CITY OF WEST ST. PAUL
DAKOTA COUNTY, MINNESOTA

RESOLUTION NO. 19-

PRELIMINARY ASSESSMENT THAT THE COMCAST FORMAL PROPOSAL FOR FRANCHISE RENEWAL BE DENIED

WHEREAS, on or about April 1, 2000, the City of West St. Paul, Minnesota, ("City") granted a Cable Television Franchise Ordinance ("Franchise"), which is currently held by Comcast of St. Paul, Inc. ("Comcast"), to provide cable service in the City; and

WHEREAS, the Northern Dakota County Cable Communications Commission ("Commission") is a joint powers commission organized pursuant to Minnesota Statutes §238.08 and §471.59, as amended, and includes the following seven (7) municipalities: Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul, Minnesota (the "Member Cities"); and

WHEREAS, the Commission was formed in 1982 and presently obtains its authority from the Member Cities under an Amended Joint Powers Cooperative Agreement ("JPA"); and

WHEREAS, the Commission has the authority under the JPA to administer the Franchises on behalf of the City, including negotiating and recommending renewal thereof; and

WHEREAS, Section 626(a)(1) of the Cable Communications Policy Act of 1984, as amended (the "Cable Act"), 47 U.S.C. §546(a)(1), provides that if a written renewal request is submitted by a cable operator during the six (6) month period which begins with the thirty-sixth (36^{th}) month before franchise expiration and ends with the thirtieth (30) month prior to franchise expiration, a franchising authority shall, within six (6) months of the request, commence formal proceedings to identify the future cable-related community needs and interests and to review the performance of the cable operator under its franchise during the then current franchise term; and

WHEREAS, by letter dated July 27, 2012, from Comcast to the City, Comcast invoked the formal renewal procedures set forth in Section 626 of the Cable Act, 47 U.S.C. §546; and

WHEREAS, the JPA empowers the Commission to conduct the Section 626 formal franchise renewal process on behalf of the City and to take such other steps and actions as are needed or required to carry out the formal franchise renewal process; and

WHEREAS, by letter dated August 7, 2012, the Commission, on behalf of the City, informed Comcast that the Commission had commenced proceedings to identify the future cable-related community needs and interests and to review the performance of Comcast under the Franchises; and

WHEREAS, in 2013 and 2014 the Commission conducted a detailed and comprehensive needs assessment process for the purpose of (A) identifying the future cable-related community needs and interests of the Commission and its Member Cities, and (B) reviewing the performance of Comcast under the Franchise, all as required by Section 626(a) of the Cable Act, 47 U.S.C. §546(a); and

WHEREAS, the Commission's needs ascertainment and past performance review produced the following reports: The Buske Group's "Community Needs Ascertainment - Northern Dakota County Cable Communications Commission (Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul, Minnesota)"; CBG Communications Inc.'s, "Report on the Institutional Network Technical Review and Needs Assessment for the Northern Dakota County Cable Communications Commission;" and

WHEREAS, since 2014 the Commission has been engaged with Comcast in informal franchise renewal negotiations contemplated by 47 USC § 546(h), in hopes of arriving at a renewed franchise; and

WHEREAS, in June of 2014 Comcast submitted FCC Form 394 requesting authority to transfer ownership of the cable system serving the Commission and the City; however, the transfer request was terminated by Comcast in April 2015; and

WHEREAS, in February 2015 the Commission and Member Cities received a request for a competitive cable franchise from Quest Broadband Services, Inc. dba CenturyLink ("CenturyLink"); and

WHEREAS, the Commission processed CenturyLink's request for a franchise and in March 2016 the City granted a franchise to CenturyLink; and

WHEREAS, following the grant of the CenturyLink franchise the Commission and Comcast undertook further informal renewal discussions but were not able to reach agreement on a renewed franchise; and

WHEREAS, on February 7, 2018, the Commission directed Commission staff to finalize preparation of formal renewal documents, as specified in Section 626(a)-(g) of the Cable Act, 47 U.S.C. §546(a)-(g); and

