

RESOLUTION NO. 15-45

**A RESOLUTION OF THE DRAPER CITY COUNCIL AUTHORIZING THE EXECUTION BY THE MAYOR OF A CABLE TELEVISION FRANCHISE AGREEMENT BETWEEN DRAPER CITY AND QWEST BORADBAND SERVICES, INC.**

**WHEREAS**, Draper City Municipal Code Section 5-13-010 permits the City Council to grant a cable television franchise to a vendor to provide cable TV services within the confines and boundaries of Draper City; and

**WHEREAS**, the City Council has reviewed and considered the attached Franchise Agreement between Draper City and Qwest Broadband Services, Inc.; and

**WHEREAS**, the City Attorney has reviewed the Franchise Agreement and has approved it as to form and compliance with federal law and regulations governing the awarding of cable television franchises; and

**WHEREAS**, the City Council has determined the Franchise Agreement to be in the best interest of the City and will be beneficial to the health, safety and welfare of citizens of the City; and

**WHEREAS**, the Mayor is authorized to execute agreements.

**NOW, THEREFORE, BE IT RESOLVED** by the Draper City Council as follows:

**Section 1. Resolution.** The Franchise Agreement between Qwest Broadband Services, Inc. and Draper City to provide cable television services, attached hereto as Exhibit A and by this reference made a part hereof, is hereby approved and authorized for signing by the mayor on behalf of Draper City.

**Section 2. Effective Date.** This Resolution shall become effective immediately upon passage.

**PASSED AND ADOPTED BY THE CITY COUNCIL OF DRAPER CITY, STATE OF UTAH, THIS THE 18<sup>th</sup> DAY OF August, 2015.**

ATTEST:

DRAPER CITY

  
\_\_\_\_\_  
City Recorder

  
\_\_\_\_\_  
Mayor



**EXHIBIT A**

**FRANCHISE AGREEMENT  
QWEST BROADBAND SERVICES, INC. D/B/A CENTURYLINK**

WHEREAS, this Franchise Agreement ("Franchise") is between Draper City, Utah (the "City") and Qwest Broadband Services, Inc. d/b/a CenturyLink ("CenturyLink").

WHEREAS, the City is authorized to grant and renew cable franchises for the installation, operation, and maintenance of cable television systems and otherwise regulate cable communications services within the City boundaries by virtue of federal and state statutes, by the City's police powers, by its authority over its public rights-of-way, and by other City powers and authority;

WHEREAS, Qwest Broadband Services, Inc. d/b/a CenturyLink desires to provide cable communications services and to construct, operate and maintain a cable television system within the City; and

WHEREAS, the City hereby acknowledges that the financial, legal, and technical ability of CenturyLink is reasonably sufficient to provide services, facilities, and equipment necessary to meet the future cable-related needs of the community, and having afforded the public adequate notice and opportunity for comment, desires to enter into this Franchise with CenturyLink for the construction and operation of a cable system on the terms set forth herein.

**Section 1. Definitions**

For the purpose of this Franchise, the following terms, phrases, words, abbreviations, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future; words in the plural include the singular and words in the singular include the plural. The word "shall" is always mandatory and not merely discretionary.

A. "Act" shall mean the Communications Act of 1934, including the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996.

B. "Cable Service" shall have the meaning provided under Federal law and regulations.

C. "Cable System" shall have the meaning provided under Federal law and regulations.

D. "Gross Revenue" means any and all revenue in whatever form, from any source, directly received by Qwest Broadband Services, Inc. d/b/a CenturyLink ("CenturyLink") or an Affiliate of CenturyLink that would constitute a Cable Operator of the Cable System under the Cable Act, derived from the operation of the Cable System to provide Cable Services in any manner that requires use of the Public Right-of-Way in the Service Area. Gross Revenues shall include, but are not limited to, basic, expanded basic and pay service revenues, revenues from installation, rental of converters, the applicable percentage of the sale of local and regional advertising time, and any leased access revenues.

Gross Revenues does not include any fees or taxes which are imposed directly or indirectly on any Subscriber by any governmental unit or agency, and which are collected by CenturyLink on behalf of a governmental unit or agency. Gross Revenues do not include franchise fees, or revenues which cannot be collected by CenturyLink and are identified as bad debt; provided, that if revenue previously representing bad debt is collected, the revenue shall be included in Gross Revenues for the collection period.

