City of Minneapolis

Cable Officer Report
On
CenturyLink Cable Franchise Application

By

Matthew Laible, City of Minneapolis Cable Officer
Peter W. Ginder, Deputy City Attorney
Michael R. Bradley, Bradley Hagen & Gullikson, LLC

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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 City of Minneapolis (the "City") on January 20, 2015 asking the City to grant the company a franchise to provide cable services within the territorial boundaries of the City.

The City held a public hearing on February 23, 2015, before the Ways and Means Committee. 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 Cable Officer commenced review of the application. Peter Ginder, Deputy City Attorney, and Mike Bradley of Bradley Hagen & Gullikson, LLC, long-time outside counsel to the City on cable franchising matters, assisted the Cable Officer in the review and drafting of this Report.

Upon review of the public record on CenturyLink's application materials, it is the Cable Officer's recommendation that staff now be directed to negotiate a cable franchise with CenturyLink, consistent with this Report. The Cable Officer 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 City 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 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."
- The provision of culturally diverse programming.
- Fair and Reasonable build-out requirements with the goal of CenturyLink providing competitive cable services throughout the entire City 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 to the City
- Indemnification from any litigation resulting from the grant of a franchise.

If the Cable Officer's recommendation is adopted by the City Council, City staff should be directed to commence negotiating a cable franchise with CenturyLink immediately. The City Council should issue a notice of intent to award a cable franchise by ordinance. Once a cable franchise ordinance is introduced, a public hearing on the ordinance will be scheduled before the Ways and Means Committee. The City Council may act on the cable franchise ordinance any time seven days following the public hearing on the cable franchise ordinance. At the time of the City Council decision to award a cable franchise by ordinance or to deny the award of a cable franchise, it will need to 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 City of Minneapolis and the surrounding cities in the Twin Cities area. Shortly afterwards, CenturyLink approached the City of Minneapolis about obtaining a cable franchise. In December, 2014, CenturyLink informed City staff that it was prepared to apply for a cable franchise with the City. The City then published a Notice of Intent to Franchise in compliance with the Minnesota Cable Act.[1] *See* **Exhibit 1**.

CenturyLink submitted a timely franchise application on January 20, 2015, to the City. *See* **Exhibit 2**. The City issued a request of information, to which CenturyLink responded. *See* **Exhibits 3 and 4**. A public hearing was held before the Ways and Means Committee on February 23, 2015, where additional public testimony and comments were received by the City. *See* **Exhibits 5 – 8**.[2] The purpose of this report is to review the CenturyLink application in light of the public record and recommend whether City 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."[3] 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 Industry Prices* found the price per channel for expanded basic service is 13.5 percent lower in effective competition areas. *Id*. at ¶ 16.

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1 *See* Minnesota Statutes Chapter 238.

2 The Public Hearing can be viewed at: https://www.youtube.com/watch?v=ZgCoFZanYgY

3 *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 9**. The *621 Order* was upheld on appeal. *See Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), attached as **Exhibit 10**.

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 City goes back to the 1970s. The City initially granted a cable communications franchise to Northern Cablevision of Minneapolis, Inc. ("Northern Cablevision") in 1979 by enacting ordinance 79-OR-263. In 1982, the City divided the City's cable franchise into two areas, with Northern Cablevision (d/b/a Storer) and Minneapolis Cablesystems (d/b/a Rogers) each granted a franchise for approximately one-half of the City's total geographic area. In 1983, Rogers acquired the Northern Cablevision franchise area, thereafter holding franchise rights for the entire City. *See* 83-OR-320.

Several changes in ownership, structure and name took place after 1983. In 1995, Time Warner Cable became the owner of the franchise, but continued to operate as Paragon Cable pursuant to the enactment of 95-OR-096. In 2000, the franchised operator began doing business as Time Warner Cable. *See* 2000-OR-050. The franchise was transferred to Comcast in 2006. *See* 2006R-371. In 2009 the franchise was renewed. The present franchise ordinance, as amended, is codified in the Minneapolis Code of Ordinances, Appendix H. Earlier this year, the City conditionally approved the transfer of the franchise to GreatLand Connections. *See* 2015R-055. If the conditions in the resolution are met, the Comcast franchise will be transferred to a new company called GreatLand Connections.