WHEREAS, based on the Commission's needs ascertainment and past performance review, best industry practices, national trends in franchising and technology, and its own experience, Commission staff prepared a Formal Needs Assessment Report ("Needs Report"), which included a Request for Formal Renewal Proposal ("RFRP") and a Model Cable Television Franchise Ordinance ("Model Ordinance") that collectively address the Member Cities' present and future cable-related needs and interests, establish requirements for facilities, equipment and the channel capacity on Comcast's cable system, and include model provisions for satisfying the identified cable-related needs and interests; and

WHEREAS, on April 4, 2018, the Commission approved the Needs Report, RFRP and Model Ordinance; and

WHEREAS, the Commission established July 16, 2018, as a deadline for Comcast's response to the Needs Report, RFRP and Model Ordinance; and

WHEREAS, even after the issuance of the Needs Report, RFRP and Model Ordinance, the Commission and Comcast engaged in informal renewal negotiations pursuant to 47 U.S.C. §546(h) but were unable to arrive at mutually acceptable terms, although informal discussions are ongoing; and

WHEREAS, on June 28, 2018, Comcast requested a thirty (30) day extension of the deadline for Comcast to provide its formal proposal; and

WHEREAS, on June 29, 2018, the Commission granted Comcast's extension request; and

WHEREAS, the new deadline for Comcast's response to the formal renewal request was set at August 15, 2018; and

WHEREAS, on or about August 15, 2018, Comcast submitted to the Commission its Formal Proposal in response to the Needs Report, RFRP and Model Ordinance ("Formal Proposal"); and

WHEREAS, on August 26, 2018, the Commission published a notice informing the public that Comcast's Formal Proposal had been received and was placed on file for public inspection in the Commission's office, as well as online, and that written public comments may be submitted to the Commission; and

WHEREAS, by letter dated November 28, 2018, the Commission and Comcast agreed that the Commission has the authority to issue a recommendation to the Member Cities regarding preliminary approval or denial of Comcast's Formal Proposal ("Letter of Understanding"); and

WHEREAS, on December 12, 2018, the Commission adopted Resolution No. 12-12-2018, which issued a Recommendation Regarding Preliminary Assessment that the Comcast Formal Proposal for Franchise Renewal be Denied; and

WHEREAS, under the Letter of Understanding, prior to March 15, 2019, each Member City shall consider and act upon the Commission recommendation at a regular or special City Council meeting; and

WHEREAS, pursuant to the Letter of Understanding, the Commission and Comcast further agree that if one (1) or more of the Member Cities issues a preliminary denial, the Commission shall administer any requested administrative proceeding as a group on behalf of one (1) or more of the Member Cities in accordance with 47 U.S.C. § 546(c); and

WHEREAS, the City has carefully reviewed Comcast's Formal Proposal and agrees with the findings and conclusions set forth in Commission Resolution No. 12-12-2018: and

WHEREAS, the City agrees with the Commission that there are a number of areas where the Formal Proposal fails to meet the future cable-related community needs and interests taking into account the cost of meeting such needs and interests, each of which is set forth in Exhibit A to this resolution; and

WHEREAS, should Comcast request the commencement of an administrative hearing pursuant to 47 U.S.C. §546(c), the City agrees that the Commission should follow the Commission's prescribed Rules for the Conduct of an Administrative Hearing, attached hereto as Exhibit B, which rules comply with all procedural obligations set forth in 47 U.S.C. §546(c); and

WHEREAS, the City has carefully considered all public comment, including that contained within the Needs Report.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY OF WEST ST. PAUL, MINNESOTA, THAT:

1. Each of the above recitals is hereby incorporated as a finding of fact by the City.

2. Exhibits A and B are hereby incorporated by reference as if fully set forth in the body of this Resolution.

3. The City hereby issues preliminary assessment that the Comcast Formal Proposal should be denied and the Comcast Franchise should not be renewed.

4. The City preliminarily finds that Comcast's Formal Proposal fails to meet the City's and the Commission's future cable-related community needs and interests taking into account the cost of meeting such needs and interests.

5. The basis for the Commission's preliminary assessment is set forth in Exhibit A.

6. The City hereby confirms the Commission's recommendation that at any administrative hearing requested by Comcast, the Rules for the Conduct of an Administrative Hearing, attached hereto as Exhibit B, will ensure that Comcast is afforded a fair opportunity for full participation including the right to introduce evidence, to require the production of evidence, and to question witnesses.