E. "Living Unit" means a distinct address as tracked in the QC network inventory, used by CenturyLink to identify existing or potential Subscribers. This includes, but is not limited to, single family homes, multi-dwelling units (e.g., apartment buildings and condominiums) and business locations.

F. "Person" shall mean any person, firm, partnership, association, corporation, company or organization of any kind other than the City.

G. "QC" means Qwest Corporation d/b/a CenturyLink QC ("QC"), an Affiliate of CenturyLink.

H. "Qualified Living Unit" means any Living Unit designated as qualified for Cable Service in QC's loop qualification network inventory.

I. "Service Area" shall mean the territory within the boundaries of the City.

J. "Street" and "Public Right-of-Way" shall have the meaning set forth in applicable City Code or rules as defined below.

K. "Subscriber" shall mean an authorized recipient lawfully receiving Cable Service provided by CenturyLink by means of or in connection with the Cable System, whether or not a fee is paid for such service.

L. "City Code" shall mean the code, rules and regulations adopted by Draper City, from time-to-time.

M. "Reasonable Notice" shall mean the following: Unless otherwise defined herein, reasonable notice means the delivery of written notice to the other party at least thirty (30) days prior to the action proposed for the alleged defect, situation or default. In the event of any emergency that poses an immediate risk of harm to the health safety, welfare or property of the residents of the City, reasonable notice shall be construed to mean written or verbal notice of the action, condition or defect or situation as soon as practicable under the circumstances.

N. "Multiple Dwelling Unit" or "MDU" means any adjacent building(s) such as apartments under common ownership containing more than four dwelling units used as living quarters.

## **Section 2. Grant of Franchise**

The nonexclusive Franchise is hereby granted to CenturyLink and subject to the terms, conditions, and limitations hereinafter stated, to use the Streets or Public Rights-of-Way of the City now or hereafter laid out or dedicated, and all extensions thereof, and additions thereto, to construct, erect, operate and maintain in, upon, along, across, above, over, and under the aforementioned Streets and/or Public Rights-of-Way in the City, wires, cables, underground

conduits, manholes, and other conductors and fixtures necessary for the maintenance and operation in the City of a Cable System for the reception, sale, and distribution of Cable Service and for any and all other lawful purposes.

CenturyLink agrees to comply with the terms of any lawfully adopted generally applicable local ordinance, to the extent that the provisions of the ordinance do not have the effect of limiting the benefits or expanding the obligations of CenturyLink to provide Cable Service pursuant to this Agreement. In the event of a conflict between any ordinance and this Agreement, the Agreement shall control, provided however that CenturyLink agrees that it is subject to the lawful exercise of the City's police power.

Any Affiliate of CenturyLink directly involved in the offering or delivery of Cable Services in the Service Area, or directly involved in the management or operation of the Cable System in the Service Area, shall comply with the obligations of this Franchise. However, the Parties acknowledge that Qwest Corporation d/b/a CenturyLink QC ("QC"), an Affiliate of CenturyLink, will be primarily responsible for the construction and installation of the facilities in the Streets/Public-Rights-of-Way which will be utilized by CenturyLink to provide Cable Service, including Cable Services utilizing QC's Fiber-to-the-Premises Network or Fiber-to-the-node infrastructure utilizing facilities provided by QC. So long as QC does not provide Cable Services to Subscribers in the City, QC will not be subject to the terms and conditions contained in this Franchise. QC's installation and maintenance of facilities in the Streets/Public-Rights-of-Way shall otherwise be subject to applicable laws and permit requirements. To the extent CenturyLink uses any third-parties (whether or not affiliated with CenturyLink) to fulfill its obligations under this Franchise, CenturyLink will insure such parties comply with the terms and conditions of this Franchise. To the extent CenturyLink constructs and installs Facilities in the Streets/Public-Rights-of-Way, such installations and facilities will be subject to the terms and conditions contained in this Franchise.

### **Section 3. Area of Operation**

A. Subject to the lawful exercise of the police power heretofore or hereafter granted to the City, CenturyLink shall have the right to construct, operate, and maintain, in, on, along and under the Streets and Public Rights-of-Way of the Service Area of the City, wires, cables, remote terminal cabinets, underground conduits, manholes, and other conductors and fixtures necessary for the maintenance and operation in the City of a Cable System at such locations designated by CenturyLink and approved by the City. All new construction by CenturyLink shall be underground as required by City Code and shall be within public utility easements where possible.

