at p. 5 and Exhibit 3 at ¶¶ 1-6.

As required by the Minnesota Cable Act, CenturyLink provided a notation and explanation of omissions or other variations with respect to the requirements of the proposal. In particular, CenturyLink indicated that it would not provide information relating to the area-served application requirement because it believes Federal law preempts the State law 5-year build out requirement. *See* Exhibit 3 at ¶¶ 28-31 and Testimony of Jim Campbell of CenturyLink.<sup>27</sup> There was documentary and testimonial evidence received into the record concerning CenturyLink's build-out of the NMTC. *See* Exhibit 5. While Comcast expressed concern over the build-out commitment of CenturyLink if awarded a cable franchise by the NMTC, there was no objection to CenturyLink explaining why it omitted build-out information in its cable franchise application.

For purposes of complying with the state's application requirements only, CenturyLink has adequately explained why it omitted a time schedule for construction of the entire system with the time sequence for wiring the various parts of the area requested to be served in. Therefore, it has substantially complied with the application filing requirements in state law. This should not be interpreted to mean the NMTC accepts CenturyLink's position. In the event that the NMTC authorizes staff to negotiate a franchise with CenturyLink, acceptable build-out provisions will need to be negotiated consistent with this Report.

Finally, the NMTC Competitive Franchising Policies and Procedures indicate that a proposed franchise must be included in a cable franchise application. A proposed franchise was not included in the application. The absence of a proposed franchise does not render the application as substantially incomplete. Since the Parties must negotiate a cable franchise if the NMTC authorizes its staff to negotiate a franchise with the applicant, the inclusion of a proposed franchise was unnecessary. In addition, it was unnecessary for assessing the qualifications of the applicant.

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<sup>27</sup> Mr. Campbell's testimony on the 5-Year Build Statute can be found at the 20:30 mark of the Public Hearing. *See* FN 2 above.

### 3. CenturyLink appears to have the Financial, Technical and Legal Qualifications to Provide Cable Service.

While the NMTC may review the financial, legal and technical qualifications of a franchise applicant, the FCC has indicated that in cases of the application by a LEC that already has a certificate for public convenience and necessity from the state, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way. *See* 621 Order at ¶ 23. This is because the LEC has already demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. *Id.*

**a. Financial Evaluation.** As shown above, under 47 U.S.C. § 541(a)(4) the NMTC may consider a franchise applicant's financial qualifications in determining whether to grant a franchise. The parent company of the proposed franchisee appears financially qualified. CenturyLink, Inc. is the third largest telecommunications company in the United States with \$18.0 Billion in annual operating revenue and free cash flow of \$2.7 Billion. *See* Exhibit 2 at page 5-6; and Exhibit 3 at ¶ 38. CenturyLink has further committed to making a \$125 Million investment to bring cable television service to the Twin Cities. *See* Exhibit 2 at page 6. Provided that CenturyLink, Inc. can provide adequate assurances for the performance of the proposed franchisee, it appears that CenturyLink has the financial qualifications to operate a cable communications system in the NMTC. Recently, the NMTC member cities required certain parent guarantees of GreatLand Connections in connection with the recent conditional approval of the cable franchise transfer from Comcast to GreatLand Connections. *See e.g.* Blaine Res. No. 15-016.

**b. Technical Evaluation.** As shown above, under 47 U.S.C. § 541(a)(4), the Commission may consider whether CenturyLink has the necessary technical qualifications to construct, operate and maintain a cable system. CenturyLink has a demonstrated history of operating cable systems in 13 markets in the United States. *See* Exhibit 2 at p. 4. CenturyLink has approximately 300,000 cable television subscribers and is capable of delivering it to approximately 2.3 Million homes. *Id.* CenturyLink's management team displays a wealth of experience in the cable and telecommunications industry. *See* Exhibit 3 at ¶¶ 6, 11-16, and 35-36. The application described a state-of-the-art cable system capable of reliably providing a panoply of cable services to subscribers. *See* Exhibit 2 at pp. 2-3. According to CenturyLink, it "offers more channels in HD than any other MVPD nationally." *Id.* at p. 1. Based on the information contained in CenturyLink's application and its response to the request for information, it appears that CenturyLink has the technical qualifications to operate a cable communications system in the NMTC.

**c. Legal Evaluation.** Both federal law and the Competitive Franchising Policies and Procedures permit the Commission to consider a cable franchise applicant's legal qualifications in the process of determining whether to grant a cable television franchise.<sup>28</sup> The applicant appears legally qualified to hold a cable franchise in the NMTC. The company is properly formed and authorized to do business in the state of Minnesota. *See* Exhibit 3 at ¶¶ 1-2. The company agrees to make all appropriate filings and preparations prior to offering cable

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<sup>28</sup> *See* 47 U.S.C. § 541(a)(4)(C) and Section 4, Subd. 2 of the Competitive Franchising Policies and Procedures.

service. *Id.* at ¶ 8. No adverse administrative, civil or criminal action has been taken against the applicant over the past five years. *Id.* at ¶ 9.

While the applicant will operate the cable system, the facilities in the public rights-of-way will be owned by Qwest Corporation (“QC”). *Id.* at 10. Any cable franchise to applicant must contain adequate provisions ensuring compliance by QC of any franchise provisions related to the location, removal, relocation, testing, performance, and any other franchise requirement or applicable cable regulation relating to any portion of the cable communications system. Based on the information contained in CenturyLink’s application and responses to the NMTC’s request for information, it appears that CenturyLink has the legal qualifications to operate a cable communications system in the NMTC. Any franchise that is ultimately negotiated is subject to all restrictions under federal, state and local laws.