7. The City finds that its actions are appropriate and reasonable in light of the mandates contained in federal law including 47 U.S.C. §546.

Adopted by the City Council of the City of West St. Paul, Minnesota, this 28th day of January 2019.

Attest:

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David J. Napier, Mayor	Shirley R Buecksler, City Clerk

EXHIBIT A

Analysis of Comcast's Formal Renewal Proposal to the Northern Dakota County Cable Communications Commission

Lack of System Specific Financial Data

Comcast chose not to follow the directions of the RFRP, which required that applicants provide financial information pertaining specifically to the Commission franchise area serving the Member Cities. Instead Comcast referred to Comcast Corporations' publicly available 10-K filings. In addition, Comcast submitted a one page income statement as well as a one-half page balance sheet (both labeled *Trade Secret*) prepared with data for the entire Comcast Twin Cities Region (Minnesota and Wisconsin). Comcast declined to provide any financial information specific to the Commission franchise area or for each Member City's franchise area, stating that such information was "confidential and proprietary" and "unnecessary."

Under 47 U.S.C. § 546(c) the Commission and Member Cities are required to consider whether Comcast's Formal Proposal is "reasonable to meet the future cable-related community needs and interests, <u>taking into account the cost of meeting such needs and interests</u>." Without financial information from Comcast that is specific to the cable system in the Commission franchise area, the Commission and Member Cities have limited ability to assess one of Comcast's primary objections to the Needs Report and Model Ordinance – that the cost associated with meeting the identified needs and interests render large portions of the Needs Report and Model Ordinance unreasonable.

Comcast's refusal to submit system specific financial data for the Commission franchise area is in direct violation of the requirements of the RFRP and eliminates the Commission's and Member Cities' ability to weigh the cost implications of the Needs Report and Model Ordinance against the Formal Proposal. Comcast appears to argue instead that the only consideration to be made by the Commission and Member Cities is whether the costs associated with the Needs Report will be "popular" among subscribers – a standard that Comcast appears to have created despite the requirements of 47 U.S.C. § 546. Comcast ignores the plain language of the Cable Act and the legislative history, which provide that "in assessing the costs [under § 546(c)(1)(D)], the cable operator's ability <u>to earn a fair rate of return on its investment</u> and the impact of such costs on subscriber rates are important considerations." H.R. Rep. No. 98-934, at 74, reprinted in 1984 U.S.C.C.A.N. at 4711.

When a formal proposal does not satisfy an identified need, it is the franchising authority's obligation to decide whether the operator has established that the cost of meeting that need so outweighs the value of the need that the formal proposal is nonetheless reasonable. Without any specific financial information provided by Comcast to allow the Commission and Member Cities to determine if Comcast can earn a fair rate of return, the Commission and Member Cities are left with only Comcast's opinion that pass-through costs associated with meeting the Needs Report and Model Ordinance would not be well received by subscribers.

The House Report regarding 47 U.S.C. § 546 states:

> *It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.*

H.R. Rep. No. 98-934, at 24, reprinted in 1984 U.S.C.C.A.N. at 4661.

As the House Report makes clear, the Commission and Member Cities are in the best position to understand the needs of the community, and those needs and interests have been set forth in writing by the Commission when it adopted the Needs Report and Model Ordinance. Comcast appears to argue that the Commission and Member Cities should not focus on whether the Formal Proposal meets the Needs Report <u>considering the cost implications to Comcast</u>, but rather the Commission and Member Cities should consider whether the Needs Report and Model Ordinance may result in a rate increase to subscribers. Comcast relies upon its Comcast Survey to create its own alternative needs ascertainment and argues that if the Needs Report results in any rate increase, no matter what the amount, subscribers would be upset and therefore the costs associated with the Needs Report must be unreasonable.

