COTTONWOOD HEIGHTS
ORDINANCE NO. 258

AN ORDINANCE GRANTING A FRANCHISE TO QWEST BROADBAND SERVICES, INC. D/B/A CENTURYLINK TO OPERATE AND MAINTAIN A CABLE TELEVISION SYSTEM WITHIN THE CITY; SETTING FORTH THE CONDITIONS OF THE GRANT OF SUCH FRANCHISE; PROVIDING FOR REGULATION AND ADMINISTRATION OF THE CABLE TELEVISION SYSTEM; AND PRESCRIBING PENALTIES FOR VIOLATION OF THE FRANCHISE PROVISIONS

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

WHEREAS, Qwest Broadband Services, Inc. d/b/a CenturyLink, a Delaware corporation ("*Provider*"), provides cable communications services and desires to construct, operate and maintain a cable television system within City's boundaries; and

WHEREAS, City's municipal council (the "*Council*") met in regular session on 12 July 2016 to consider, among other things, the adoption of an ordinance granting such a franchise to Provider; and

WHEREAS, the Council finds that (a) the development of competitive cable television services is essential and can provide great economic and social benefit to City's residents, and (b) because of the complex and rapidly changing technology associated with such services, the public convenience, safety and general welfare can be achieved by establishing regulatory powers, and (c) the intent of this ordinance (this "*Ordinance*") is to attain the best possible public benefit for City's residents; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interest of the health, safety and welfare of City's residents to adopt an ordinance granting a non-exclusive franchise to Provider to operate a cable television system within City's boundaries.

NOW, THEREFORE, BE IT ORDAINED by the Cottonwood Heights city council as follows:

Section 1. **Definitions**. For the purpose of this Ordinance, 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, words in the singular include the plural, and the use of any gender shall be applicable to all genders whenever the sense requires. The words "*shall*" and "*will*" are mandatory and the word "*may*" is permissive. Words not defined shall be given their common and ordinary meaning.

(a) "*Basic Cable*" is the lowest price tier of service that includes the retransmission of local broadcast television signals and the cable-casting of public, educational and government access channels.

(b) "*Cable Act*" means 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.

(c) "*Cable Service*" shall mean (i) the one-way transmission to Subscribers of (A) video programming, or (B) other programming service, and (ii) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

(d) "*Cable System*" shall have the meaning provided for "Cable System" in the Cable Act. Unless otherwise specified, such term in this Ordinance shall refer to the Cable System constructed and operated by Provider in the Service Area pursuant to the Franchise.

(e) "*City*" shall mean the city of Cottonwood Heights, Utah, all the territory within its present municipal boundaries and any additions thereto by annexation or other legal means.

(f) "*City Code*" shall mean the code of ordinances and other rules and regulations adopted by City from time-to-time.

(g) "*FCC*" shall mean the Federal Communications Commission or any successor governmental entity.

(h) "*Franchise*" shall mean the initial authorization, or renewal thereof, issued by City, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, or otherwise, which authorizes construction and operation of Provider's Cable System. The Franchise granted hereunder is a non-exclusive franchise.

(i) "*Franchise Fee*" means any tax, fee or assessment of any kind imposed by City or another government entity on Provider or the Subscribers, or both, solely because of their status as such. The term "*Franchise Fee*" does not include (i) any tax, fee, or assessment of general applicability; (ii) capital costs which are required by the Franchise to be incurred by Provider for public, educational and governmental access facilities, so long as Provider is able to pass such costs directly through to the Subscribers; or (iii) requirements or charges incidental to the awarding or enforcing of the Franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages.

(j) "*Gross Revenue*" means all revenue of any kind or nature received directly or indirectly by Provider, its affiliates, subsidiaries, parent and any person, firm or corporation in which Provider has a financial interest or which has a financial interest in Provider, according to generally accepted accounting principles, arising from or attributable to Provider's operation of its Cable System to provide Cable Services within City, including, but not limited to:

(i) Revenue from all charges for services provided to Subscribers;

(ii) Revenue directly derived and attributable to the sale of commercial advertising upon the Cable System;

(iii) Revenue from all charges for the leased use of studios;

(iv) Revenue from all charges for the use of or lease of leased access channels;

(v) Monthly recurring revenue from all charges for the installation, removal, connection and reinstatement of equipment necessary for a Subscriber to receive Cable Services; and

(vi) Revenue from the sale, exchange, use or cablecast of any programming developed for community use or institutional Subscribers.

"*Gross Revenues*" shall not include taxes or fees (except the Franchise Fee) collected by Provider on behalf of any governmental authority; any increase in the value of stock, security or asset; any surcharges for underground conversion of cable plant costs; any increase in the value of any stock, security or asset; the value of complimentary service provided to Provider's employees; and dividends or other distributions made in respect of any stock or securities; value received by Provider or any of its affiliates through cooperative advertising; or revenues which cannot be collected by Provider and are identified as bad debt (provided, however, that if revenue previously representing bad debt is collected, that revenue shall be included in Gross Revenue for the collection period).

(k) "*Living Unit*" means a distinct address as tracked in the network inventory used by Provider 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.

(l) "*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.

(m) "*Person*" means any person, firm, partnership, association, corporation, limited liability company or organization of any kind other than City.

(n) "*Qualified Living Unit*" means any Living Unit located at a distinct address that is qualified for Cable Service in accordance with Provider's reasonably discretionary but nondiscriminatory servicing criteria.

(o) "*Reasonable notice.*" Unless otherwise defined herein, "*reasonable notice*" means the delivery of written notice by one Party 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 City residents, "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.

(p) "*Service Area*" means the territory within City's municipal boundaries from time to time.

(q) "*Street*" means the surface of and space above and below any public street, road, highway, easement, lane, path, alley or other public right-of-way owned by City as now or hereafter laid out by or dedicated to City.

(r) "*Subscriber*" means any Person who legally receives any one or more of the Cable Services provided by means of or in connection with the Cable System, whether or not a fee is paid for such service.

Section 2. **Police Power**. Nothing in this Ordinance shall be construed as an abrogation by City of any of its lawful police powers. City reserves the right to adopt such additional ordinances, rules and regulations as it shall find to be in City's best interests, so long as such actions do not materially impair Provider's rights hereunder.

Section 3. **Grant of Franchise**.

(a) *Nonexclusive Franchise*. City hereby grants to Provider a nonexclusive Franchise to construct, operate, maintain and reconstruct a Cable System within the Streets in the Service Area. The Franchise shall constitute both a right and an obligation to provide the services of a Cable System as required by this Ordinance. City reserves the right to grant to other providers, on materially equivalent terms, such additional franchises or other similar lawful authorization to provide Cable Services within the Service Area as City deems appropriate.

