

**TO: Honorable Mayor and City Council**

**FROM: City Administrator Ron Johnson**

**SUBJECT: Adopt Resolution; Conduct 1<sup>st</sup> Reading of Ordinance Approving HBC's Cable Franchise Application and Agreement**

**DATE: February 1, 2017**

**BACKGROUND**

In early to mid-2016, discussion took place at several City Council meetings regarding the need to provide competition by adding at least one additional cable television franchise in the city. At the August 3, 2016 Council meeting, approval was given to Provide Notice of Council's Intent to Consider Issuance of a Cable Franchise. Also at that meeting, Council accepted Kennedy & Graven's proposal to provide legal services to assist with the competitive cable franchising process.

Applications were received from Hiawatha Broadband Communications, Inc. (HBC) and Frontier Communications of MN, Inc. A public hearing was conducted in September and Council approved a motion to direct staff (including consulting attorney Bob Vose, Kennedy & Graven) to review applications, report on applicants' qualifications, and negotiate franchise terms.

HBC provided a complete application and the required application fee per the City's application instructions. The application, subsequent hearing, and negotiated franchise terms adequately address HBC's qualifications to receive a cable franchise. Bob Vose, Kennedy & Graven, sees no legal impediment to approval of HBC's application. Discussions with Frontier, however, have not resulted in final franchise terms.

Based on review of HBC's application and franchise negotiations with the company, Mr. Vose and staff recommend approval of the application and adoption of the cable television franchise that has been negotiated with HBC.

A resolution is attached for adoption, and a request is being made to conduct the first reading of the attached ordinance.

**REQUESTED COUNCIL ACTION**

Adopt the Resolution Approving Hiawatha Broadband Communications, Inc. (HBC'S) Cable Franchise Application, and conduct first reading of AN ORDINANCE GRANTING A FRANCHISE TO HIAWATHA BROADBAND COMMUNICATIONS, INC. TO CONSTRUCT, OPERATE, AND MAINTAIN A CABLE COMMUNICATIONS SYSTEM IN THE CITY OF CANNON FALLS, MINNESOTA

Attachment(s): Kennedy & Graven Report; Resolution; Ordinance

**Kennedy**

**&**

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**CHARTERED**

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## **MEMORANDUM**

**DATE:** December 15, 2016  
**TO:** City of Cannon Falls  
**FROM:** Bob Vose  
**RE:** HBC Cable Franchise Application

## **INTRODUCTION**

This Memorandum addresses the cable television franchise application submitted to the City of Cannon Falls (“City”) by Hiawatha Broadband Communications, Inc. (“HBC”), and the results of subsequent franchise negotiations with HBC.

The City also received a franchise application from Frontier Communications of Minnesota, Inc. (“Frontier”). Discussions with Frontier, however, have not resulted in final franchise terms.

### **Background**

The City previously granted a nonexclusive cable franchise to Mediacom Minnesota, LLC (“Mediacom”). That franchise was to expire on or about May 9, 2015. Mediacom timely requested renewal of its franchise under applicable federal law, the City assessed its cable-related needs and interests, and the parties began negotiations. When negotiations did not result in a timely renewal, the City agreed to extend the expiration date to December 31, 2015 at the company’s request. However, no renewal terms were agreed upon by the end of 2015, and Mediacom’s franchise has been expired for nearly one year.

In late 2015, HBC indicated that it was interested in providing competitive cable service in the City.<sup>1</sup> Near the same time, Frontier also indicated interest in adding cable service to its other, existing telecommunications services.

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<sup>1</sup> A franchise is required under applicable federal and state law to provide cable service in a municipality. A cable franchise grants a valuable privilege to use the public rights-of-way to provide cable service for profit.

Minnesota Statutes, Chapter 238 (“Chapter 238”), establishes the process for considering issuance of franchises authorizing cable service.<sup>2</sup> In response to HBC and Frontier’s inquiries, the City published notice of intent to consider franchises as required by Chapter 238. HBC filed a timely application dated August 12, 2016, and Frontier filed an application dated August 27, 2016. Both companies submitted the required application fee and their applications respond to all application instruction requirements.