Nowhere does Comcast present any evidence that Comcast would be unable to continue in business or earn a fair rate of return if cable rates increase to meet the Needs Report and the requirements of the Model Ordinance. Comcast offers no evidence that subscribers would disconnect from the cable system if the Needs Report were met. In fact, over the past 30 years that Comcast has held a franchise in the Commission franchise area, Comcast has routinely increased rates virtually every year to recoup programming cost increases, capital expenditures, employee expenses and other expenses. These rate increases may have been unpopular with subscribers, yet Comcast still implemented the increases and presumably remains a profitable company in the franchise area. Moreover, Comcast has recently entered into cable franchise agreements in the Twin Cities metropolitan area that contain similar or higher fee assessments and more burdensome franchise obligations[1] than those set forth in the Model Ordinance, yet Comcast remains profitable and thriving in those franchise areas based upon the financial information relied upon by Comcast in its Formal Proposal.

Comcast's Alternative Needs Assessment

Despite the fact that 47 U.S.C. § 546(a) requires that the Commission and Member Cities, not Comcast, identify the future cable-related needs and interests, Comcast chose to create its own ascertainment of future needs by submitting as part of its Formal Proposal an alternative Ascertainment Issues Survey dated September 2015 ("Comcast Survey"). Comcast presented its alternative needs and interests throughout the Formal Proposal.

Because 47 U.S.C. § 546(a) requires that the Commission and Member Cities identify the future needs and interests, Comcast's alternative ascertainment is of no value when determining if the

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1 *See one recent example* - North Suburban Communications Commission ("NSCC") Cable Television Franchise Ordinance with Comcast, which became effective in the fall of 2017 (depending upon the date of adoption of the NSCC member cities).

Comcast Franchise meets the identified needs and interests contained in the Needs Report and Model Ordinance. To do otherwise would be to create a new ascertainment, one created by Comcast, which would then require a new opportunity to submit a formal proposal. The process would be forever circular if the Needs Report and Model Ordinance created by the Commission and Member Cities are not maintained in final form, exactly as those documents were approved by the Commission, so that Comcast's Formal Proposal can then be weighed against the needs assessment as contemplated by 47 U.S.C. § 546.

By rejecting large portions of the Needs Report and replacing its findings with Comcast's alternative ascertainment, Comcast has ignored the express requirements of 47 U.S.C. § 546(b). The responsibility to assess future cable-related needs and interests in the franchise area rests with the Commission and Member Cities. Comcast is entitled to demonstrate in its Formal Proposal that Comcast's cost of meeting those identified needs and interests renders such needs and interests unreasonable. However, Comcast is not entitled to exercise legislative authority and determine on behalf of the Commission and Member Cities what those needs and interests may be. Nor is Comcast entitled to submit a formal proposal based on an ascertainment that has not been adopted by the franchising authority – the Commission and Member Cities. Comcast's approach in this renewal turns the federally mandated formal renewal process on its head and is in direct violation of the statutory requirements contained therein.

Comcast refusal to respond to Model Ordinance

Within the Formal Proposal, Comcast completely ignored the Model Ordinance and instead drafted and submitted an entirely different model franchise document, which Comcast included as Exhibit 1 of the Formal Proposal - City of [X], Minnesota Ordinance Granting a Cable Television Franchise to Comcast of St. Paul, Inc. ("Comcast Model Franchise"). Comcast argues that the Comcast Model Franchise meets the Comcast Survey, with little regard for the finding of the Needs Report and the requirements of the Model Ordinance as prescribed by 47 U.S.C. § 546(a).

The Commission's Model Ordinance is substantially based on the existing franchise currently held by Comcast, as well as the terms and requirements of the April 2016 Cable Television Franchise Ordinance granted by the Commission and the Member Cities to CenturyLink. Under Minn. Stat. § 238.08 the Commission and Member Cities are required to maintain a level playing field on several key franchise issues, including the payment of franchise fees, public, education and government access requirements and the franchise area served. By ignoring the Model Ordinance and instead proposing the Comcast Model Franchise, Comcast places the Commission and Member Cities in the position of being unable to comply with Minn. Stat. § 238.08.

Comcast's Formal Proposal is unacceptable

Due to the volume of unacceptable provisions in the Formal Proposal, this Exhibit A will assess the differences between the Comcast Model Franchise on the one hand and the Needs Report and Model Ordinance on the other, to organize and present a list of reasons why Comcast's Formal Proposal is unacceptable and should be preliminarily denied. The below list outlines those portions of the Formal Proposal that are unacceptable as they do not meet the future cable-related community needs and interests set forth in the Needs Report and Model Ordinance, taking into account the costs associated with meeting those needs and interests. Since Comcast has substantially ignored the Model Ordinance and provided an entirely different Comcast Model Franchise, it is not possible to provide a section by section comparison as the documents are structured differently. The below section references are to the Model Ordinance prepared by the Commission and Member Cities.