(i) This Franchise is granted under the terms and conditions specified herein and is intended to be consistent with federal and state laws and regulations. **If any portion of this Agreement conflicts with federal or state laws, rules and regulations, such federal or state laws, rules and regulations shall be deemed controlling, and the conflicting provisions of this Agreement shall be deemed reformed to the extent necessary to fully comply with such laws, rules and regulations.**

(ii) The Franchise also is subject to the City Code and other City ordinances now or hereafter in effect. Nothing in this Ordinance shall be deemed to waive the requirements of the City Code and ordinances regarding permits, fees to be paid or manner of construction. Provider agrees to abide by any existing or new ordinances or regulations of general applicability to the operation of the Cable System in the Service Area, adopted in the manner provided by law, so long as such ordinances or regulations do not materially impair Provider's express rights under this Franchise. Subject to the foregoing, the terms of this Ordinance shall control any conflicting terms of any subsequently-enacted City ordinance.

(iii) To the extent allowed by law, City retains the authority to regulate and receive compensation for non-Cable Services. If Provider is allowed by law and chooses to provide non-Cable Services, then both parties will negotiate the terms and fees in accordance with applicable law.

(b) *Term*. The term (the "*Term*") of the Franchise and all rights, privileges, obligations, and restrictions pertaining thereto shall remain in effect for five years from the effective date of this Ordinance, unless sooner terminated as provided for herein.

(c) *Renewals*. Any renewals of the Franchise shall be conducted pursuant to applicable law in effect at that time, which is currently Section 626 of the Cable Communications Policy Act of 1984 and the Cable Television and Consumer Protection and Competition Act of 1992, as amended by the Telecommunications Act of 1996.

(d) *Other Franchisees*. The Franchise granted to Provider is nonexclusive. City specifically reserves the right to grant to one or more third party(ies), at any time, such additional franchises for one or more Cable System(s) as it deems appropriate, so long as such additional grants do not materially modify, revoke, or terminate any rights previously granted to Provider or any other franchisee. Subject to, and unless otherwise permitted by, federal law, the material provisions of such additional franchises shall be comparable to those of this Franchise to avoid City granting an unfair competitive advantage to one Person over another. Subject to, and unless otherwise permitted by, federal law, City shall not authorize or permit a Cable System to operate within City on terms or conditions materially more favorable or less burdensome to such Person than those applied to Provider pursuant to this Ordinance.

(e) *Franchise Required*. Subject to federal law, no Cable System shall be allowed to occupy or use the Streets or operate within the Service Area without being granted a Franchise.

(f) *Additional Requirements*. Subject to federal law, City may establish appropriate requirements of new Franchises or Franchise renewals to reflect the future cable-related community needs and interests, taking into account the costs of meeting such needs and interests.

(g) *No Favoritism*. Subject to federal law, City may grant a Franchise for all or any defined portion of the Service Area, provided that one operator is not granted unfair competitive advantage over another by virtue of having been awarded a Franchise.

(h) *Public Records*. Subject to state and federal law, all new and renewal Franchise applications, when filed, shall be available for public inspection at places designated by City. Information previously identified by Provider or an applicant as "proprietary and confidential" shall not be disclosed by City without Provider's or the applicant's consent, except to the extent state law or any City ordinance adopted pursuant to state law requires its disclosure. Subject to federal law, City may grant or may decline to grant any Franchise.

(i) *Affiliates and Contractors*. Any affiliate of Provider 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 Ordinance. To the extent Provider uses any third-parties (whether or not affiliated with Provider) to fulfill its obligations under this Ordinance, Provider will insure such parties comply with the terms and conditions of this Ordinance. To the extent Provider constructs and installs its facilities in the Streets, such installations and facilities will be subject to the terms and conditions contained in this Ordinance. Any affiliate of Provider which constructs, installs or maintains the Cable System but does not provide Cable Services in the City through the Cable System shall not be subject to this Ordinance, but shall be subject to all other applicable laws and to the requirements of any separate franchise ordinance or agreement between City and such affiliate of Provider.

Section 4. **Installation, Operation and Maintenance**. For the purposes of operating and maintaining a Cable System in the Service Area, Provider may erect, install, construct, repair, replace, reconstruct and retain in, on, over, under, upon, across and along the Streets within the Service Area such lines, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of the Cable System, provided that all applicable permits are applied for and granted, all fees paid and all other City codes and ordinances are otherwise complied with. Provider also shall comply with the following requirements:

(a) *Plans and Approvals*. Provider's use of the Streets shall be subject to all City ordinances, rules and policies in effect from time to time. Prior to construction or alteration of the Cable System, Provider shall in each case file plans with all appropriate departments and utility companies and receive written approval of such plans, which approval by City departments shall not be unreasonably withheld. Issuance of excavation, construction or similar permits as required by ordinance shall constitute such written approval.

(b) *Interference*. Provider shall construct and maintain its Cable System so as not to interfere with other uses of the Streets. Provider shall make use of existing poles and other facilities available to Provider wherever possible. Provider shall make reasonable best efforts to individually notify all residents affected by proposed construction in writing at least 72 hours prior to the commencement of that work; provided that such prior notification will not unnecessarily delay repair or restoration of existing services or slow expeditious remedy of unsafe conditions.

(c) *No Inappropriate Use*. Notwithstanding the above grant to use City's Streets, no Street shall be used by Provider if City, in its reasonable opinion, determines that such use is inconsistent with the terms, conditions or provisions by which such Street was created or dedicated, or presently used.

(d) *Private Property*. Nothing contained herein may be construed as granting to Provider any rights whatsoever to the use of any private property without the consent of the owner thereof unless such is permitted by UTAH CODE ANN. § 54-4-13, as amended.

Section 5. **Acceptance; Effective Date**.

(a) *Acceptance*. Within 60 days after the passage of this Ordinance by the Council, Provider shall send a written acceptance thereof to City. Such acceptance will acknowledge that Provider agrees to be bound by and to comply with the provisions contained herein.

(b) *Effective Date*. The Franchise granted herein will take effect and be in full force from and after final enactment of this Ordinance by the Council, subject to acceptance by Provider, and shall continue in full force and effect for the Term, unless sooner terminated as provided in section 19 ("Franchise Violations"), below.