B. CenturyLink shall provide Cable Services upon request from any Person in the Service Area who resides in a Qualified Living Unit.

C. Except as otherwise provided in this Franchise, CenturyLink shall provide Cable Services within seven (7) days of a request by any Person who resides in a Qualified Living Unit. A request shall be deemed made on the date of signing a service agreement, receipt of funds by CenturyLink or receipt by CenturyLink of a verified verbal or written request.

D. In cases of new construction or property development where utilities are to be placed underground, the developer/property owner shall give CenturyLink reasonable notice of such construction or development, and of the particular date on which open trenching will be available for CenturyLink's installation of conduit and/or cable. CenturyLink shall also provide

specifications as needed for trenching. Costs of trenching and easements required to bring Cable Service to the development shall be borne by the developer/property owner unless agreed to otherwise between CenturyLink and developer.

E. CenturyLink's use of Public Rights-of-Way shall be subject to all rules and policies adopted by the City from time to time, provided, such rules and policies do not materially change the terms of this Franchise.

#### **Section 4. Acceptance; Effective Date; Term**

A. The effective date of this Agreement shall be the date that this Agreement is fully executed by the Parties.

B. The Franchise granted herein will take effect and be in full force from and after final passage by the City, subject to the acceptance provided in paragraph A above and shall continue in full force and effect for a period of ten (10) years (hereinafter the "Term"), unless earlier terminated as set forth herein.

#### **Section 5. Conditions on use of Streets and Roads**

A. **Trimming/Cutting Trees.** CenturyLink, upon consultation with the City, shall have the right to trim and keep clear of its poles, wires, cables, underground conduits, manholes and other conductors and fixtures, the trees in and along the Streets. In the exercise of such right, CenturyLink shall not cut or otherwise injure any trees to any greater extent than is reasonably necessary. Nothing herein shall allow trimming, cutting, clearing or other activity on private property without consent from the private property owner.

B. **Restoring Streets.** CenturyLink shall restore, reconstruct, or repair any Street and Public Right-of-Way, and any sewer, gas, effluent, water main, pipe, or fire alarm disturbed or destroyed by the exercise of any right granted to CenturyLink by this Franchise in accordance with applicable City Code, as amended. In the event the City determines CenturyLink has not made such restoration, reconstruction or repair in a reasonably satisfactory manner, the City, after giving CenturyLink notice and opportunity to correct such failure, shall have the right to carry out such restoration, reconstruction or repair, and CenturyLink shall reimburse the City in full for all reasonable expenses incurred by the City in carrying out all or part of such restoration, reconstruction or repair.

C. **Safety.** CenturyLink shall at all times employ ordinary care and shall install and maintain in use commonly accepted methods and devices for preventing failure and accidents which are likely to cause damage, injuries, or nuisances to the public. All structures and lines, equipment, and connections in, over, under, and upon the Streets, shall at all times be kept and maintained in a safe, suitable, substantial condition, and in good order and repair. Any opening or obstruction in the streets shall be guarded and protected at all times by placement of adequate barriers, fences, or boardings, the bounds of which will be clearly designated by warning lights.

D. **Compliance with Applicable Laws.** CenturyLink shall install and maintain its wire, cables, fixtures, and other equipment in accordance with applicable City Code, as amended, any building codes, or other construction standards imposed by the City, and the applicable

sections of the National Electric Safety Code as revised during the Term and in such manner as shall not interfere with any installations of the City or of any public utility serving the City.

E. Temporary Moving of Wires. CenturyLink shall, on the request of any Person holding a building-moving permit issued by the City, temporarily relocate its facilities to permit the moving of buildings, water, effluent or sewer lines, or Streets and/or Public Rights of Way. The expense of such relocation shall be paid by the Person requesting the same, and CenturyLink shall have the authority to require such payment. CenturyLink shall be given not less than five (5) business days' notice to arrange for such relocation.

F. Inspection. The City shall have the right to inspect all construction or installation work performed in, over, under and upon the Streets, subject to the provisions of this Franchise and make such inspections as it shall find necessary to insure compliance with the terms of this Franchise.