<u>Section 1.2 – Definitions.</u>

"<u>Gross Revenues</u>" – Within the Comcast Model Franchise, Comcast has proposed material changes to the definition of "Gross Revenues" upon which Comcast's franchise fee payments are based. In fact, Comcast presents an entirely different definition from that contained in the Model Ordinance. The Needs Report requires that Comcast remit franchise fee payments on any and all revenue derived from the provision of cable services in the franchise area. Comcast's attempt to limit the gross amount on which the calculation is based is unacceptable.

Comcast proposes that "gross revenues" be calculated in accordance with Generally Accepted Accounting Principles ("GAAP"). GAAP are standards for maintaining a company's books and records. GAAP does not direct how to calculate cable service revenue, particularly gross revenues specifically defined in a contract (franchise). Comcast's Formal Proposal could allow items that should be counted as gross revenues to go uncounted and could further allow for deductions for bundled services (cable, telephone and broadband) in excess of the definition included in the Model Ordinance. Nothing in the Cable Act references GAAP, and it is inappropriate to use these principles to allow for the potential unilateral determination by Comcast of what is (or is not) to be counted as gross revenues. For the reasons set forth above, Comcast's proposed definition of Gross Revenues is unacceptable.

"<u>Right-of-Way</u>" – Comcast does not define the term "Right-of-Way," rather Comcast uses the term "Street" in its Comcast Model Franchise. The definition of Right-of-Way is contained in the existing Franchise and is carefully drafted to mirror definitions used by a number of the Member Cities in local city codes. Moreover, the Comcast definition for Street included in the Comcast Model Franchise contains a grant of authority to "entitle the Grantee to the use" of the Streets to install poles, wires and related facilities with no clarification how such a grant of authority would be administered by each Member City. For these reasons Comcast's proposal to use an overly broad definition for the term "Street" is not acceptable.

"<u>Subscriber</u>" – Comcast has made material changes to the definition of "Subscriber," which could have the impact of significantly altering the manner in which PEG fees are collected. By deleting the phrase, "[i]n the case of multiple office buildings or multiple dwelling units, the "Subscriber" means each lessee, tenant or occupant, not the building owner," Comcast is, in part, seeking to reduce the PEG fees to be paid and disproportionately assess PEG fees over its subscriber base. This is particularly true since Comcast is proposing a monthly PEG fee of $1.39 per subscriber.

By way of example, if such a PEG fee were to be implemented, each subscriber would remit such a fee as part of its monthly payment. But a 100 unit apartment building, with 80 cable Subscribers, may only have to remit one $1.39 PEG fee (instead of 80 x $1.39) because, under the Comcast Model Franchise, the landlord would be the only person (Subscriber) with a contractual relationship with Comcast, not each apartment lessee. Taking into consideration the number of multiple dwelling units ("MDU") in the Commission franchise area and the ten-year term contemplated by the Model Ordinance, the revenue that may be lost by the Commission and Member Cities due to this change would be significant.

In addition, for other purposes under the Model Ordinance, those living in MDUs may not be considered a "Subscriber," meaning they would have limited ability to exercise rights under customer service standards or related provisions of the Model Ordinance. Only the landlord would be considered the "Subscriber" under the Comcast Model Franchise.

For these reasons, Comcast's proposal to limit the definition of the term "Subscriber" is unacceptable.

Section 2 – Grant of Franchise.

Section 2.2 – Grant of Nonexclusive Authority. Comcast added Section 17.16 in its Comcast Model Franchise titled "Competitive Equity." Such a provision is not included in the Model Ordinance as this issue has long been addressed under Minn. Stat. § 238.08. Comcast's one-sided competitive equity mandate serves as a type of "most favored nations" provision that would allow Comcast to unilaterally walk away from franchise obligations if Comcast determines that another franchise has been granted with different material terms. In the alternative, Comcast seeks the option to abandon the cable franchise and opt into a competitor's franchise issued by a Member City.

