

Midway City Council
18 January 2022
Regular Meeting

Resolution 2022-03 /
Qwest
Franchise Agreement



Memo

Date: 12 January 2022
To: Mayor, City Council and Staff
Cc: File
From: Brad Wilson, City Recorder
RE: Franchise Agreements and Fees

In 1996 the Utah State Legislature adopted the Municipal Energy Sales and Use Tax Act (Utah Code 10-1-301 et seq.). This act phased out fees associated with energy related franchise agreements. It allowed municipalities to collect a tax of up to 6% of the delivered value of the taxable energy. The Midway City Council adopted Ordinance 1997-04 on 5 February 1998 imposing the tax. The proposed agreement with Dominion Energy is subject to the Act.

In 2003 the State Legislature adopted the Municipal Telecommunications License Tax Act (Utah Code 10-1-401 et seq.). The act phased out fees associated with telecommunications related franchise agreements. It allowed municipalities to collect a tax of up to 3.5% on the gross receipts from telecommunications services attributed to the municipality. The Midway City Council adopted Ordinance 2004-05 on 9 June 2004 imposing the tax. The proposed agreement with Qwest is subject to the Act.

Cable TV franchises are regulated by federal rather than state law. Municipalities can continue to impose a fee with such agreements. On 26 August 2015, the Midway City Council adopted a franchise agreement with Comcast of Utah II, Inc. which imposed a 5% fee.

Franchise agreements are still important even though most franchise fees are no longer allowed. For example, they establish the terms of the franchise and the use of a municipality's rights-of-way.

Please contact me if you have any questions.

RESOLUTION NO. 2022-_____

A RESOLUTION TO GRANT A FRANCHISE TO QWEST CORPORATION D/B/A CENTURLINK QC ON BEHALF OF ITSELF AND ITS OPERATING AFFILIATES ("CENTURLINK") TO OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM ("THE SYSTEM") IN THE CITY OF MIDWAY, UTAH ("THE CITY").

The City hereby resolves that it is in the public interest to grant CenturyLink a Franchise to operate the System pursuant to the terms and conditions contained herein.

SECTION 1. Grant of Franchise. The City hereby resolves to grant to CenturyLink the right, privilege and authority to install, construct, maintain, operate, upgrade, repair, relocate and remove its cables and related appurtenances ("Facilities") in, under, along, over and across the present and future streets, alleys and other public ways in the City ("Public Ways", or in the singular "Public Way"), for the purpose of providing telecommunication services to the City's inhabitants and other customers of CenturyLink located within the City's corporate limits.

SECTION 2. Acceptance by CenturyLink. Within sixty (60) days after the passage of this Resolution by the City, CenturyLink shall file an unqualified written acceptance thereof with the City; otherwise the Resolution and the rights granted herein shall be null and void.

SECTION 3. Term. The initial term of this Franchise is ten (10) years commencing on the date of Acceptance by CenturyLink as set forth above in Section 2 and shall thereafter automatically renew from year-to-year unless either party gives advance written notice to the other party at least 120 days prior to expiration of the initial term or subsequent annual term requesting the parties enter into good faith discussions to reach terms of a new agreement.

SECTION 4. Records Inspection. CenturyLink shall make available to the City at a CenturyLink office, upon reasonable advance written notice of no fewer than sixty (60) days and not more often than once every two (2) years, such relevant information pertinent only to enforcing the terms of this Resolution in such form and at such times as CenturyLink can reasonably make available. Subject to applicable laws, any information that CenturyLink provides to the City, except as otherwise provided herein, is confidential and proprietary and shall not be disclosed or used for any purpose other than verifying compliance with the terms of this Resolution. Except as otherwise provided herein, any such information provided to the City shall be returned to CenturyLink following review, without duplication, unless CenturyLink grants the City written permission to duplicate the information.

SECTION 5. Non-Exclusive Franchise. The right to use and occupy the Public Ways shall be nonexclusive, and the City reserves the right to use the Public Ways for itself or any other entity. The City's and other entities' use, however, shall not unreasonably interfere with CenturyLink's Facilities or the rights granted CenturyLink herein.