Section 6. **Additional Conditions on Use of Streets**. Provider shall comply with the following requirements:

(a) *Location of Facilities*. All transmission and distribution structures, poles, lines and equipment installed or erected by Provider within the Service Area pursuant to the Franchise shall be so located as to cause minimum interference with the proper use of streets, alleys, and other public ways and places, and to cause minimum interference with the rights and reasonable convenience of property owners who adjoin any of said streets, alleys or other public ways and places. All of Provider's poles, lines, and other equipment installed or erected in the Service Area shall be located, to the greatest extent reasonably practicable, to be visually unobtrusive and to preserve the natural beauty and neighborhood aesthetics within the Service Area. No poles or structures shall be erected by Provider without City's prior approval through established permit procedure pursuant to applicable City Code. The location of any Cable System pole or structure shall be removed or modified by Provider whenever City determines that the public health, safety and welfare would be negatively affected. If City requires the removal or relocation of part of the Cable System, such removal or relocation shall be solely at Provider's expense unless the relocation or removal requested by City is solely for aesthetic reasons during the Term, in which event such relocation or removal shall be performed at City's expense.

(b) *Trimming/Cutting Trees*. Provider shall have the authority to trim trees or other natural growth overhanging any of its Cable System so as to prevent the branches from coming in contact with Provider's wires, cables or other equipment. Provider shall use its best efforts, including written notice, to notify owners of property adjacent to the trees to be trimmed at least 72 hours prior to doing the work. For all trimming, Provider shall use generally accepted pruning standards of modern arboriculture in a manner which is least damaging to the health and aesthetic appearance of the trees, etc., being trimmed.

(c) *Restoration*. Provider promptly shall repair or replace, at its own expense, any and all rights-of-way, pavements, sidewalks, street improvements, excavations, other facilities, landscaping, utility lines, mains or pipes, or other improvements, whether public or private, used, disturbed, or damaged by Provider's operations, including construction, installation, and maintenance thereof to the extent that such repair or replacement was necessitated by installation or operation of the Cable System. Such repair or replacement shall return the property to as good or better condition as it was prior to the work being done and shall comply with all other City ordinances. The cost associated with the return, replacement and/or restoration shall be borne by Provider. The requirements imposed upon Provider extend to any subcontractor or independent contractor that Provider might employ to perform the tasks outlined herein. If City determines Provider or its contractor has not made such restoration, reconstruction or repair in a reasonably satisfactory manner, City, after giving Provider notice and opportunity to correct such failure, shall have the right to carry out such restoration, reconstruction or repair, and Provider shall reimburse City in full for all reasonable expenses incurred by City in effecting such restoration, reconstruction or repair.

(d) *Safety*. Provider 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.

(e) *Compliance with Applicable Laws*. Provider shall install and maintain its wire, cables, fixtures, and other equipment (i) in accordance with all applicable laws, including, without limitation, the City Code, any building codes or other construction standards imposed by City, and the applicable sections of the National Electric Safety Code as revised during the Term, and (ii) in such manner as shall not interfere with any installations of City or of any public utility serving City.

(f) *Annual Plan*. On or before January 15th of each year, Provider shall submit to City in writing Provider's proposed schedule (the "*Annual Plan*") with regard to any anticipated construction, maintenance, tree-trimming or other similar activities (collectively, "*Activities*") on Provider's then current facilities planned by Provider in or on any Street within the Service Area for that calendar year. The Annual Plan will be used by City to coordinate Provider's Activities with City's pending public works projects, construction/ maintenance activities within the Service Area planned by other utility franchisees, etc. in order to minimize disturbances to the citizenry and to protect City's infrastructure investment. On or before February 15th of each year, City will either approve Provider's Annual Plan or will supply to Provider any proposed revisions. Provider then shall have ten business days to object to City in writing to any such proposed revisions to Provider's Annual Plan. If Provider so objects, then City and Provider shall promptly, reasonably cooperate to formulate a mutually-acceptable Annual Plan. Provider shall strictly adhere to the finalized Annual Plan and shall not undertake any Activities within the Service Area not contemplated by the finalized Annual Plan unless a legitimate, unforeseeable emergency situation then exists or unless City gives written consent to such change.

(g) *Temporary Moving of Wires*. Provider shall, on the request of City or any Person holding a building-moving permit, franchise or other approval issued by City or the state of Utah, temporarily relocate its facilities to permit the moving of buildings, water, effluent or sewer lines, or Streets. The expense of such relocation shall be paid by the party requesting the same, and Provider shall have the authority to require such payment in advance. Provider shall be given not less than five business days' prior notice to arrange for such relocation.

(h) *Inspection*. City shall have the right to inspect all construction or installation work concerning the Cable System performed in, over, under and upon the Streets, and make such inspections and related orders as it shall find necessary to insure compliance with the terms of this Agreement. In situations where the Cable System is being installed or modified in connection with a construction project involving other (non-Cable System) work by third parties not affiliated with Provider, to the extent possible (as determined by City in its reasonable judgment) City shall endeavor to inspect and approve conforming work on the Cable System independent of its inspection and approval of the other (non-Cable System) work by third parties in order to facilitate final completion and approval of the Cable System work by or on behalf of Provider.

(i) *Erection of Poles*.

(i) The Franchise does not expressly or impliedly authorize Provider to construct or install poles or wire-holding structures within Streets for the purpose of placing cables, wires, lines or otherwise, without City's prior written consent. Such consent shall not

unreasonably be withheld, but shall include a requirement for Provider to perform at its expense all tree trimming, etc., required to maintain the poles, cable and wires clear of obstructions.

(ii) With respect to any poles or wire-holding structures which Provider is authorized to construct and install within the Service Area, a public utility or public utility district serving City (the "*Public Utility*") may, if denied by Provider the privilege of utilizing such pole or wire-holding structures, apply to City for such permission. If City finds that such use by the Public Utility would enhance the public convenience and would not unduly interfere with Provider's present and future operations, City may authorize such use by the Public Utility subject to such terms and conditions as may reasonably be agreed between the parties. Such authorization shall include the condition that the Public Utility (A) pay to Provider any and all actual and necessary costs incurred by Provider in permitting such use and, in addition, an annual fee per attachment which is equal to that which Provider pays to the public electric service utility in the Service Area for such use, and (B) shall indemnify Provider from and against any claims or causes of action brought about due to such use. City's legal ability to provide such authorization is subject to any applicable law to the contrary.

(j) *Undergrounding*.

(i) Provider shall use its best efforts to construct, install and place its cables, wires, drop lines and other facilities underground. Amplifier boxes and pedestal mounted terminal boxes may be placed aboveground if existing technology reasonably requires, but shall be of such size and design and shall be so located as to minimize visual and physical impact on adjacent yards and landscapes insofar as it is technically and economically feasible and not unsafe. However, all amplifier boxes, pedestal-mounted terminal boxes and all other equipment placed aboveground shall be kept in good repair and replaced as needed. If Provider has used its best efforts to construct and install its cables, wires, drop lies and other facilities underground, then in any part of the Service Area where there are certain cables, wires and other like facilities of a public utility or public utility district suspended aboveground from poles, Provider may construct and install its cables, wires and other facilities from the same poles subject to applicable standards and, subject to the provisions of section 6(i) ("Erection of Poles"), may place additional poles as technically required.