Certainly every business would prefer to enter a contract where it is guaranteed the best possible terms and rates for a ten-year period and can unilaterally opt into a competitor's contract whenever it chooses. Comcast desires a franchise which grants to Comcast the authority to run cable and facilities down every street, sidewalk, road and alley. Comcast further desires the security of a long term franchise (ten (10) years) but wants the ability to abandon the franchise with no consequences. Comcast offers the Member Cities no such option for unilateral termination if Comcast enters into a more favorable franchise elsewhere in the country. Unless such a provision works to the benefit of both parties, there is no rationale in contract law, and no city would agree to such a one sided provision that can only work to the city's disadvantage.

Neither state nor federal law contains any similar competitive equity provisions other than the previously referenced Minn. Stat. 238.08, which is significantly limited in scope. The Model Ordinance presented by the Commission and Member Cities includes the Minn. Stat. 238.08 mandate. Comcast's competitive equity proposal seeks to provide Comcast with the maximum flexibility while conversely tying the Commission's and Member Cities' hands in negotiations with future competitive cable operators seeking franchises. For these reasons Comcast's competitive equity proposal is unacceptable.

Section 2.6 – Compliance with Applicable Laws and City Code. Comcast has proposed to delete entire sections of the Model Ordinance that would provide the Member Cities the option to amend their respective City Codes and have such code provisions govern over the terms of a franchise granted to Comcast. For this reason Comcast's proposal is unacceptable.

Section 2.8 – Territorial Area Involved. The Model Ordinance requires that in the event of annexation Comcast must serve the annexed territory so long as certain density criteria are met.

Comcast's Model Franchise instead includes a provision that would allow Comcast to refuse to serve an annexed area if a competing cable operator is already providing cable service in that area. Such a provision would mean that rather than receive the benefits of competition in the annexed area, those homes in the annexed area would risk being served by one cable operator and lose the benefits of competition. For this reason Comcast's proposal is unacceptable.

Section 4.10 – Home Wiring. The Model Ordinance contains a requirement that serves to protect residential customers and ensure consumer choice for all providers of cable service in the franchise area. Specifically the provision requires Comcast to provide its subscribers with a notification upon commencement of service, and annually thereafter, advising them of their rights relating to home wiring as expressed by the FCC. The Comcast Model Franchise is completely silent on this provision and offers no alternative for consideration. For this reason Comcast's proposal is unacceptable.

Section 5.3 (e) and (f) – reports. These provisions of the Model Ordinance require Comcast to provide: 1) a quarterly customer service compliance report demonstrating Comcast's compliance with the customer service requirements contained in the franchise; and 2) a monthly subscriber data report consistent with the information Comcast has historically provided over the prior franchise term. Comcast's proposal requires that the Commission and Member Cities "request" reports after a showing of "demonstrated need." Not receiving these reports would prevent the Commission from undertaking the monthly due diligence it has historically performed on behalf of the Member Cities and would significantly limit the ability of the Commission to monitor Comcast's compliance with customer service and the financial terms of the franchise. For this reason Comcast's proposal is unacceptable.

Section 6.2 – Subscriber Network Drops to Designated Buildings. The differences between the Model Ordinance and the Comcast Model Franchise are significant in this section. The differences relate to the type of service to be provided, the number of receivers (terminal equipment) to be provided, the number of locations to be served and many other details. For these reasons the Comcast proposal is unacceptable.

Section 7 – Institutional Network. As the Needs Report makes clear, the Institutional Network is an important issue to the Commission and Member Cities. The background regarding how the Institutional Network was financed, constructed, and utilized over the past 15+ year franchise term is set forth in the Needs Report. Section 7 of the Model Ordinance parallels much of the language contained in the existing Franchise between Comcast and Member Cities regarding the Institutional Network. The Commission updated the language to reflect that the Institutional Network is no longer a new construction project, but rather ongoing maintenance of an already existing network, one that was paid for by the institutional users of the network, not Comcast. Rather than provide any response to the Institutional Network or any alternative for consideration, Comcast's Formal Proposal and the Comcast Model Franchise are completely silent regarding the Institutional Network. In fact, there is literally no reference to the term "Institutional Network," nor any Institutional Network services, found anywhere in Comcast's Formal Proposal or Comcast's Model Franchise. As a result there is no ability for the Commission to provide a detailed analysis of any proposed differences between the Needs Report, Model Ordinance and

Comcast's Formal Proposal. Comcast's failure to provide any proposal regarding an Institutional Network is unacceptable.