When the City initially granted a cable franchise, the cable operator proposed to build out its system throughout the City within 2.5 years. *See* 79-OR-263, Addendum A at p. 9. Due to litigation, construction under the 1979 franchise was delayed. In 1982, the build-out commitment was amended to be completed within 3 years. *See* 82-OR-206, Art. II, Section 3, and Addendum A, Section B; and 82-OR-209, Art. II, Section 3, and Addendum A, Section B. The cable system was substantially completed by 1986. However, by 1985 and 1986, the incumbent cable operator claimed to have "a cash shortfall substantially in excess of prior projections" and requested and received from the City relief from certain franchise commitments in an effort to "enable Company to achieve financial stability…" *See* 86-OR-164. Since the franchise was granted in 1979, no other cable franchise has been granted in the City.

Section 4
The City'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 City's Charter further authorizes the City Council to grant and regulate any lawful franchise. Minneapolis City Charter § 4.1(d). Additionally, a cable service provider must obtain a cable franchise prior to offering cable service. *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 the Minnesota Statues (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"). Under these requirements, the City cannot unreasonably refuse to award an additional competitive cable franchise, nor may it award an applicant a franchise on material terms that are more favorable or less burdensome than certain terms contained in the City's existing franchise with Comcast. The specific procedures to be followed in soliciting and reviewing cable franchise applications are contained in the Minnesota Statutes[4] 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
Cable Franchise Application Requirements – State and Local

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

4 *See* Minn. Stat. § 238.081, Subd. 1-7.

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.

- **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. City's Competitive Franchising Policies and Procedures

The City adopted its "Policies and Procedures Governing Application, Review and Recommendations Regarding Grant of Competitive Cable Franchises," on May 5, 2000 ("Competitive Franchising Policies and Procedures"). *See* City Pet. 265879.1. The Competitive Franchising Policies and Procedures adopted by the City supplement state and federal law.

1. City'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 City. Under Section 4, Subd. 1 of the Competitive Franchising Policies and Procedures and state law, the application process is initiated by the City's publication 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 City on December 23, 2014, all franchise applications were to be filed with the Cable Officer no later than 4:00 p.m. on January 20, 2015.

2. Contents of Application

The City'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 statement that applicant seeks to construct a Cable System and to provide Cable Services within the City;
- The name, address, address and telephone number of the individuals who may be contacted for further information;
- Plans for the provision of institutional network capacity and services or other "in-kind" services and the terms, conditions and technical standards under which particular service is to be provided to governmental, educational, and other institutional entities;
- A list of all institutions receiving institutional network service;
- A schedule of proposed rates in relation to the services to be provided, and a proposed policy regarding unusual or difficult connection of services;
- An agreement to pay the City a franchise fee in the same percentage of gross revenues as the incumbent provider(s);

- Indemnification language; and
- an application fee.

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,[5] and may require adequate assurances that an applicant:

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

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. The FCC's *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.[6] It is sometimes referred to as the "*621 Order*" because it addresses the implementation of Section 621(a)(1) of the Federal Cable Act.[7] Section 621(a)(1), among other things, prohibits franchising authorities from unreasonably refusing to award competitive cable franchises.

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[5] *See* 47 U.S.C. § 552(a)(2).
[6] *See* FN 3.
[7] Section 621(a)(1) is codified at 47 U.S.C. § 541(a)(1).

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

By its terms, the *621 Order* applies only to new entrants.[8] According to the FCC, the *621 Order* does "not preempt state law or state level franchising decisions . . ."[9] 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."[10] 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."[11] 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").[12]

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 may 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

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8 *See, e.g., 621 Order* at ¶¶ 18 and 139.
9 *Id*. ¶ 126.
10 *Id*. at ¶ 1, n. 2.
11 *621 Order* at ¶ 126.
12 *See* **Exhibit 11**, at ¶ 7.

> 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."[13] 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. *<u>Examples of Unreasonable Build-Out Requirements</u>*.

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;

[13] *621 Order* at ¶ 89.

- 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.[14]

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.[15] The FCC also opined that it would seem reasonable to establish build-out requirements based on a new entrant's market penetration.[16]

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.[17] 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."[18] Overall, the FCC found that PEG support must be both "adequate and reasonable."[19] Adequacy is defined by the FCC as "satisfactory or sufficient."[20] The *621 Order* does provide some examples of unreasonable PEG and Institutional Network support obligations,[21] including:

- Completely duplicative PEG and I-Net requirements;[22]
- 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.

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[14] *Id*. at ¶¶ 89-90.
[15] *Id*. at ¶ 89.
[16] *Id*.
[17] *Id*. at ¶ 110.
[18] *Id*. at ¶ 114.
[19] *Id*. at ¶ 115.
[20] *Id*. at ¶ 112.
[21] *Id*. at ¶ 119.
[22] 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*.