(ii) With respect to any cables, wires and other like facilities constructed and installed by Provider aboveground, Provider shall, at its sole expense, reconstruct and install such cables, wires or other facilities underground pursuant to any project under section 6(k) below under which the cables, wires or other like facilities of other utilities providers are placed underground within an area. All construction, reconstruction and installation required under this section shall be done at no cost to City unless otherwise provided by law.

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

(k) *Relocation*.

(i) If during the Term of the Franchise, City or a publicly-owned utility (including without limitation, a public water district, a public sanitation district, a public drainage district or any other similar special public district) elects to alter, repair, realign, abandon, improve, vacate, reroute or change the grade of any Street or to replace, repair, install, maintain, or otherwise alter any aboveground or underground cable, wire, conduit, pipe, line, pole, wire-holding structure, structure, or other facility utilized for the provision of utility or other services or transportation of drainage, sewage or other liquids, Provider shall, except as provided in subsection 6(k)(ii) below or as otherwise provided by law or by agreement with such publicly owned utility, at its sole expense remove or relocate as necessary its installed poles, wires, cables, underground conduits, manholes and any other facilities.

(ii) Provider will, upon reasonable notice from City, protect, support, temporarily disconnect or relocate its property in the Street when required by City, Salt Lake County or the state of Utah 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 requesting party shall bear the cost to the extent such request for relocation or disconnection is for purely aesthetic purposes.

Section 7. **Construction and Operation**.

(a) *Compliance*. Provider shall construct, install and maintain the Cable System in compliance with all applicable laws, ordinances, construction standards, governmental requirements, and technical standards equivalent to those established by the FCC. 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 applicable Utah state and City codes, rules and regulations.

(b) *Maintenance of Design Map*. Provider shall maintain at all times a current design map or set of design maps drawn to scale showing the Cable System and all equipment installed or placed in the Streets and other public places. Such maps shall be made available for inspection and study by City or its designated representative at Provider's place of business promptly upon City's request from time to time.

(c) *OSHA*. 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) *Coordination*. 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 City following accepted construction procedures and practices and working through existing committees and organizations. Provider will at all times fully comply with all City requests regarding its work within the Streets.

(d) *Antennae*. Any antenna structure used in the Cable System shall comply with the City Code and with construction, marking and lighting of antenna structures required by the United States Department of Transportation. Provider shall obtain a use permit from City prior to the installation of any such antenna structure.

(e) *Interference*. All cable and wires shall be installed, where possible, parallel with electric and telephone lines, and multiple cable configurations shall be arranged in parallel and bundled with due respect for engineering considerations. Any RF leakage shall be monitored as required by applicable FCC rules and regulations. Provider will not intentionally interfere with television reception of Persons not served by Provider, nor will the Cable System interfere with, obstruct or hinder in any manner, the operation of the various utilities serving the residents within the Service Area. Provider shall not interfere, obstruct or hinder in any manner, City's communications systems, water system, sewer system, fire department system, police department system, public works systems or court system.

(f) *Required Extensions of Service*. The following provisions of this section 7(f) are applicable to the extent permitted by the Cable Act:

(i) Provider shall provide Cable Service within seven 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, Provider's receipt of funds or Provider's receipt of a verified verbal or written request.

(ii) No Subscriber shall be refused service arbitrarily.

(iii) In the case of new construction or property development where utilities are to be placed underground, the developer or property owner shall give Provider reasonable notice of not less than 30 days prior to such construction or development, of the particular date on which open trenching will be available for Provider's installation of conduit, pedestals/or vaults, and laterals to be provided at Provider's expense. The developer/property owner shall also provide specifications in conformance with City requirements as needed for trenching. The developer/property owner may close the requisite trenches when:

(A) Provider has placed the necessary conduit; or

(B) Seven days after the developer/property owner has given a second notice that the requisite trench has been opened; or

(C) Provider has waived its right to place its facilities under this provision, whichever comes sooner.

(iv) Costs of trenching and easements required to bring service to the development shall be borne by the developer/property owner

(g) *Multiple Dwelling Units*. Provider shall not be required to make Cable Service available to residents of an MDU project until a mutually acceptable agreement granting Provider access to the MDU has been executed and delivered by Provider and the property owner.

Section 8. **Customer Service**. Provider shall comply at all times with the customer service provisions set forth in 47 C.F.R. Parts 76.309, 76.1602 and 76.1603, as amended.

Section 9. **Channels**.

(a) *Programming*. Provider shall use reasonable efforts to provide a minimum of 200 channels. Provider shall provide broad categories of services, such as:

(i) Educational programming;
(ii) News and information;
(iii) Sports programming;
(iv) General entertainment (including movies);
(v) Children's programming;
(vi) Family programming;
(vii) Culture and performing arts;
(viii) Science/documentary;
(ix) Weather information;
(x) Ethnic programming; and
(xi) Governmental affairs.

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

(b) *Educational and Governmental Channel(s)*.

(i) Upon at least 120 days' prior written notice (or such other notice period as may be mutually acceptable to City and Provider), Provider shall make available, free of charge by Provider, one channel to be used for educational and governmental cablecast programming. When first-run programming on the first educational and governmental access channel occupies at least 50% of the hours between 11:00 a.m. and 11:00 p.m. for any twelve consecutive weeks, City may request the use of one additional channel, free of charge by Provider, for the same purpose. The additional channel must maintain programming at least 25% of the hours between 11:00 a.m. and 11:00 p.m. for twelve consecutive weeks. If that level of programming is not maintained, the second channel will return to Provider for its use. Provider also reserves the right to program designated educational and governmental channels during the hours not used by City or other governmental entities.

(ii) 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. City shall indemnify, save and hold harmless Provider from and against any liability resulting from City's use of the aforementioned educational and governmental channels, except for liability resulting from program time shared with other municipalities. Provider shall not be required to provide any channel capacity beyond that provided by any other cable television provider holding a franchise in the Service Area. Each user of the educational and governmental channel(s) shall be responsible for its operation and pay its own costs of operation and programming. Provider may assess reasonable charges for any technical or other support (other than channel time) when such support is requested in writing by the user.

(iii) No new Provider shall be required to provide a greater number of educational and governmental channels than an incumbent Provider.

(c) *Capital Contribution*.