SECTION 6. City Regulatory Authority. The City reserves the right to adopt such additional resolutions, ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens consistent with applicable federal and state law. The City agrees to promptly notify CenturyLink of any such changes potentially applicable to this Franchise.

SECTION 7. Indemnification. The City shall not be liable for any property damage or loss or injury to or death of any person that occurs as the result of the construction, operation or maintenance by CenturyLink of its Facilities. CenturyLink shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of CenturyLink's use of the Public Ways. The City shall: (a) give prompt written notice to CenturyLink of any such claim, demand or lien with respect to which the City seeks indemnification hereunder; and (b) permit CenturyLink to assume the defense of such claim, demand, or lien with legal counsel of CenturyLink's selection. CenturyLink shall not be subject to liability for any settlement or compromise made without its prior written consent. Notwithstanding the other provisions contained herein, CenturyLink shall in no event be required to indemnify the City for any claims, demands, or liens arising from the negligence or wrongful actions or inactions of the City, its officials, boards, commissions, agents, contractors, and/or employees.

SECTION 8. Insurance Requirements. CenturyLink will maintain in full force and effect for the Term of the Franchise, at CenturyLink's expense, a comprehensive liability insurance policy written by a company authorized to do business in the State of Utah, or will provide self-insurance reasonably satisfactory to the City, protecting it against liability for loss, personal injury and property damage occasioned by the operation of the System, including the Facilities, by CenturyLink. Such insurance will be in an amount not less than \$2,000,000.00. CenturyLink will also maintain Worker's Compensation coverage throughout the term of this Franchise as required by law. Evidence of such insurance is available at www.centurylink.com/moi.

SECTION 9. Annexation. When any territory is approved for annexation to the City, the City shall within ten (10) business days provide by certified mail, return receipt requested, postage prepaid, to CenturyLink at the addresses provided in Section 18 hereof: (a) each site address to be annexed as recorded on City assessment and tax rolls; (b) a legal description of the proposed boundary change; and (c) a copy of the City 's ordinance approving the proposed annexation.

SECTION 10. Plan, Design, Construction and Installation of CenturyLink's Facilities.

10.1 All Facilities under authority of this Resolution shall be used, constructed and maintained in accordance with applicable law and local zoning ordinances.

10.2 CenturyLink shall, prior to commencing new construction or major reconstruction work in Public Ways or other public places, apply for a permit from the City, which permit shall not be unreasonably withheld, conditioned, or delayed. CenturyLink will provide plans of new facilities to be placed in the Public Ways pursuant to a permit issued by the City. CenturyLink will abide by all applicable ordinances and reasonable rules, regulations and requirements of the City consistent with applicable law, and the City may inspect the manner of such work and require remedies as may be reasonably necessary to assure compliance. Notwithstanding the foregoing, CenturyLink shall not be obligated to obtain a permit to perform emergency repairs or for normal maintenance of its facilities.

10.3 To the extent practical and consistent with any permit issued by the City, all Facilities shall be located so as to cause minimum interference with the Public Ways and shall be constructed, installed, maintained, cleared of vegetation, renovated or replaced in accordance with applicable rules, ordinances and regulations of the City, which include burying all new lines in areas within the City where all other utility lines (including the lines of electric and other telecommunications providers) are already located underground. CenturyLink shall be required to place existing aerial utility lines underground when required of all utilities by the City for the purposes set forth in section 11.1 regarding relocation.

10.4 If, during the course of work on its Facilities, CenturyLink causes damage to or alters the Public Way or other public or private property, CenturyLink shall replace and restore such Public Way or public or private property at

Commented [SE1]: CTL agrees to place underground in new areas where all utilities are underground, and to relocate underground as part of a valid relocation requirement in 11.1.

CenturyLink's expense to a condition reasonably comparable to the condition that existed immediately prior to such damage or alteration, normal wear and tear excepted.

10.5 CenturyLink shall have the right to excavate the Public Ways subject to reasonable conditions and requirements of the City. Before installing new underground facilities or replacing existing underground facilities, CenturyLink shall first obtain a permit from the City in accordance with subsection 10.2 hereof.