### **Public Hearing**

Chapter 238 requires a public hearing affording reasonable notice and an opportunity for all interested parties to be heard regarding any franchise application.<sup>3</sup> Further, any franchise that is ultimately issued must include:

a provision that the franchisee’s technical ability, financial condition, and legal qualification were considered and approved by the franchising authority in a full public proceeding that afforded reasonable notice and a reasonable opportunity to be heard;<sup>4</sup>

The public hearing is significant because cable franchising is a “quasi-judicial” process.<sup>5</sup> Among other things, the public hearing affords an incumbent cable operator the opportunity to present evidence and argument concerning its existing franchise that may be relevant in evaluating competitive franchise applications.

The City gave the required notice and conducted a public hearing on September 6, 2016. At the hearing, representatives for HBC and Frontier gave presentations describing their qualifications and plans to offer video service. Mediacom did not appear or provide any written comments. After the hearing was closed, the City Council directed staff to review the applications, proceed with franchise negotiations, and present a report along with any negotiated franchise(s).

## **REPORT**

### **1. Level Playing Field Law**

Minnesota has a “level playing field law,” Minn. Stat. § 238.08 (“LPF law”), which provides:

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<sup>2</sup> The member cities also have competitive franchising policies that closely track applicable state law.

<sup>3</sup> Minn. Stat. § 238.081, Subd. 6.

<sup>4</sup> Minn. Stat. § 238.084, Subd. 1(1).

<sup>5</sup> *In re Application of Dakota Telecommunications Group*, 590 N.W.2d 644, 647-8 (Minn. App. 1999) (citing, *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414-15 (Minn. 1981)).

Quasi-judicial proceedings involve an investigation into a disputed claim that weighs evidentiary facts, applies those facts to a prescribed standard, and results in a binding decision. In granting a cable television franchise, the Cable Act requires that franchise proposals contain specific information and a public hearing be held affording reasonable notice and opportunity to be heard. Minn. Stat. § 238.081, subs. 4, 6. This procedure involves testimonial and documentary evidence, and results in a binding decision.

Id. (case citations omitted).

[n]o municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational, or governmental access requirements; or (3) franchise fees.<sup>6</sup>

A 2010 amendment to the LPF law clarified that a telephone company may be allowed to only provide cable service in the area of a municipality in which it offers local exchange service.<sup>7</sup>

Mediacom's franchise expired at the end of 2015. The company presented no claim or argument that it has an "existing franchise" entitling it to the protections of the LPF law.<sup>8</sup> In any case, the franchise terms negotiated with HBC would not violate the LPF law even if Mediacom had rights under that law.<sup>9</sup> The relevant terms negotiated with HBC are:

#### Area Served

The HBC franchise would provide:

Service Area Obligation. This Franchise is granted for the Service Area. Grantee shall design, construct, and activate the Cable System so as to make Service available to all requesting businesses and residences in the Service Area within two (2) years of the Effective Date, and thereafter maintain the System. As the Cable System is constructed and made capable of providing Cable Service, Grantee shall activate and offer Cable Service to businesses and residences passed by the System within a reasonable period of time. No Person shall be refused Service arbitrarily, nor denied to any group of potential Subscribers because of the income of the residents in such area. Grantee shall meet with City representatives upon request to report on the progress of Cable System construction and Service activation and provide current Service Area maps. Grantee's maps may be marked as "Trade Secret" in which case the City shall maintain them accordingly under the Minnesota Data Practices Act, Minn. Stat. Ch. 13.

HBC's service obligation will not be more favorable or less burdensome than Mediacom's prior franchise. Mediacom was only required to make service available in areas of the City meeting a specified development density. HBC will make service available to everyone.

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<sup>6</sup> Minn. Stat. § 238.08, Subd. 1(b).

<sup>7</sup> Minn. Stat. § 238.08, Subd. 1(c).

<sup>8</sup> Despite expiration of its franchise, Mediacom arguably has a right to operate under its prior, expired franchise until the federal renewal process is completed. *Rolla Cable Systems, Inc., v. City of Rolla*, 745 F.Supp. 574, 575-76 (E.D.Mo. 1990); *Comcast of California v. City of Walnut Creek*, 371 F.Supp. 1147, 1155 (N.D.Cal. 2005).