(i) At any time during the Term, City may require that Provider prospectively provide a "*Capital Contribution*" during the remainder of the Term, to be used

specifically for educational and governmental access. City shall give Provider at least 90 days' prior written notice of any required Capital Contribution. The amount of the Capital Contribution payable by Provider to City shall not exceed ten cents ($.10) per month, per Subscriber, to be remitted annually no later than 45 days after the end of the calendar year. All amounts paid as a Capital Contribution may be separately stated on Subscribers' bills as permitted in 47 C.F.R. 76.985.

(ii) The Capital Contribution will be payable by Provider to City after: (A) the approval of City, if required, to the inclusion of the Capital Contribution on Subscribers' bills, including any required approval pursuant to 47 C.F.R. 76.933; (B) notice to Provider's Subscribers of the inclusion; and (C) the collection of the Capital Contribution by Provider from its Subscribers. Any Capital Contribution is not to be considered in the calculation of Franchise Fee pursuant to this Franchise.

(iii) Provider shall never be required to pay a different monthly amount per Subscriber than is being collected from any other cable television provider in the Service Area as a Capital Contribution.

(d) *PEG Channels*. Provider may make all PEG channels available on a mosaic display.

Section 10. **Conduct of Operations**.

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

(b) *FCC Regulations*. Provider shall comply with all applicable Federal Communications Commission rules and regulations, both present and future.

Section 11. **Indemnification**.

(a) *Exculpation*. 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 Provider of its Cable System.

(b) *Indemnification by Provider*. Provider shall indemnify, hold harmless and defend City and its officers, agents and employees from and against any and all claims, demands, suits, actions, causes of action, costs, liens, liabilities, injuries fees and damages of whatsoever kind resulting directly or indirectly from, or arising out of:

(i) The construction, operation or maintenance by Provider of the Cable System;

(ii) Any acts or omissions of or by Provider, its agents, representatives, officers, employees, contractors or subcontractors in connection with Provider's use of the Streets and other public places within the Service Area;

(iii) Provider's failure to inspect, discover, correct or otherwise address any defect, dangerous condition or other condition created by or resulting from Provider's Cable System and use of the Streets within the Service Area;

(iv) Provider's failure to comply with any statute, rule, regulation or ordinance of the United States, the state of Utah, City or any other governmental entity with jurisdiction over Provider; or

(v) Provider's alleged invasion of the right of privacy, defamation of any person, firm or corporation, or the violation or infringement of any copyright, trade mark, trade name, service mark or patent, or of any other right of any person, firm or corporation.

Provider's duty to defend and indemnify City under this Agreement includes reasonable attorney's fees, litigation and court costs and expert witness fees.

(c) *Limitation*. Notwithstanding Section 11(a) or any provision hereof to the contrary, Provider shall not be obligated to indemnify, defend or hold 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 City or any of its officers, agents or employees.

Section 12. **Insurance**.

(a) *General Requirements for all Policies*.

(i) Any insurance coverage required herein that is written on a "claims made" form rather than on an "occurrence" form shall (A) provide full prior acts coverage or have a retroactive date before the effective date of this Ordinance, and (B) be maintained for a period of at least three years following the end of the Term of the 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 City.

(ii) All policies of insurance shall be issued by insurance companies licensed 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.

(iii) Provider shall furnish evidence of insurance, acceptable to City, verifying compliance with the insurance requirements herein prior to Provider's written acceptance of the Franchise and this Ordinance.

(iv) If any work to be performed by Provider is subcontracted, Provider shall require its contractor to secure and maintain all minimum insurance coverages required of

Provider hereunder. No failure by such contractor to secure and maintain such insurance coverage shall excuse Provider from the obligation to assure such coverage and to otherwise fully comply with this section 12.

(v) Provider's insurance policies shall be primary and non-contributory to any other coverage available to City. The workers' compensation, general liability and auto liability policies to be provided by Provider shall be endorsed with a waiver of subrogation in favor of City.

(vi) If Utah's governmental immunity limits are subsequently altered by legislation or judicial opinion, Provider shall provide a new certificate of insurance within 30 days after such change, certifying coverage in compliance with the modified limits or, if no new limits are specified, in an amount acceptable to City.

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

(viii) If Provider fails to obtain 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 Provider for the costs of said insurance.

(b) *Required Insurance Policies*. Provider, at its own cost, shall secure and maintain during the entire Term of the Franchise, including any and all renewal terms, the following minimum insurance coverage:

(i) Workers' compensation and employer's liability insurance as required by the state of Utah, and employer's 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, limited liability companies, partnerships and other business entities. If any work is subcontracted, Provider shall require its contractor(s) similarly to provide workers' compensation insurance for all of the contractor's employees unless a waiver of coverage is allowed and acquired pursuant to Utah law.

(ii) Commercial general liability insurance, on an occurrence form, naming City and its officer, agents and employees as additional insureds, in the minimum amount of $2,000,000 per occurrence with a $3,000,000 general policy aggregate and a $2,000,000 products completed operations policy aggregate. The policy shall protect City (and its related parties specified above), Provider, and any contractor from claims for damages for personal injury, including accidental death, and from claims for property damage that may arise from Provider's operations under the Franchise, whether performed by Provider 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 City whether such coverage be primary, contributing or excess.

(iii) 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 13. **Unauthorized Connections or Modifications**.

(a) *No Unauthorized Use*. 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 Provider's express consent.

(b) *No Tampering*. 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) *Liability for Violation*. Any Person convicted of a violation of this section will be subject to the maximum penalty allowed by federal, state and local law. City agrees to cooperate with Provider in the prosecution of any such violations.

Section 14. **Franchise Fee**. For the use of the Streets and for the purposes of providing revenue with which to defray the costs of regulation arising out of the granting of this Franchise, Provider shall pay a franchise fee in the amount prescribed by this section.

(a) *Amount*. During the Term of the Franchise, Provider shall pay City an amount equal to five percent (5%) of Provider's Gross Revenues (the "*Franchise Fee*"). The percentage amount of Provider's Franchise Fee shall not exceed the percentage amount of the franchise fee paid to City by any other cable provider franchisee.

(b) *Timing; Certification*. The Franchise Fee shall be paid to City quarterly within 45 days after the end of each calendar quarter. The amount payable shall be equal to five percent (5%) of Provider's Gross Revenues for the calendar quarter immediately preceding each such payment date. Not later than the date of each payment, Provider shall file with City a written statement signed by an officer of Provider, or his/her designee, attesting to the accuracy, completeness and veracity of the statement, and which identifies in detail the sources and amounts of Gross Revenues received by Provider during the period for which the payment is made.

(c) *No Accord*. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall such acceptance of payment be construed as a release of any claim which City may have for further or additional sums payable under the provisions of this section.

