

STAFF MEMO
CenturyLink Cable Franchise

INTRODUCTION

The City is one of seven member cities of the North Metro Telecommunications Commission (the "NMTC"). Following the submission of an application for a cable television franchise for each member city of the NMTC, the above-entitled matter initially came before the NMTC for a public hearing on February 18, 2015, at Spring Lake Park City Hall. Said public hearing was held open through February 27, 2015, for the purpose of allowing additional written public comments. Following the public hearing, the NMTC's Executive Director prepared a detailed report entitled "Staff Report on CenturyLink Cable Franchise Application" (the "Report"). The NMTC received and filed the Report and directed NMTC staff to negotiate a cable television franchise with CenturyLink. NMTC staff negotiated a cable television franchise with CenturyLink and presented it to the NMTC on October 21, 2015. The NMTC adopted a Findings of Fact and Recommendation on October 21, 2015, which recommended approval of the negotiated cable television franchise with CenturyLink by each member city. The CenturyLink Cable Television Franchise is now before the City Council for consideration.

DISCUSSION

Supporting information

On February 12, 2015, the NMTC received a cable franchise application covering each member city from CenturyLink. Comcast Cable currently has a non-exclusive franchise agreement with the City, which means the City Council may grant additional franchises to provide cable service in the City.

A public hearing on the application was held on February 18, 2015, and additional written comments from the public were accepted through February 27, 2015. Following the public hearing, staff prepared a Staff Report ("Report"), which recommended that the NMTC receive and file the Report and direct staff to negotiate a cable franchise with CenturyLink, consistent with the Report. On April 15, 2015, the NMTC adopted the recommendation. This action did not approve a franchise.

The NMTC's outside attorney, Mike Bradley, Bradley Hagen & Gullikson, LLC, in consultation with NMTC Executive Director, Heidi Arnson, engaged in cable franchise negotiations with CenturyLink. The attached cable franchise is the product of those negotiations.

In reviewing the CenturyLink cable franchise, there are two primary issues to consider. The first is whether federal law preempts Minnesota's 5-Year Build Statute. Minnesota Statutes Section 238.084, subdivision 1(m) requires all initial franchises to have a provision that requires a cable operator build out its cable system at a rate of 50 plant miles per year and that its cable system be substantially complete within 5 years. As the Report indicated, CenturyLink claims that this 5-Year Build Statute is an unlawful barrier to entry and is preempted by federal law and an FCC

decision referred to as the 621 Order. The Report also indicated that there is no case law in Minnesota directly addressing preemption of the 5-Year Build Statute. The Report concluded that CenturyLink has a good faith basis on its preemption claim and is willing to indemnify the City related to any litigation surrounding the grant of a franchise to CenturyLink. CenturyLink refused to incorporate the language of the 5-Year Build Statute in the proposed franchise, based on its preemption argument. As described below, the proposed CenturyLink franchise ordinance has provisions for a reasonable build-out of the city. The proposed franchise ordinance also has provision for defense and indemnification of the City and the NMTC regarding this issue.

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

- Complete Equitable Build-Out. Goal is to build-out the entire city over 5-year term, based on market success, with a significant investment targeted to areas below the median income in the city.
- Initial Minimum Build-Out Commitment. 15% of the city over two years.
 - CenturyLink must make its best effort to complete the initial deployment in a shorter period of time.
 - Equitable Deployment to households in the City.
 - Must include a significant number of households below the medium income of the City.
 - CenturyLink permitted to serve more households than the initial commitment.
- Quarterly Meetings. Starting January 1, 2016, CenturyLink must meet with the City [and/or City designee at NMTC] and show to the City's satisfaction:
 - Number of households capable of being served and actually served.
 - Compliance with anti-redlining requirements.
 - Maps and documentation "showing exactly where within the City the Grantee is currently providing cable service."
- Additional Build-Out Based on Market Success. Starting January 1, 2016, the CenturyLink build-out commitment will increase if its penetration rate is at least 27.5% in the areas that it is offering service.
 - Example: If CenturyLink is offering service to 60% of the City and CenturyLink has penetration of 30% in that area, then the build-out commitment will increase by 15%, to cover 75% of the city.
 - Additional build-out commitment continues until all households are served.
- Line Extension. No initial mandatory line extension, unless CenturyLink becomes

the dominate cable provider. Then the City decides CenturyLink's build-out schedule, including a density requirement that is the same or similar to Comcast's density requirement.