10.6 Nothing in this Resolution shall be construed to prevent the City from constructing, maintaining, repairing, or relocating its sewers, streets, water mains, sidewalks, or other public property. However, before commencing any work within a Public Way that may affect CenturyLink's Facilities, the City shall give written notice to CenturyLink, and all such work shall be done, insofar as practicable, in such a manner as not to obstruct, injure, or prevent the free use and operation of CenturyLink's poles, wires, conduits, conductors, pipes, and appurtenances.

10.7 CenturyLink shall not attach to, or otherwise use or commit to use, any pole within Midway City until a separate pole attachment agreement has been executed by the parties.

10.8 Century Link shall repair and/or replace its poles that do not meet existing safety standards.

SECTION 11. Relocation of Facilities.

11.1 Relocation for the City. CenturyLink shall, upon receipt of advance written notice of not fewer than ninety (90) days, protect, support, temporarily disconnect, relocate, or remove any CenturyLink property located in a Public Way when required to do so by the City for reasons of public health, safety, and welfare. When making a request for an alteration of CenturyLink's system the City shall submit reasonable advance written notice to CenturyLink. For purposes of this subsection, "reasonable advance written notice" shall mean no fewer than forty-five (45) days for a temporary relocation, and no fewer than one hundred twenty (120) days for a permanent relocation. CenturyLink shall have an obligation to coordinate with the City's contractor on the job to accomplish relocation with minimal disruption to the City's project and to avoid creating delay or additional work. However, CenturyLink shall not be required to relocate or adjust its facilities pursuant to this subsection in furtherance of non-essential projects done primarily for aesthetics or to benefit Third Parties ("Non-Essential Project"), except in accordance with subsection 11.2 below. CenturyLink shall be responsible for any costs associated with these obligations to the same extent as other users of the respective Public Way.

Commented [SE2]: This is not related to relocation and was revised/moved to 10.8. FYI: CTL inspects 10% of its 2.2 million poles per year and replaces those that require replacement.

11.2 Relocation for Non-Essential Project. CenturyLink shall, at the request of any person holding a lawful permit issued by the City and/or in support of a Non-Essential Project by City, protect, support, raise, lower, temporarily disconnect, relocate in or remove from Public Ways, as applicable and if possible, any CenturyLink property, provided that the cost of such action is borne by the person requesting it and CenturyLink is given reasonable advance written notice and sufficient time to take the appropriate action. In such situation, CenturyLink may also require advance payment. For purposes of this subsection, "reasonable advance written notice" shall mean no fewer than forty-five (45) days for a temporary relocation, and no fewer than one hundred twenty (120) days for a permanent relocation.

11.3 Alternatives to Relocation. CenturyLink may, after receipt of written notice requesting a relocation of Facilities, submit to the City written alternatives to such relocation. Such alternatives shall include the use and operation of temporary transmitting facilities in adjacent Public Ways. The City shall promptly evaluate such alternatives and advise CenturyLink in writing if one or more of the alternatives are suitable. If requested by the City, CenturyLink shall promptly submit additional information to assist the City in making such evaluation. The City shall give each alternative

proposed by CenturyLink full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, CenturyLink shall relocate the Facilities as otherwise provided herein. Notwithstanding the foregoing, CenturyLink shall in all cases have the right to abandon the Facilities.

SECTION 12. Vegetation Management. CenturyLink shall have the authority to trim trees and other growth in the Public Ways in order to access and maintain the Facilities in compliance with applicable law and industry standards.

SECTION 13. Revocation of Franchise for Noncompliance.

13.1 In the event that the City believes that CenturyLink has not materially complied with the terms of the Franchise, the City shall informally discuss the matter with CenturyLink. If these discussions do not lead to resolution of the problem, the City shall notify CenturyLink in writing of the exact nature of the alleged noncompliance.

13.2 CenturyLink shall have thirty (30) days from receipt of the written notice described in subsection 13.1 to either respond to the City, contesting the assertion of noncompliance, or otherwise initiate reasonable steps to remedy the asserted noncompliance issue, notifying the City of the steps being taken and the projected date that they will be completed.