(d) *External Costs*. City acknowledges that all Franchise Fees paid to City will be collected from Subscribers as "external costs" as such term is used in 47 C.F.R. 76.922, and will be separately stated on Subscribers' bills as permitted in 47 C.F.R. 76.985.

(e) *Basis for Payments*. Provider acknowledges that this Franchise provides Provider with the use of valuable public Streets acquired and maintained by City at great expense to its taxpayers and citizens, and in recognition thereof that the grant to Provider of the use of

those Streets is a valuable privilege, and that such payments are made as a matter of contract. Should either federal or state law ever be amended to discontinue altogether City's authority to assess the Franchise Fee, then so long as Provider maintains facilities in the Streets, City is entitled to collect from Provider reasonable and non-discriminatory payments for use of the Streets. Such payments shall be comparable to those fees paid by other providers of services similar to those provided by Provider within the Service Area.

(f) *Delinquencies*. Any Franchise Fee which remains unpaid after the dates specified above shall be delinquent and shall thereafter accrue interest at ten percent (10%) per annum until paid. The period for limitation for recovery of any franchise fee payable hereunder shall be subject to applicable Utah state law.

(g) *Accounting Standards*. Within 45 days after City's written request at any time or from time to time, Provider shall provide to City an unqualified written certification of the accuracy of the Franchise Fee payments remitted for the preceding fiscal year(s) of the Term. This certification must be prepared by an independent certified public accountant and prepared in accordance with generally accepted accounting principles consistently applied.

(h) *Auditing and Financial Records.*

(i) During the Term of the Franchise, City may, not more frequently than once each year, conduct an audit of the books, records and accounts of Provider for the purpose of determining whether Provider has paid Franchise Fees in the required amounts. The audit may be conducted by City or its designated agent, and shall be conducted at the sole expense of City unless the audit discloses a shortfall of four percent (4%) or more of the annual Franchise Fee, in which case Provider promptly shall reimburse City for all cost of the audit. The party conducting the audit shall prepare a written report containing its findings, and the report shall be filed with City and a copy mailed to Provider.

(ii) Provider shall make available for inspection by authorized representatives of City its books, accounts, and all other financial records at reasonable times and upon reasonable advance notice for the purpose of permitting exercise of the authorities conferred by this section. Provider shall not be required to provide Subscriber information in violation of Section 631 ("Protection of Subscriber Privacy") of the Cable Act or any other applicable law.

(i) *Other Taxes, Etc*. Notwithstanding any provision to the contrary, Provider shall, in addition to the Franchise Fee, pay the required charges, taxes and fees lawfully established in a code or ordinance properly adopted by City. Provider shall be entitled to pass such charges, taxes and fees directly to its Subscribers in the Service Area.

(j) *Basic Cable Outlet for Public Buildings*. Provider shall provide, without charge, one outlet (including one set top box) of basic or expanded basic service to each governmental building in the Service Area owned and/or occupied by City or its public or private municipal service contract providers (including, but not limited to, fire stations, police substations, and public and non-profit private school buildings) that is a Qualified Living Unit so long as the location is not simultaneously receiving service, without compensation, from another franchised cable service provider. The government building may redistribute the signal within that building by adding additional outlets and additional set top boxes at City's own cost without compensation to Provider; provided, however, that no material degradation in signal

quality/service to Provider's subscribers results from such complimentary service to City. The outlets of basic and expanded basic service shall not be used to sell Cable Services in or throughout such buildings; nor shall such outlets be located in common or public areas generally open to the public. Provider shall have the right to secure any and all of its signals to ensure compliance with this provision and to ensure compliance with its contractual agreements with its programming suppliers. If additional outlets are provided to such buildings, the building owner may also be required to pay the service fees, installation charges and set top boxes associated with the provision of all service(s) provided for the additional outlets relating thereto. Users of such outlets shall hold Provider harmless from any and all liability or claims arising out of their use of such outlets, including but not limited to those arising from copyright liability.

City acknowledges that complimentary services reflects a voluntary initiative by Provider, and that Provider does not waive any rights it may have regarding complimentary services under federal law. Subject to applicable law, Provider shall give City at least 90 days' prior written notice if Provider elects to offset the cost of complimentary services to City hereunder against the Franchise Fee.

Section 15. **Rates**. All of Provider'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. Provider 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. Notwithstanding the foregoing, however, nothing herein shall be construed to prohibit Provider from:

(a) *Promotions*. The temporary reduction or waiving of rates or charges in conjunction with valid promotional campaigns;

(b) *Discounts*. The offering of reasonable discounts to senior citizens or economically disadvantaged citizens;

(c) *Commercial Rates*. 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) *Residential Rates*. The establishment of different and nondiscriminatory rates and charges for residential Subscribers as allowable by federal law and regulations.

Section 16. **Records and Reports**.

(a) *Regulatory Records*. Copies of all petitions, applications, communications, and reports submitted by Provider to the FCC or any other federal or state regulatory commission or agency having jurisdiction in respect to any matters affecting construction or operation of the Cable System or services provided through such system shall be made available to City upon reasonable request. Copies of responses or any other communications from the regulatory agencies to Provider affecting construction or operation of the Cable System likewise shall be made available upon reasonable request.

(b) *Inspection Right*. In addition to City's right to audit the accuracy of the Franchise Fee payments under section 14(h), above, City shall have the right, at its own expense, not more than once during any calendar year, and upon at least 30 days' prior written notice, to inspect at Provider's offices during normal business hours, all books and records directly related to the Franchise to ensure compliance with the terms of this Ordinance. To the extent such information is protected by state or federal law, City will not disclose to the public or to competitors of Provider any commercial or financial information reviewed by City pursuant to this Ordinance. If any books or records of Provider are not kept in a local office and if City determines that an examination of such records is necessary or appropriate for the performance of any of 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 Provider.

(c) *Annual Report*. Within 20 days after City's written request from time to time during the Term, Provider shall provide 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. Provider shall not be required to disclose any protected or confidential information as part of this annual report. Provider also shall meet with City from time to time upon City's request following at least 15 days' prior written request to Provider. Matters to be discussed may include, without limitation, customer service, system performance, technical issues and other matters related to Provider's operation of the Cable System.

Section 17. **Franchise Renewal**. Any renewal of the Franchise shall be in accordance with the renewal provisions of the Cable Act under Section 626 or as otherwise codified at the time of the renewal and any relevant provisions of the City Code, as amended; provided that at any time City and Provider may initiate and finalize informal negotiations regarding renewal of the Franchise and City may grant such renewal, conditioned on all appropriate prior public notice and opportunity to comment.