<sup>9</sup> The LPF law would likely be interpreted to require "similar," not identical, franchise obligations. See, *WH Link v. City of Otsego*, 664 N.W.2d 390, 396 (Minn. Ct. App. 2003); *Cable TV Fund 14A v. City of Naperville*, 1997 U.S. Dist. LEXIS 7336, \* 37-38 (N.D. IL 1997); *Comcast Cablevision of New Haven, Inc. v. Connecticut Department of Public Utility Control*, 1996 Conn. Super. LEXIS 2927, \*7 (1996); and *United Cable Television Corporation v. Connecticut Department of Public Utility Control* 1994 Conn. Super. LEXIS 2222 (1994).

### PEG Access Requirements

HBC has agreed to address the City's needs originally identified for purposes of Mediacom's renewal. HBC will provide 2 PEG channels, a \$30,000 grant for immediate equipment needs, a PEG fee of \$1.25 per customer, per month to fund future needs, and the provision of two-way connections at the Cannon Falls High School, City Hall and John Burch Park to facilitate the live cablecast of PEG access programming. Renewal negotiations have focused on these issues, and Mediacom has resisted the commitments HBC is making.

HBC's PEG obligations will not be more favorable or less burdensome than Mediacom's prior franchise.

### Franchise Fees

HBC will agree to a 5% franchise fee based on language that the City proposed to Mediacom in renewal negotiations. The City proposed several modifications to Mediacom's prior franchise that benefit the City. For example, the new language clarifies how franchise fees are calculated where cable service revenues subject to the fee are bundled with telephone or internet access service fees at a discount. The discount will need to be allocated fairly, in proportion to the cost for the services individually.

HBC's franchise fee obligation will not be more favorable or less burdensome than Mediacom's prior franchise.

## **2. Application Completeness**

HBC's application is substantially complete and includes information addressing the company's financial, technical, and legal qualifications.<sup>10</sup> No defects, discrepancies or deficiencies were claimed or identified.

## **3. Applicant Qualifications**

As noted, HBC's application addresses the company's financial, technical, and legal qualifications. No opposition to HBC's qualification was raised. Any potential concerns have been addressed in the proposed franchise as discussed below.

### Legal

HBC is authorized to do business in the state of Minnesota.<sup>11</sup> HBC represents that it will make all appropriate filings and preparations prior to offering cable service.

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<sup>10</sup> The City prepared "Application Instructions" which are consistent with the "franchising proposal" requirements of Chapter 238. See, Minn. Stat. § 238.081, subd. 4.

<sup>11</sup> HBC's filings with the Minnesota Secretary of State can be viewed at: <https://www.sos.state.mn.us/>.

### Technical

HBC's application explains the company's formation in 1993 to serve Winona, and its subsequent expansion into 17 Minnesota communities. The application describes the company's success in delivering high quality networks and services, its reputation for good customer service, and its receipt of various industry awards. The application identifies the management team and describes a state-of-the-art fiber-to-the-premises network to be deployed in the City.

In addition, HBC will agree to both customer service requirements and system performance/technical standards consistent with applicable FCC regulations and industry standards. Such obligations will be detailed in the franchise.

### Financial

HBC represents that the company will deploy cable service in the City using "internal funds." As a privately-held company, HBC's application provides relatively little detail regarding the company's financing. However, HBC's representation that it has sufficient capacity to fund deployment in the City is unchallenged.

In addition, the proposed franchise will require HBC to:

- pay a 5% franchise fee, and provide a PEG grant and ongoing PEG support;
- post a \$10,000 letter of credit and be subject to specified sanctions for franchise violations;
- post a \$50,000 performance bond;
- provide liability insurance in the amount of \$2,000,000.00 for personal injury of property damage, and;
- indemnify the City from suits or liabilities arising out of the franchise.

### **CONCLUSION**

As required by Minnesota law, HBC provided a complete application and the required application fee per the City's application instructions. The application, subsequent hearing, and negotiated franchise terms adequately address HBC's qualifications to receive a cable franchise. We see no legal impediment to approval of HBC's application.

Based on review of HBC's application and franchise negotiations with the company, we recommend approval of the application and adoption of the franchise that has been negotiated.