G. Location of Distribution Lines-Poles/Underground Cable. No poles or structures shall be erected by CenturyLink without prior approval of the City, through established permit procedure pursuant to applicable City Code, as amended. Location of any pole or structure shall be removed or modified by CenturyLink whenever the City determines that the public health, safety and welfare would be negatively affected. If the City requires the removal or relocation of part of the Cable System, such removal or relocation shall be solely at CenturyLink's expense.

H. Moving of CenturyLink Property. CenturyLink will, upon reasonable notice from the City, protect, support, temporarily disconnect or relocate its property in the Street or Public Right-of Way when required by the City or State by reason of traffic conditions, public safety, street closing or abandonment, highway or street construction, change or establishment of street grade, or any other types of structures or improvements. The City shall bear the cost to the extent such request for relocation or disconnection is for aesthetic purposes, otherwise CenturyLink shall bear the cost.

I. CenturyLink shall provide as-builts to the City for its facilities in the streets and rights-of-way.

## **Section 6. Construction and Operation**

A. All installation and maintenance of electronic equipment shall be in accordance with the applicable sections of the current edition of the National Electric Safety Code and all State as well as all applicable City codes.

B. All working facilities, conditions, and procedures, used or occurring during construction and maintenance of the Cable System shall comply with the standards of the Occupational Safety and Health Administration.

C. Construction, installation and maintenance of the Cable System shall be performed in an orderly and workmanlike manner, and in close coordination with public and private utilities serving the City following accepted construction procedures and practices and working through existing committees and organizations.

D. Any antenna structure used in the Cable System shall comply with construction, marking and lighting of antenna structures required by the United States Department of Transportation. CenturyLink shall obtain a special use permit from the City prior to the installation of any such antenna structure.

E. CenturyLink will not intentionally interfere with television reception of Persons not served by CenturyLink, nor will the Cable System interfere with, obstruct or hinder in any manner, the operation of the various utilities serving the residents within the confines of the City. Specifically, CenturyLink shall not interfere, obstruct or hinder in any manner, the City's communications systems, water system, sewer system, fire department system, police department system, public works systems or court system.

F. CenturyLink shall not be required to make Cable Service available to residents of an MDU project until a mutually acceptable agreement granting CenturyLink access to the MDU has been executed and delivered by CenturyLink and the property owner.

G. CenturyLink will at all times fully comply with all City requests regarding its work within the Public Rights-of-Way.

#### **Section 7. Customer Service**

CenturyLink shall obtain and maintain sufficient telephone lines and staffing so as not to delay unreasonably the answering of any telephone call, and shall adjust its staffing, as necessary, with respect to special events which may reasonably be expected to increase call volume. In any event, CenturyLink shall comply at all times with the customer service provisions set forth in 47 Code of Federal Regulations Parts 76.309, 76.1602 and 76.1603.

#### **Section 8. Channel Capability**

A. CenturyLink shall use reasonable efforts to provide a minimum of two hundred (200) channels. CenturyLink shall provide broad categories of services. Suggested broad categories of video programming are:

1. Educational programming;
2. News and information;
3. Sports programming;
4. General entertainment (including movies);
5. Children's programming;
6. Family programming;
7. Culture and performing arts;
8. Science/documentary;
9. Weather information;
10. Ethnic programming; and,
11. Governmental affairs.

CenturyLink shall carry the signals of local broadcast stations in the Salt Lake City Metropolitan area that have indicated to CenturyLink their "must carry" designation as well as broadcast stations that have executed "retransmission consent" agreements with CenturyLink in accordance with FCC regulations and federal law.



B. Upon request by the City, CenturyLink shall make available one (1) channel to be used for educational and governmental cablecast programming. When first-run programming on the first educational and governmental access channel occupies fifty percent of the hours between 11:00 a.m. and 11 p.m., for any twelve consecutive weeks, the City may request the use of one additional channel for the same purpose. The additional channel must maintain programming twenty-five percent of the hours between 11:00 a.m. and 11:00 p.m. for twelve consecutive weeks. If this level of programming is not maintained, the channel will return to CenturyLink for its use. CenturyLink also reserves the right to program designated educational and governmental channels during the hours not used by the City or other governmental entities. If programming time is not used by City and is available for sharing, the channels may be shared with other municipalities receiving programming from the common head end receive site location. The City shall agree to indemnify, save and hold harmless CenturyLink from and against any liability resulting from the use of the aforementioned educational and governmental channels by the City, except for liability resulting from program time shared with other municipalities. CenturyLink shall not have to provide any channel capacity beyond that provided by any other franchised cable provider in the City.