Section 18. **Transfer of Franchise**. Provider shall not transfer the Franchise to another party, person, or entity except to a company controlling, controlled by or under common control with Provider, without complying with the provisions of the Cable Act. Further:

(a) *City Consent Required*. Without City's prior written consent, which shall not be unreasonably withheld, the Franchise shall not be sold, assigned or transferred, either in whole or in part, or leased, sublet, or mortgaged in any manner, nor shall title thereto (either legal or equitable) or any right, interest or property therein, pass to or vest in any person except to an entity controlling, controlled by, or under common control with Provider.

(b) *Exclusion for Mortgages*. No such consent shall be required for a transfer in trust, mortgage, or other hypothecation in whole or in part to secure an indebtedness reasonably incurred by Provider in the ordinary course of its business.

(c) *Assignee Qualifications*. The proposed assignee must show technical ability, financial capability, legal qualifications and general qualifications as reasonably determined by City and must agree to comply with all provisions of the Franchise and such conditions as may be prescribed by the Council expressed by resolution. Within 30 days after receiving the request or notice of transfer, City shall, in accordance with FCC Rules and

Regulations, notify Provider in writing of the information it requires to determine the legal, financial and technical qualifications of the proposed transferee. If City has not taken action on Provider's request for transfer within 120 days after receiving such request, consent by City shall be deemed given.

(d) *Changes in Control*. Provider shall promptly notify City of any actual or proposed change in, or transfer of, or acquisition by any other party of, control of Provider unless such other party already is an affiliate which controls, is controlled by, or is under common control with, Provider. The word "*control*" as used herein is not limited to major stockholders but includes actual working control in whatever manner. Every change, transfer, or acquisition of control of Provider shall make the Franchise subject to cancellation unless and until City shall have consented thereto, which consent will not be unreasonably withheld. For the purpose of determining whether it shall consent to such change, transfer or acquisition or control, City may inquire into the qualifications of the prospective controlling party and Provider shall assist City in any such inquiry.

(e) *Rebuttable Presumption of Change in Control*. A rebuttable presumption that a transfer of control has occurred shall arise upon the acquisition or accumulation by any person or group of persons of fifty (50%) percent of the voting interest of Provider.

(f) *No Waiver*. The consent or approval of City to any transfer of the Franchise shall not constitute a waiver or release of the rights of City in and to the streets, and any transfer shall by its terms, be expressly subordinate to the terms and conditions of the Franchise.

(g) *Assumption Agreement*. In no event shall a transfer of ownership or control be approved without Provider's successor-in-interest becoming a signatory to an agreement further evidencing the effect and binding nature of this Ordinance.

Section 19. **Franchise Violations**.

(a) *Enforcement Procedure*. If City determines that Provider has violated any provision of the Franchise, City may make a written demand on Provider to remedy such violation. If the violation is not remedied, or in the process of being remedied, to City's reasonable satisfaction within 30 days following such written demand, an informal meeting or administrative hearing shall be held to review the alleged violation. If such meeting or hearing does not result in a satisfactory resolution, and/or if Provider requests a public hearing, then a public hearing shall be held and Provider shall be provided with an opportunity to be heard upon 30 days' prior written notice to Provider of the time and the place of the hearing and the allegations of Franchise violations.

(i) Any hearing may be conducted by the Council or, at the Council's sole discretion, by a hearing officer appointed by the Council. Any such hearing officer shall be an attorney licensed to practice under Utah law.

(ii) City shall bear the cost of providing a place for the hearing and compensation for the hearing officer. The costs incurred by the parties for attorney's fees, expert witness fees and other expenses shall be borne solely by the party incurring those costs. The cost of any reporter retained to record the proceeding shall be born equally by City and Provider.

(iii) All witnesses testifying at any hearing held pursuant to this section shall be sworn witnesses and shall be subject to direct and cross-examination. However, formal rules of evidence applicable to the trial of civil and criminal proceedings in the trial courts of the state of Utah shall not be applicable to the hearing. The provisions of the Administrative Procedures Act (UTAH CODE ANN. § 63-46b-1, et. seq., as amended), or any successor legislative enactment, shall not be applicable to any such hearing. The hearing may be continued from time to time.

(iv) If the hearing is conducted by a hearing officer, the officer shall, upon conclusion of the hearing, prepare a recommended decision which includes findings of fact and conclusions. The recommended decision shall be filed with City's recorder and mailed to the parties not later than thirty (30) calendar days after the conclusion of the hearing. Upon receipt of such a recommended decision, the Council may, without a hearing except as otherwise required below, either:

(A) Adopt the recommended decision, including findings of fact and conclusions submitted by the hearing officer;

(B) Adopt the findings of fact and conclusions contained in the recommended decision, modify the decision, and adopt the recommended decision as so revised;

(C) Based upon the record of the hearing, modify the findings of fact, conclusions or decisions and adopt the recommended decision as so revised; or

(D) Reject the recommended decision and conduct a new hearing.

(v) If the hearing is conducted by the Council, following conclusion of the hearing the Council shall adopt a decision which includes findings of fact and conclusions.

(b) *Remedies*. If, after notice is given and any required public hearing is held, City determines that such violation occurred or still exists, then City may impose a remedy, including, without limitation:

(i) Making the correction itself, and charging the cost to Provider;

(ii) Commencing an action at law for monetary damages or seeking other equitable relief;

(iii) Requiring the filing of a financial performance instrument by Provider to insure future performance; or

(iv) In the case of a substantial default of a material provision of the Franchise, declare the Franchise terminated.

(c) *Council Resolution*. If the Council determines that there are grounds for termination of the Franchise and that the Franchise should be terminated, the Council may adopt a resolution which terminates the Franchise and includes its findings and decisions. The effective

date of termination shall be such date as is prescribed by the Council, in its sole discretion, in the resolution. Any such termination shall be subject to applicable law.

(d) *Limitation on Termination*. Provider shall not be held in default under or in non-compliance with the provisions of the Franchise, nor suffer any enforcement or penalty relating thereto, for any such non-compliance or alleged defaults that are caused by war, civil disturbance, strikes, acts of God, power outages, or other events reasonably beyond its ability to control.

(e) *Revenue Report Following Termination*. If this Franchise is terminated, forfeited or voided as provided in this Ordinance or any order or decree by a court of competent jurisdiction, Provider shall, not later than 30 days following the termination of the Franchise, submit to City a report prepared as before required showing the Gross Revenue of Provider for the time elapsed since the last period for which Provider has paid the Franchise Fee. With the submission of the report, Provider shall pay to City the unpaid balance of the Franchise Fee due and owing to City.

(f) *Alternative Remedies*.