**d. Cable-Related Community Needs and Interests.**

No formal needs assessment is legally required in connection with an application for a competitive franchise. The NMTC’s cable-related needs and interests were addressed in the 2002 Comcast cable franchise and recently updated through a 2014 Settlement Agreement. *See e.g.* Blaine Ord. No. 02-1957; and NMTC Res. No. 12-17-2014. Any franchise negotiated with CenturyLink should be substantially similar (but need not be identical) to the 2002 Comcast cable franchise, as amended, and consistent with this Report.

**Section 11**  
**Cable Franchise Considerations**

In the event that the NMTC directs NMTC staff to negotiate a cable franchise with CenturyLink, the Administrator recommends that any franchise include, but certainly not be limited to, addressing the following issues.

**a. Economic Redlining or “Cherry Picking.”** Comcast raised a concern that CenturyLink will discriminate based on the income of residents in the NMTC member city area. *See* Exhibit 5 and Public Hearing Testimony. There is nothing in the record to indicate that CenturyLink will do so. However, the application does not provide clarity as to where CenturyLink will provide cable service. The CenturyLink application only indicates that its cable service “will be available to over thirty percent of the households in the [NMTC] member cities.” *See* Exhibit 2 at p. 4. The Federal Cable Act does prohibit economic redlining. *See* 47 U.S.C. § 541(a)(3). While economic redlining is illegal, it should be addressed in any negotiated cable franchise with CenturyLink.

**c. Franchise Area - Reasonable Build-Out of the NMTC.**

As discussed in Section 8 above, the state of Minnesota has a statute that requires that all initial cable franchises contain a franchise provision requiring a 5-year build. It is CenturyLink’s position that the 5-year Build Statute is preempted by the Federal Cable Act. *See* Exhibit 3 at ¶¶ 28-31. While there is no court decision directly addressing whether the Federal Cable Act preempts the state 5-Year Build Statute, CenturyLink does provide a good faith basis for its

position. *Id.* CenturyLink is also willing to completely indemnify the NMTC for any litigation concerning the grant of a cable franchise to CenturyLink. *See* Exhibit 2 at 6.

With the 5-Year Build Statute on one hand and federal preemption on the other, the NMTC is left with a difficult choice. Does the NMTC err on the side of caution and require a 5-year build-out commitment from CenturyLink and risk thwarting a competing cable operator that will bring benefits to consumers of the NMTC member cities? Or, does the NMTC err on the side of competition and risk litigation with Comcast? Litigation may be inevitable with either choice.

Should the NMTC direct staff to negotiate a cable franchise with CenturyLink, the cable franchise should contain fair and reasonable build-out requirements with the goal of CenturyLink providing competitive cable services throughout the entire NMTC member city area within a reasonable time and in an equitable manner. In doing so, the Federal Cable Act, the 5-Year Build Statute, the FCC *621 Order*, and any other applicable law should be considered.

**d. Level Playing Field Considerations.**

Comcast is the only commenter to specifically raise the state level playing field statute, Minnesota Statutes Section 238.08, as a concern. In the FCC's *621 Order*, the FCC found:

In many instances, level-playing-field provisions in local laws or franchise agreements compel LFAs to impose on competitors the same build-out requirements that apply to the incumbent cable operator. ***Cable operators use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town.*** Even in the absence of level-playing-field requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant.

*621 Order* at ¶ 34 (Footnotes omitted). Regardless of the reason for raising the issue, any franchise should contain adequate provisions addressing the state level playing field statute. This should include provisions to provide cable service to all NMTC member city residents over a reasonable time and reasonable circumstances (consistent with the build-out discussion above), similar public, educational, and governmental access requirements as Comcast, and the same franchise fee requirement as Comcast. *See e.g.* Blaine Ord. 02-1957.

**e. Compliance with Comcast Cable Franchise**

In the event the NMTC determines to grant a cable franchise to CenturyLink, the cable franchise must be granted by an ordinance. The local level playing field provision in the cable franchise with Comcast requires that the NMTC not authorize or permit itself or another Person or governmental body to construct, operate or maintain a cable system on terms and conditions which are, taken as a whole, more favorable or less burdensome than those applied to the

Grantee. *See* Section 8(C) above. However, local level playing field provisions may also be subject to federal preemption. *See* Section 7(G) above. Any negotiated franchise should address the local level playing field provision in the Comcast franchise consistent with this Report.

## **Section 12 Recommendation**

Based on the record developed by the NMTC, including this Report, it is the Administrator's recommendation that the NMTC (1) receive and file this Report; and (2) direct NMTC staff to negotiate a cable communications franchise with CenturyLink consistent with this report.

If the NMTC accepts this recommendation, NMTC staff will negotiate a cable franchise with CenturyLink. Following negotiations, the NMTC will recommend final action to be taken by its member cities. In the event that a franchise ordinance is recommended to the member cities, each member city will hold a public hearing on the proposed cable franchise ordinance. Each member city may act on the cable franchise ordinance any time seven days following the public hearing. After the public hearing, each member city will need to decide whether to award a cable franchise by ordinance or to deny the award of a cable franchise. Additionally, each member city will need to make findings of fact in support of its decision.