C. At any time during the term of this Franchise the City may require that CenturyLink provide a "Capital Contribution," during the remaining term of the Franchise, to be used specifically for educational and governmental access. The City shall give CenturyLink ninety (90) days written notice of such a requirement. The amount of the Capital Contribution payable by CenturyLink to the City shall not exceed ten cents per month, per Subscriber, to be remitted annually. The payment shall be due no later than forty-five (45) days after the end of the calendar year. All amounts paid as the Capital Contribution may be separately stated on Subscribers' bills as permitted in 47 C.F.R. 76.985. The Capital Contribution will be payable by CenturyLink to the City after; a) the approval of the City, if required, to the inclusion of the Capital Contribution on Subscribers' bill including any required approval pursuant to 47 C.F.R. 76.933; b) notice to CenturyLink's Subscribers of the inclusion; and c) the collection of the Capital Contribution by CenturyLink from its Subscribers. The "Capital Contributions" are not to be considered in the calculation of Franchise Fees pursuant to this Franchise. CenturyLink shall never be required to pay a different amount than being collected from the incumbent cable provider from its subscribers as a capital contribution.

D. CenturyLink may make all PEG channels available on a mosaic display.

## **Section 9. Conduct of Operations**

A. CenturyLink will render efficient Cable Service, make repairs promptly, and interrupt Cable Service only for good cause and for the shortest time possible. CenturyLink will use reasonable efforts to assure that such interruptions will occur during periods of minimum system use.

B. CenturyLink shall comply with all applicable Federal Communications Commission rules and regulations, both present and future.

## **Section 10. Indemnification**

A. The City shall in no way be liable or responsible for any loss or damage to property or any injury to, or death of, any person that may occur in the construction, operation or maintenance by CenturyLink of its Cable System.

B. CenturyLink shall indemnify, hold harmless and defend the City, its officers, agents and employees from and against and all claims, demands, suits, costs, liens, liabilities, injuries and damages of whatsoever kind resulting directly or indirectly from, or arising out of: 1) any acts or omissions of or by CenturyLink, its agents, representatives, officers, employees, or subcontractors in connection with CenturyLink's use of the Public Rights-of-Way within the City; or 2) CenturyLink's failure to inspect, discover, correct or otherwise address any defect, dangerous condition or other condition created by or resulting from CenturyLink's use of the Public Rights-of-Way within the City. CenturyLink agrees that its duty to defend, hold harmless and indemnify the City under this Franchise includes reasonable attorney's fees, litigation and court costs and expert witness fees.

C. Notwithstanding any provision hereof to the contrary, CenturyLink shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand, suit, cost, lien, liability, injury or damage arises out of or in connection with any negligent or willful act or failure to act of the City or any of its officers, agents or employees.

## **Section 11. Insurance**

### **11.1 General Insurance Requirements for all Policies.**

A. Any insurance coverage required herein that is written on a "claims made" form rather than on an "occurrence" form shall (i) provide full prior acts coverage or have a retroactive date before the effective date of this Franchise, and (ii) be maintained for a period of at least three (3) years following the end of the term of this Franchise or contain a comparable "extended discovery" clause. Evidence of current extended discovery coverage and the purchase options available upon policy termination shall be provided to the City.

B. All policies of insurance shall be issued by insurance companies Franchised to do business in the state of Utah and either:

1.A. Currently rated A- or better by A.M. Best Company; and

1.B. For construction contracts only, the insurer must also have an A.M. Best Company financial size category rating of not less than VII.

—OR—

2. Listed in the United States Treasury Department's current Listing of Approved Sureties (Department Circular 570), as amended.

C. CenturyLink shall furnish evidence of insurance, acceptable to the City, verifying compliance with the insurance requirements herein prior to CenturyLink's written acceptance of this Franchise.

D. In the event any work is subcontracted, CenturyLink shall require its contractor, at no cost to the City, to secure and maintain all minimum insurance coverages required of CenturyLink hereunder.

E. CenturyLink's insurance policies shall be primary and non-contributory to any other coverage available to the City. The workers' compensation, general liability and auto liability policies shall be endorsed with a waiver of subrogation in favor of the City.

F. In the event that governmental immunity limits are subsequently altered by legislation or judicial opinion, CenturyLink shall provide a new certificate of insurance within thirty (30) days after being notified thereof in writing by the City, certifying coverage in compliance with the modified limits or, if no new limits are specified, in an amount acceptable to the City.