(i) No provision of this Ordinance shall be deemed to bar the right of City to seek or obtain judicial relief from a violation of any provision of the Franchise or any rule, regulation, requirement or directive promulgated thereunder. Neither the existence of other remedies identified in this Ordinance nor the exercise thereof shall be deemed to bar or otherwise limit the right of City to recover monetary damages for such violation by Provider, or judicial enforcement of Provider's obligations by means of specific performance, injunctive relief or mandate, or any other judicial remedy at law or in equity.

(ii) No provision of this Ordinance shall be deemed to bar any rights Provider may have under law (including, without limitation, the Cable Act) or the right to seek appropriate judicial review of any decision by the Council concerning the Franchise.

(g) *Non-enforcement*. Provider shall not be relieved of any obligation to comply with any of the provisions of the Franchise or of any rule, regulation, requirement or directive promulgated thereunder by reason of any failure of City to enforce prompt compliance.

Section 20. **Removal of Cable System Equipment and Facilities**.

(a) *Underground Cable and Conduit*.

(i) Upon expiration or termination of the Franchise, if the Franchise is not renewed and if an assignee does not purchase the Cable System and become the substitute franchisee under the Franchise, Provider may remove any underground cable that is part of the Cable System from the Streets which has been installed in such a manner that it can be removed without trenching or other opening of the Streets along the extension of cable to be removed. Provider shall not remove any underground cable or conduit which requires trenching or other opening of the Streets along the extension of cable to be removed, except as hereinafter provided. Subject to federal law, Provider shall remove, at its sole cost and expense, any underground cable or conduit by trenching or opening of the streets along the extension thereof or otherwise which is ordered to be removed by City based upon a determination, in City's

reasonable discretion, that removal is required in order to eliminate or prevent a hazardous condition or promote future utilization of the Streets for public purposes.

(ii) Any order by City to remove cable or conduit shall be mailed to Provider not later than 90 calendar days following the date of expiration or termination of the Franchise. Provider shall file written notice with City's recorder not later than 30 calendar days following the date of expiration or termination of the Franchise of its intention to remove cable and a schedule for removal by location. The schedule and timing of removal shall be subject to City's approval and regulation. Any such removal shall be completed no later than one year following the date of expiration or termination of the Franchise. Underground cable and conduit in the Streets which is not so removed shall be deemed abandoned and title thereto shall vest in City.

(b) *Aboveground Elements*. Subject to federal law or unless relieved of the obligation by City, upon expiration or termination of the Franchise, if the Franchise is not renewed and if an assignee does not purchase the System and become the substitute franchisee under the Franchise, Provider shall at its sole expense remove from the Streets all above-ground elements of the Cable System, including but not limited to amplifier boxes, pedestal mounted terminal boxes, and cable attached to or suspended from poles.

(c) *Legal Compliance*. Provider shall conduct and complete the work of removal in compliance with all such applicable ordinances, and shall restore the streets to equal to or better condition as before the work of removal commenced. In connection with such work, Provider shall apply for and obtain such encroachment permits, licenses, authorizations or other approvals and pay such fees and deposit such security as required by applicable City ordinances.

(d) *Repurposing*. This section 20 does not require removal of any facilities of the Cable System which are being used for another authorized purpose (such as internet or phone) by Provider or an assignee following expiration or termination of the Franchise.

Section 21. **Miscellaneous**.

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

(b) *Severability*. If any section, sentence, paragraph, term or provision of this Ordinance, is for any reason determined to be or rendered illegal, invalid, or superseded by other lawful authority (including any state or federal, legislative, regulatory or administrative authority having jurisdiction thereof) or determined to be unconstitutional, illegal or invalid by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, to the extent that the essential terms of this Ordinance remain unaffected 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(s) thereof.

(c) *No Waiver or Estoppel*.

(i) Neither City nor Provider shall be excused from complying with any of the terms and conditions of the Franchise by any failure of the other, upon any one or more occasions, to insist upon or to seek compliance with any such terms and conditions.

(ii) City acknowledges that acceptance of the terms and conditions of the Franchise will not constitute, or be deemed to constitute, a waiver, either expressed or implied, by Provider of any constitutional or legal right which Provider may have or may be subsequently determined to have, either by current or subsequent legislation or court decisions. City acknowledges that Provider hereby reserves its rights under applicable federal and state constitutions and law.

(d) *Governing Law*. This Ordinance shall be governed by the laws of the state of Utah and any applicable federal laws.

(e) *Waiver of Jury Trial*. **Each party hereby irrevocably waives all rights to trial by jury in any action, proceeding or counterclaim arising out of or relating to the Franchise, any course of conduct, course of dealing, statements (whether verbal or written) or actions of either of the parties or their agents, employees, or other related parties. Each party acknowledges that this waiver has been freely and voluntarily made after full opportunity to discuss such waiver with its counsel.**

(f) *Notices*. All notices or correspondence to be served upon City or Provider by the other party shall be in writing and delivered by first class mail, postage prepaid or by facsimile or by a national express mail service.

Notices or correspondence to City shall be addressed as follows:

Cottonwood Heights
Attention: City Manager
1265 E. Fort Union Blvd. #250
Cottonwood Heights, UT 84047

With a copy to: Wm. Shane Topham
Callister Nebeker & McCullough, P.C.
10 East South Temple, 9th Floor
Salt Lake City, UT 84133

Notices or correspondence to Provider shall be addressed as follows:

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

With a copy to: CenturyLink
Attn. Public Policy
250 East 200 South, 16th Floor
Salt Lake City, UT 84111

City or Provider may designate other notice address(es) from time to time by giving written notice to the other as set forth above.

(g) *Action of Officers*. All actions of City's officers, agents and employees that are in conformity with the purpose and intent of this Ordinance, whether taken before or after the adoption hereof, are hereby ratified, confirmed and approved.

(h) *Repealer*. All ordinances or parts thereof in conflict with this Ordinance are, to the extent of such conflict, hereby repealed.

This Ordinance, assigned no. 258, shall take immediate effect as soon as it shall be published or posted as required by law and deposited and recorded in the office of the City's Recorder, or such later date as may be required by Utah statute.

PASSED AND APPROVED this 12th day of July 2016.

ATTEST:

By: _____
Paula Melgar, Recorder

COTTONWOOD HEIGHTS CITY COUNCIL

By _____
Kelvyn H. Cullimore, Jr., Mayor

VOTING:

Kelvyn H. Cullimore, Jr.	Yea ✓	Nay ___
Michael L. Shelton	Yea ✓	Nay ___
J. Scott Bracken	Yea ✓	Nay ___
Michael J. Peterson	Yea ✓	Nay ___
Tee W. Tyler	Yea ✓	Nay ___

DEPOSITED in the Recorder's office this 12th day of July 2016.

POSTED this 12 day of July 2016.