13.3 In the event that CenturyLink does not comply with subsection 13.2, above, unless the parties agree to an extension of the time provided in subsection 13.2, above, the City shall schedule a public hearing to address the asserted noncompliance issue. The City shall provide CenturyLink at least twenty (20) days' prior written notice of, and the opportunity to be heard, at the hearing.

13.4 Subject to applicable federal and state law, in the event the City, after the hearing set forth in subsection 13.3, determines that CenturyLink is noncompliant with this Resolution, the City may:

- A. Seek specific performance of any provision which reasonably lends itself to such remedy, as an alternative to damages; or
- B. Commence an action at law for monetary damages or other equitable relief; or
- C. In the case of substantial noncompliance with a material provision of the Resolution, seek to revoke the Franchise in accordance with subsection 13.5.

13.5 Should the City seek to revoke the Franchise after following the procedures set forth above, the City shall give written notice to CenturyLink including a statement of all reasons for such revocation. CenturyLink shall have ninety (90) days from receipt of such notice to object in writing and state its reason(s) for such objection. Thereafter, the City may seek revocation of the Franchise at a public hearing. The City shall cause to be served upon CenturyLink, at least thirty (30) days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke the Franchise. At the designated hearing, the City shall give CenturyLink an opportunity to state its position on the matter, after which the City shall determine whether or not the Franchise shall be revoked. CenturyLink may appeal the City's determination to an appropriate court, which shall have the power to review the decision of the City *de novo*. Such appeal must be taken within sixty (60) days of the issuance of the City's determination. The City may, at its sole discretion, take any lawful action which it deems appropriate to enforce its rights under this Resolution in lieu of revocation.

13.6 Notwithstanding the foregoing provisions in this Section 13, CenturyLink does not waive any of its rights under applicable law.

SECTION 14. No Waiver of Rights. Neither the City nor CenturyLink shall be excused from complying with any of the terms and conditions contained herein by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions. Each party expressly reserves any and all rights, remedies, and arguments it may have at law or equity, without limitation, and to argue, assert, and/or take any position as to the legality or appropriateness of any provision in this Resolution that is inconsistent with State or Federal law, as may be amended.

SECTION 15. Transfer of Franchise. CenturyLink's right, title, or interest in the Franchise shall not be sold, transferred, assigned, or otherwise encumbered without prior notice to and prior approval by the City, such approval not to be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, when said sale, transfer, assignment, or encumbrance is to an entity controlling, controlled by, or under common control with CenturyLink, or for any rights, title, or interest of CenturyLink in the Franchise or Facilities in order to secure indebtedness, or to an entity that acquires substantially all the assets or equity of CenturyLink by sale, merger, consolidation or reorganization, approval by the City shall not be required.

SECTION 16. Amendment. Amendments to the terms and conditions contained herein shall be mutually agreed upon in writing by the City and CenturyLink.

SECTION 17. Notices. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received upon actual receipt or refusal of delivery if sent by (a) personal delivery, (b) United States Mail, postage prepaid, certified, return receipt requested, or (c) nationally recognized overnight courier, and addressed to the Parties as set forth below:

If to the City of Midway:

City Recorder
Midway City
P.O. Box 277
Midway, Utah 84049

With Copies to:
Corbin B. Gordon
Midway City Attorney
322 East Gateway Drive, Suite 201
Heber City, Utah 84032

To CenturyLink:

CenturyLink
ATTN: ROW/NIS Manager
100 CenturyLink Drive
Monroe, LA 71203

with a copy to:

CenturyLink
ATTN: Legal Department
931 14th Street
Denver, CO 80202

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SECTION 18. Severability. If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority, including any state or federal regulatory authority having appropriate jurisdiction thereof, or unconstitutional, illegal or invalid by any court having appropriate jurisdiction thereof, such portion shall be deemed a separate, distinct, and independent provision, and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

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[SIGNATURES BEGIN ON NEXT PAGE]

CONSIDERED and APPROVED this ____ day of _____, 2022.

CITY OF MIDWAY, UTAH

By: _____
Celeste Johnson, Mayor

Attest: _____
Brad Wilson, City Clerk

ACCEPTED BY CENTURYLINK:

QWEST CORPORATION D/B/A CENTURYLINK QC

BY: _____

TITLE: _____

DATE: _____