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

Another issue related to the reasonable build-out is whether the penetration rate triggering additional build-out is reasonable. CenturyLink claims that it needs a penetration rate of 27.5% in order to commit to an additional mandatory build in the city. This penetration number is based on internal CenturyLink return on investment models. Given Comcast's penetration rate in the City is around 40-50%, a penetration rate of 27.5% may be difficult to obtain and, therefore, it is possible that CenturyLink may not be required to build-out more than its initial commitment.

Economic redlining or "cherry picking" was identified as a concern through the public hearing process. As the Report noted, cherry picking is prohibited by the Federal Cable Act. See 47 U.S.C. § 541(a)(3). The proposed CenturyLink franchise prohibits cherry picking, identical to the Comcast franchise. To ensure compliance, CenturyLink has an additional \$500 per day penalty/liquidated damage for violating the build-out and economic redlining provisions of the Franchise.

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

CenturyLink is required to pay a franchise fee of 5% of its Gross Revenues (Identical to Comcast Franchise). The Franchise Area is the entire city (Identical to Comcast Franchise). The Public, Educational, and Governmental ("PEG") Access Requirements of the CenturyLink franchise meet, and in places exceed, Comcast's franchise commitments. The CenturyLink PEG commitments are summarized as follows:

- Number of Access Channels. CenturyLink will provide 12 Access Channels

(greater overall number of Access Channels as Comcast).

- Format of Access Channels. CenturyLink will provide all 12 Access Channels in HD if the City sends them in HD format (Comcast will provide up to 2 Access Channels in HD over time).
- Electronic Programming Guide. CenturyLink will have similar requirement as Comcast.
- Channel Placement. CenturyLink will make all Access Channels accessible at Channel 16 through the “North Metro Mosaic.” The Access Channels will be physically located in the 8000s (Comcast has no mosaic and is required to have all the HD Access Channels located near the broadcast channels).
- Public Service Announcements. CenturyLink will allow the NMTC to air PSAs on non-Access channels during periods of unsold/unused air time (Exceeds Comcast’s commitment).
- Video On-Demand. CenturyLink will provide 25 hours of VOD per member city (Exceeds Comcast’s PEG commitment).
- PEG Support. CenturyLink will pay a PEG Fee in support of the Access Channels of \$3.16 adjusted by CPI starting in 2016. (Amount of funding identical to Comcast).

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

- Term. CenturyLink’s Franchise term is 5 years. Comcast’s term is 15+ years.
- 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. CenturyLink is providing 175 hours of VOD programming than Comcast, while Comcast is not providing any. PEG support may be used for capital and operational support under the CenturyLink franchise.
- Twin Cities Metro PEG Interconnect Network. CenturyLink will provide a network to allow cities throughout the metro area to share live programming with one another. We believe this will be the only such network in the country.
- Penalties/Liquidated Damages. CenturyLink franchise has additional damages for violating the Build-Out and Economic Redlining provisions of the franchise that is not in the Comcast franchise.
- Build-Out. CenturyLink Franchise has a reasonable build-out commitment based on market success. Comcast does not have a build-out provision, as it built-out the City many years ago.

- Line Extension. The CenturyLink franchise does not have an immediate line extension requirement. The City will determine a line extension obligation similar to Comcast's line extension if CenturyLink obtains a 50% penetration level in the City. Comcast has a line extension requirement.

Since a cable franchise is granted by ordinance, the City must hold a public hearing on the cable franchise ordinance. At a following meeting, the City should take action to approve or deny the proposed franchise ordinance and direct staff to draft findings consistent with its decision.

RECOMMENDATION

That the City (1) Hold a public hearing on the CenturyLink Cable Franchise Ordinance; (2) at a following Council Meeting, take action on the CenturyLink Cable Franchise Ordinance; and (3) adopt written findings of fact to support the action taken.