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

G. FCC 621 Order – Local Level Playing Field Requirements

Local level playing field requirements are generally preempted by the *621 Order*.[25] 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:

> 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").

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[23] *621 Order* at ¶ 120.
[24] *Id*.
[25] *Id*. at ¶138.

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 238.085, Subd. 1(m) (emphasis added). It is the position of CenturyLink that the 5-Year Build Statue 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. City Charter and Comcast Cable Franchise

In addition to Federal and State law, local law also must be considered. The local laws applicable to the application for an additional franchise are the City Charter, the Cable Franchising Policy, and the current franchise with the incumbent franchised cable operator, Comcast.

The City's Charter further authorizes the City Council to grant and regulate any lawful franchise. Minneapolis City Charter, Section 4.1(d). The Comcast cable franchise addresses competitive franchises in section 2.5, which states:

> If any laws, rules, regulations or government authorizations would allow a provider of multi-channel video programming or equivalent in the City's rights-of-way to provide multi-channel video programming or equivalent under less burdensome regulations or regulatory structure than Grantee is operating under, the obligations of this Agreement shall be modified to reflect such changes.

Section 9
Issues Raised by the Public

A. Economic Redlining or Cherry Picking.

The majority of the testimony at the Public Hearing and comments submitted to the City related to how CenturyLink would determine where it would provide cable service. For example, Pete Rhodes did not object to competition, but raised concerns about "fair and equitable distribution." *See* Exhibit 8 at p. 2. Similarly, Pastor Billy G. Russell supported broader competition, but was concerned about the service being available to only 30 percent of the City at the initial launch. *See* Exhibit 8 at p. 3. Pastor Russell supported "equitable service deployment" and adherence to "current franchise requirements."

A group of "active advocates" echoed concern over the provision of service to 30% of the City. The group stated,

> "We feel that this type of an agreement would allow CenturyLink to decide who gets service and could leave behind those that might not have a lot of resources. ***We are also concerned that there is no guarantee this competitive option would ever be made available to the remaining 70% of the City***."

See Exhibit 8 at p. 5. The group urged the City to "continue with your commitment to equity." Another commenter was concerned that CenturyLink would not release information and locations for their rollout and that only CenturyLink believed that Federal law preempted state law. *See* Exhibit 8 at p. 9.

Other commenters were supportive of CenturyLink's initial service offering to 30% of the City. As one commenter stated,

> "***Even if CenturyLink is only [serving] 30[%] of the homes to start it will still put Comcast on notice. Both companies competing means the consumer wins!***"

See Exhibit 8 at p. 11. Another commenter stated "it is about time that another company gives the public some choice" and urged the City to "grant [CenturyLink] a cable franchise even if only part of the City benefits to start with." *See* Exhibit 8 at p. 10. Mona Meyer on behalf of the Communications Workers of America ("CWA") supported bringing a "competitive alternative to the market." Andy Thompson, another commenter stated, ***CenturyLink should be "pressured to offer their service to all Minneapolis residents over time," but "incoming competition needs to be given the opportunity to gain a foothold before expanding."*** According to Mr. Thompson, "competition and choice will always be better for the consumer than no competition." Exhibit 8 at p. 7.

B. Culturally Diverse Programming

Both Mr. Rhodes and Pastor Russell commented on the importance of culturally diverse programming. *See* Exhibit 8 at pp. 2-3.

C. Investment in the City

Ms. Meyer on behalf of the CWA also commented on the benefits of increased investment in the City. According to Ms. Meyer, the City would see "greater investment in broadband services to homes and businesses…" *See* Exhibit 8 at p. 7.

D. Job Growth in the City

Ms. Meyer on behalf of the CWA also supported the CenturyLink application because it would bring "immediate job creation, and a vision for continued job creation through growth." *See* Exhibit 8 at p. 7. Mr. Thompson wrote, "I work at home… and I have no doubt this service would help my business day-to-day."

E. Issues Raised By the Incumbent Franchised Cable Operator - Comcast

A representative from Comcast submitted a letter into the record at the public hearing that raised the following issues:

- Concern "regarding whether and to what extent [CenturyLink] will agree to many of the franchise obligations that have been required of Comcast." Exhibit 5 at p. 2.
- An expectation that "the same level of due diligence and scrutiny that the City would apply-and has applied-to Comcast and its predecessors will also be applied to CenturyLink. *Id*.
- Concern with "CenturyLink's build-out commitment that appears to stand in direct conflict with state law. *Id*.

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. At the public hearing, Mr. Campbell of CenturyLink challenged Comcast to submit evidence to prove that statement.[26] No 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

[26] *See* Public Hearing at 35:15 mark.