G. All required policies shall provide that coverage thereunder shall not be canceled or modified without providing (30) days prior written notice to the City.

H. In the event CenturyLink fails to maintain and keep in force any insurance policies as required herein City shall have the right at its sole discretion to obtain such coverage and charge CenturyLink for the costs of said insurance.

**11.2 Required Insurance Policies.** CenturyLink, at its own cost, shall secure and maintain during the term of this Franchise, including all renewal terms, the following minimum insurance coverage:

A. Workers' compensation and employer's liability insurance as required by the State of Utah, and employers liability coverage in the amount of \$1,000,000 per loss. Proof of workers' compensation coverage is required unless a waiver of coverage is allowed and acquired pursuant to Utah law. This requirement includes contractors who are doing business as an individual and/or as a sole proprietor as well as corporations and partnerships. In the event any work is subcontracted, CenturyLink shall require its contractor(s) similarly to provide workers' compensation insurance for all of the latter's employees, unless a waiver of coverage is allowed and acquired pursuant to Utah law.

B. Commercial general liability insurance, on an occurrence form, with the City as an additional insured, in the minimum amount of \$2,000,000 per occurrence with a \$3,000,000 general policy aggregate and \$2,000,000 products completed operations policy aggregate. The policy shall protect the City, CenturyLink, and any contractor from claims for damages for personal injury, including accidental death, and from claims for property damage that may arise from CenturyLink's operations under this Franchise, whether performed by CenturyLink itself, any contractor, or anyone directly or indirectly employed or engaged by either of them. Such insurance shall provide coverage for premises operations, acts of independent contractors, and completed operations. The policy shall be primary and not contributing to any other policy or coverage available to the City whether such coverage be primary, contributing or excess.

C. Commercial automobile liability insurance that provides coverage for owned, hired, and non-owned automobiles, in the minimum amount of \$1,000,000 per person, \$2,000,000 per accident, \$500,000 per occurrence for property damage, or a single combined limit of \$2,000,000.

## **Section 12. Unauthorized Connections or Modifications**

A. It is unlawful for any Person to make any connection, extension, or division whether physically, acoustically, inductively, electronically, or otherwise with or to any segment of the Cable System for any purpose whatsoever, without the express consent of CenturyLink.

B. It is unlawful for any Person to willfully interfere, tamper, remove, obstruct or damage any part, segment or content of the Cable System for any purpose whatsoever.

C. Any Person convicted of a violation of this section will be subject to the maximum penalty allowed by Federal, State and local law. The City agrees to cooperate with CenturyLink in the prosecution of any such violations.

## **Section 13. Franchise Fee**

A. CenturyLink will pay to the City quarterly, within sixty (60) days following the end of each quarter, an amount equal to five percent (5%) of CenturyLink's quarterly Gross Revenues ("Franchise Fee"). The Franchise Fee will be deemed to reimburse the City for the rights granted herein and/or all costs of regulation and administration of the Franchise. CenturyLink shall not have to pay a Franchise Fee in a percentage amount beyond that provided by any other franchised cable provider in the City.

B. Notwithstanding any provision to the contrary, CenturyLink shall, in addition to the Franchise Fee described above, pay the required charges, taxes and fees lawfully established in a code or ordinance properly adopted by the City. CenturyLink shall be entitled to pass such charges, taxes and fees directly to its subscribers in the City.

C. CenturyLink, upon request of the City, shall install and furnish, at its sole cost, a standard installation and one outlet of basic cable to those administrative buildings owned and occupied by the City, provided that such City buildings are designated as Qualified Living Units and no other cable service provider is providing Cable Services at such location. The Cable Service provided shall not be distributed beyond the originally installed outlet without authorization from CenturyLink. The Cable Service provided shall not be used for commercial purposes, and such outlets shall not be located in areas open to the public. The City shall take reasonable precautions to prevent any use of CenturyLink's Cable System in a manner that results in any loss or damage to the Cable System. The City shall hold CenturyLink harmless from any and all liability for claims arising out of the provision and use of Cable Service required by this subsection.