> 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 City 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 Cable Officer is the City officer responsible for reviewing cable franchise applications. Pursuant to the Competitive Franchising Policies and Procedures, the Cable Officer is required to prepare a report and recommendation (the "Report") within 15 days of the close of the public hearing on the franchise application. This report and recommendation will be filed timely with the City Clerk. The Cable Officer 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 City has substantially complied with state and City cable franchising application requirements.

Publication of Notice. The City fully complied with the state requirements (listed above) for publishing a notice of intent to franchise. *See* **Exhibit 1** (Notice of Intent to Franchise, Finance & Commerce, Inc.). There were no objections to the City's publication of the notice of intent to franchise.

Written Notice. In addition to publishing the notice of intent to franchise in one or more newspapers, the City also mailed copies of the notice of intent to franchise person it identified as being a potential candidate for a franchise. There were no objections to the City's provision of written notice to potential candidates for a cable franchise.

Deadline for Application Submission. The City 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 City.

Public hearing on franchise. The City held a public hearing before the Ways and Means Committee on January 22, 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 City held the public hearing.

Award of franchise. In the event the City Council decides to enter into a franchise agreement with CenturyLink in the future, the City must award the cable franchise by ordinance. In that event, while the City has held a public hearing on the cable franchise application, there will 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.

City's Competitive Franchising Policies and Procedures. The City fully complied with the City's Competitive Franchising Policies and Procedures listed above. *See* Exhibit 1. No objection to the City's process was made at the public hearing. This report is filed to fulfill the requirement that the cable officer submit a report within 15 days of the close of the public hearing. See Ex. 8 (Policies) at Section 4, Subdivision 5.

2. CenturyLink's application substantially complies with state application requirements.

Contents of franchising proposal. It was CenturyLink's responsibility to comply with all of the applications requirements in State Law. The application was submitted timely 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. 1 and Exhibit 3 at ¶ 8.
- A description of the proposed system design and planned operation. *See* Exhibit 2 at pp. 1-2 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. 2-3 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. 3 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. 3-4 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. 3 and Exhibit 3 at ¶ 37.
- Plans for financing the proposed system. *See* Exhibit 2 at p. 5 and Exhibit 3 at ¶ 38.
- A statement of ownership detailing the corporate organization of the applicant. *See* Exhibit 2 at p. 4 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 James Campbell of CenturyLink.[27] There was documentary and testimonial evidence received into the record concerning CenturyLink's build-out of the City. *See* Exhibits 5 and 8. While some members of the public disagreed with CenturyLink's preemption conclusion and expressed concern about how CenturyLink will build-out its cable system if awarded a cable franchise by the City, 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, 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.

3. CenturyLink's Application substantially complies with the City's Competitive Franchising Policies and Procedures.

The cable franchise application requirements of the City's Competitive Franchising Policies and Procedures largely mirror the requirement found in state law. To the extent the requirements are the same or similar, CenturyLink has substantially complied with the City's application filing requirements listed above. CenturyLink also substantially complied with the following requirements:

- A statement that applicant seeks to construct a Cable System and to provide Cable Services within the City. *See* Exhibit 2 at p. 1.
- The name, address, address and telephone number of the individuals who may be contacted for further information. *See* Exhibit 2 at p. 1.
- A statement of a form and substance acceptable to the City indemnifying the City fully against any claims or liabilities alleged as the result of the City's exercise of these Policies and Procedures including any such claims or liabilities alleged or asserted by the incumbent Cable Company. *See* Exhibit 2 at pp. 5-6
- An application fee. *See* Exhibit 2.

The Competitive Franchising Policies and Procedures require an agreement to pay the City a franchise fee in the same percentage of gross revenues as the incumbent provider(s). CenturyLink's response did not contain such an agreement. Any franchise with CenturyLink must contain the same commitment to pay franchise fees as Comcast.

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[27] Mr. Campbell's testimony on the 5-Year Build Statute can be found at the 31:15 mark of the Public Hearing at: https://www.youtube.com/watch?v=ZgCoFZanYgY

The City's Competitive Franchising Policies and Procedures also contain the following requirements.