D. On an annual basis, upon thirty (30) days prior written notice, the City Finance Director or his/her designee shall have the right to conduct an independent audit of CenturyLink's record reasonably related to the administration and enforcement of this Agreement, in accordance with GAAP. If the audit shows the Franchise Fees have been underpaid by five percent (5%) or more, CenturyLink shall pay the total cost of the audit. Such cost shall not exceed five thousand (\$5,000) for each year of the audit period. The City's right to audit and CenturyLink's obligation to retain records related to an audit as described in this section shall expire three (3) years after each Franchise Fee payment has been paid to the City.

E. The period of limitation for recovery of any franchise fee payable hereunder or for any overpayment shall be three (3) years from the date on which payment by CenturyLink is due, or from the date the payment is made in the case of overpayment.

#### **Section 14. Rates**

All of CenturyLink's rates and charges shall be published (in the form of a publicly-available rate card) in accordance with applicable State and Federal law, and shall be nondiscriminatory as to all persons and organizations of similar classes, under similar circumstances and conditions. CenturyLink shall apply its rates in accordance with governing law, with similar rates and charges for all subscribers receiving similar cable service, without regard to race, color, familial, ethnic or national origin, religion, age, sex, sexual orientation, marital, military or economic status, or physical or mental disability. Nothing herein shall be construed to prohibit CenturyLink from:

A. The temporary reduction or waiving of rates or charges in conjunction with valid promotional campaigns;

B. The offering of reasonable discounts to senior citizens or economically disadvantaged citizens;

C. The establishment of different and nondiscriminatory rates and charges and classes of service for commercial customers, as well as different nondiscriminatory monthly rates for classes of commercial customers as allowable by federal law and regulations; or

D. The establishment of different and nondiscriminatory rates and charges for residential Subscribers as allowable by federal law and regulations.

#### **Section 15. Records and Reports**

A. Copies of all petitions, applications and communications submitted by CenturyLink and directly related to CenturyLink's Franchise to the Federal Communications Commission, Securities and Exchange Commission or any other agency having jurisdiction in respect to any matters affecting cable television operations authorized pursuant to this Franchise, shall be submitted to the City upon written request.

B. The City shall have the right, at its own expense, and upon at least thirty (30) working days prior written notice, to inspect at CenturyLink's offices during normal business hours, all books and records directly related to this Franchise to ensure compliance with the terms of this Franchise. To the extent such information is protected by State or Federal law, the City will not disclose to the public or to competitors of CenturyLink any commercial or financial information reviewed by the City pursuant to this Franchise. If any books or records of CenturyLink are not kept in a local office and if the City determines that an examination of such records is necessary or appropriate for the performance of any of the City's duties, administration or enforcement of this ordinance, then all reasonable travel and related expenses incurred in making such examination shall be paid by CenturyLink.

C. Throughout the term of the Franchise, CenturyLink shall provide the City with an annual report of its operations of the Cable System in the Service Area, including the number of

Subscribers, the anticipated construction and maintenance of its facilities and its general plans to increase availability in the following year. CenturyLink shall not be required to disclose any protected or confidential information as part of this annual report. CenturyLink also agrees to meet with the City on an annual basis upon fifteen (15) days prior written request from the City. Matters to be discussed include, but are not limited to Customer service, System performance, technical issues and other matters related to CenturyLink's operation of the Cable System.

#### **Section 16. Franchise Renewal**

Any renewal of this Franchise shall be in accordance with the renewal provisions of the Cable Act as codified at the time of the renewal and any relevant provisions of the City Code, as amended.

#### **Section 17. Transfer of Franchise**

CenturyLink shall not transfer this Franchise to another party, person, or entity except to a company controlling, controlled by or under common control with CenturyLink, without complying with the provisions of the Cable Act.

#### **Section 18. Termination; Cancellation**

A. In addition to all other rights and powers pertaining to the City by virtue of this Franchise or otherwise, the City reserves the right, after reasonable notice to CenturyLink and after reasonable opportunity of CenturyLink to cure any alleged Franchise Violation, to terminate and cancel this Franchise and all rights and privileges of CenturyLink hereunder in the event that CenturyLink:

1. Willfully fails to reasonably carry out any provision of this Franchise or any rule, order, or determination of the City pursuant to this Franchise; or
2. Becomes insolvent, unable or unwilling to pay its debts, or is adjudicated bankrupt.

B. Such termination and cancellation shall be by resolution duly adopted after sixty (60) day notice to CenturyLink and shall in no way affect any of the City's rights under this Franchise or any provision of law.