- Plans for the provision of institutional network capacity and services or other "in-kind" services and the terms, conditions and technical standards under which particular service is to be provided to governmental, educational, and other institutional entities;
- A list of all institutions receiving institutional network service;

When the City adopted the Competitive Franchising Policies and Procedures, the City believed the franchised cable operator had an institutional network cable franchise commitment. Following litigation and a 2006 Settlement Agreement, the City and the franchised cable operator agreed there would be no institutional network commitment in a renewed cable franchise, which was renewed in 2009. *See* City Pet. 271337 and City Code, Appendix H. Thus, the current cable franchise with Comcast has no institutional network commitment. CenturyLink has indicated that it will meet any incumbent franchise commitments related to service to governmental, and educational entities. *See* Exhibit 2 at pp. 2-3 and Exhibit 3 at ¶¶ 17-22.

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

While the City may review the financial, legal and technical qualifications of a franchise applicant, the FCC has indicated that in cases of the application for 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 City 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 4-5; and Exhibit 3 at para. 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 5. 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 City. Recently, the City 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* 2015-R-XXX.

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 Sates. See Exhibit 2 at p. 3. 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 para. 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 City.

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.[28] The applicant appears legally qualified to hold a cable franchise in the City. 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 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 City's request for information, it appears that CenturyLink has the legal qualifications to operate a cable communications system in the City. 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 City's cable-related needs and interests were addressed in the 2009 Comcast cable franchise renewal and recently updated through a 2015 Settlement Agreement. *See* City Code, Appendix H; and City Pet. 277975. The public testimony and comments identified certain additional needs and interests as shown above. *See* Section 10 above. Any franchise negotiated with CenturyLink should be substantially similar (but need not be identical) to the 2009 Comcast cable franchise, as amended, and address the concerns raised by the public at the public hearing consistent with the recommendations of this Report.

[28] See 47 U.S.C. § 541(a)(4)(C) and Section 4, Subd. 2 of the Competitive Franchising Policies and Procedures.

Section 11
Cable Franchise Considerations

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

a. Economic Redlining or "Cherry Picking." The majority of the public comment from the public hearing centered on a concern that CenturyLink will choose to provide cable communications service to wealthy areas of the City, thereby discriminating based on the income of residents in the City. *See* Exhibit 8 and Public Hearing Testimony. There is nothing in the record to indicate that CenturyLink will do so. The CenturyLink application only indicates that its cable service "will be available to over thirty percent of the households in the City." *See* Exhibit 2 at p. 3. As CenturyLink stated at the Public Hearing, it is illegal to economically redline. *See* Public Hearing Testimony of Mr. Campbell. 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 a cable franchise in a similar manner as the incumbent's cable franchise. Service discrimination is addressed in Section 1.3 of Comcast's Cable Franchise. *See* Appendix H of the Minneapolis Code.

b. Diverse Programming. There were also public comments on the importance of culturally diverse programming provided by the franchised cable operators in the City. The City has limited authority on types of programming that it can require of a cable operator. Under Section 624 of the federal Cable Act, franchising authorities may establish requirements for video programming[29] and may enforce any requirements contained within a cable franchise for "broad categories of video programming." *See* 47 U.S.C. § 544(b)(2)(B). Any franchise with CenturyLink should address the broad programming categories to ensure culturally diverse programming to the extent allowed.

c. Franchise Area - Reasonable Build-Out of the City.

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 City for any litigation concerning the grant of a cable franchise to CenturyLink. *See* Exhibit 2 at 5.

With the 5-Year Build Statute on one hand and federal preemption on the other, the City is left with a difficult choice. Does the City error 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 and jobs and investment into the City? Or, does the City error on the side of competition? Litigation may be inevitable with either choice.

[29] Subject to the limitations of 47 U.S.C. § 544(h).

Should the City 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 City 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 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* City Code, Appendix H, at §§ 2.1(z)-(aa) and 4.

e. Compliance with City Charter and Comcast Cable Franchise

In the event the City determines to grant a cable franchise to CenturyLink, the cable franchise must be granted by an ordinance. In the event that the cable franchise contains regulations or a regulatory structure that is less burdensome than Comcast is operating under, the franchise agreement with Comcast will be at risk of being modified to reflect the changes. However, local level playing field provisions may also be subject to federal preemption. *See* Section 7(G) above.

Section 12
Recommendation

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

If the City accepts this recommendation, City staff will negotiate a cable franchise with CenturyLink. The City Council should issue a notice of intent to award a cable franchise by ordinance. Once a cable franchise ordinance is introduced, a public hearing on the ordinance will be scheduled before the Ways and Means Committee. The City Council may act on the cable franchise ordinance any time seven days following the public hearing on the cable franchise ordinance. After the public hearing, the City Council will need to decide whether to award a cable franchise by ordinance or to deny the award of a cable franchise. Additionally, the Council will need to make findings of fact in support of its decision.