#### **Section 19. Force Majeure**

With respect to any provision of this Franchise, the violation or noncompliance with which could result in the imposition of a financial penalty, forfeiture or other sanction upon CenturyLink, such violation or noncompliance shall be excused where such violation or noncompliance is the result of Acts of God, war, civil disturbance, work stoppage, strike, or other events, the occurrence of which was not reasonably foreseeable by CenturyLink and is beyond CenturyLink's reasonable control.

## Section 20. Miscellaneous

A. The right is hereby reserved by the City to adopt, in addition to the provisions contained herein and in existing applicable ordinances, such additional regulations, as it shall find to be in the best interests of the City, so long as such actions do not materially change the terms of this Agreement as it relates to providing Cable Service.

B. If any section, subsection, sentence, clause, phrase or portion of the Franchise is for any reason held invalid or unconstitutional by any court of competent jurisdiction such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

C. City acknowledges that acceptance of the terms and conditions of this Franchise will not constitute, or be deemed to constitute, a waiver, either expressed or implied, by CenturyLink of any constitutional or legal right which CenturyLink may have or may be subsequently determined to have, either by current or subsequent legislation or court decisions. The City acknowledges that CenturyLink hereby reserves its rights under applicable Federal and State constitutions and law.

D. This Franchise shall be governed by the laws of the State of Utah.

E. Any controversy or claim arising out of or relating to this Franchise, or the breach thereof, except as provided below, shall be settled by arbitration before a single arbitrator in accordance with the Utah Uniform Arbitration Act, UTAH CODE ANN. §§ 78B-11-101 to 131, with the arbitration proceeding being administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The following is not subject to arbitration:

(1) To the extent that any dispute otherwise arbitrable involves the interpretation or application of state or federal laws that govern the rights and obligations of the parties under this Franchise, such interpretation or application of federal or state law, shall not be subject to arbitration, but shall be resolved judicially. This exception shall not extend to the application of the common law to legal issues arising in the arbitration, or to the application of statutes that generally affect the interpretation of contracts.

(2) In the event that any material provision of the Franchise is determined to be invalid or unenforceable, or a reopener gives rise to a renegotiation of the Franchise, and the parties are unable to agree upon appropriate modifications of the Franchise, the Franchise shall be modified by arbitration in accordance with this Subsection; provided, however, to the extent either party establishes probable inconsistency between a proposed modification and federal or state law governing this Franchise, excluding common law or statutes governing contracts generally, the arbitration proceeding shall be stayed upon the request of either party made in a proceeding filed in federal court. In any event, either party shall have the right to seek judicial resolution of issues within these exceptions to arbitration either before or after any arbitration proceeding.

(3) In order to minimize the likelihood of a dispute regarding the arbitrability of specific questions under the previous subsections, the parties agree, by way of example and not limitation, that the following issues of law are not subject to arbitration, but shall be resolved judicially at the instance of either party: (a) preemption under federal or state law and the interpretation and application of any federal or state laws that are determined to have preemptive effect; (b) the application of any federal or state law that governs the parties' relationship independently of the Franchise; (c) injunctive relief.

G. All notices or correspondence to be served upon the City or CenturyLink by the other party shall be in writing and delivered by first class mail, postage prepaid or by a national express mail service.

Notices or correspondence to the City shall be addressed as follows:

Draper City  
Attention: City Manager  
1020 East Pioneer Road  
Draper City, UT 84020

Notices or correspondence to CenturyLink shall be addressed as follows:

Qwest Broadband Services, Inc. d/b/a CenturyLink  
Attention Public Policy  
1801 California Street, 10<sup>th</sup> Floor  
Denver, CO 80202

With a copy to: CenturyLink  
Attention: Public Policy  
250 E.200 S, 16<sup>th</sup> Floor  
Salt Lake City, UT 84111

The City or CenturyLink may designate such other address or addresses from time to time by giving written notice to the other as set forth above.

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IN WITNESS WHEREOF, the Parties have executed this Franchise Agreement as of this  
\_\_\_\_\_ day of \_\_\_\_\_, 2015.

CITY OF

By: \_\_\_\_\_  
Troy K. Walker, Mayor

ATTEST:

\_\_\_\_\_  
Rachelle Conner  
Draper City Recorder

APPROVED AS TO LEGAL FORM:

\_\_\_\_\_  
Mike Barker  
Deputy City Attorney