<u>Section 9.1 – Performance Bond</u>. The Comcast Formal Proposal includes a $100,000 joint performance bond, which is consistent with the Needs Report and the Model Ordinance. However, the Comcast Model Franchise fails to include any procedure under which the Commission or Member Cities can draw on the performance bond. A detailed procedure was included in the Comcast Model Franchise for the Commission or Member Cities to draw on the letter of credit, but no similar process was provided for the performance bond. Consistent with the existing franchise between Comcast and the Member Cities, as well as the requirements set forth in the Model Ordinance, an agreed upon process must be included within the franchise to provide clarification that either the Commission or Member Cities can draw upon the performance bond and the steps which must be undertaken to accomplish such a draw. For these reasons this proposal by Comcast is unacceptable.

<u>Section 9.2(b) – Liquidated Damages</u>. The Needs Report and Model Ordinance have maintained the level of liquidated damages consistent with the amounts contained in the existing Franchise between Comcast and the Member Cities. The amounts of liquidated damages in the Model Ordinance also parallel the liquidated damage levels contained in the CenturyLink franchise. Comcast's Formal Proposal and Model Franchise substantially reduce the amount of each category of liquidated damages. Moreover, Comcast proposes to cap the liquidated damages at 120 days, a provision which is not included in the Model Ordinance nor has ever been included in past franchises between the parties. For these reasons this proposal by Comcast is unacceptable.

<u>Exhibit A – PEG Access</u>. Comcast's Formal Proposal and Comcast's Model Franchise fail in many respects to meet the cable-related needs and interests of the Commission and Member Cities regarding public, education and government ("PEG") access. Below is a list of unacceptable deficiencies in Comcast's Formal Proposal and Comcast's Model Franchise, as compared to the identified needs and interests contained in the Needs Report and Model Ordinance.

1. **Number of PEG channels**. The Commission and Member Cities require seven (7) channels exclusively for PEG use. Comcast proposes to make available three (3) PEG access channels. Comcast offers no evidence of cost, impact on Comcast's business model in the Commission franchise area, or ability to earn a fair rate of return in the Commission franchise area. Comcast simply offers that the Commission and member Cities do not need the current number of PEG channels based on Comcast's assessment of the needs, not based on the Needs Report.

2. **PEG channel technical quality.** Comcast fails to provide contractual commitments to maintain adequate PEG technical quality to meet the standards set forth in the Needs Report and Model Ordinance. Comcast proposes instead to meet a vague technical quality standard that provides no point of comparison upon which to measure whether the PEG technical quality is consistent with those of other commercial programmers, including local television broadcast stations carried on the cable system.

3. **PEG channels in HD**. Within the Needs Report and the Model Ordinance the Commission and Member Cities require that a minimum of three (3) PEG channels be provided in high definition ("HD") technology while also maintaining standard definition ("SD") channels. Through this technology transition, the Commission and Member Cities would reduce one SD PEG channel and would, at the end of the technology transition, receive a total of three (3) SD/HD simulcast channels, and three (3) additional SD channels available for PEG programming. Comcast proposes in its Comcast Model Franchise to make available two (2) SD/HD simulcast channels and one (1) additional SD channel for PEG programming.

4. **PEG HD end user equipment.** Comcast proposes a requirement that any costs of end user equipment associated with the delivery of SD PEG channels in HD format would be borne by the Commission and Member Cities and must be paid for out of PEG funds. This is not a provision contained within the Needs Report or the Model Ordinance.

5. **PEG channel locations.** The Model Ordinance requires that if the PEG channels are relocated to a different location by Comcast, the PEG channels will be located in reasonable proximity to other broadcast channels. Comcast proposes that upon any relocation the PEG channels will be located in reasonable proximity to any other commercial video channels. The result of this proposal means that the PEG channels could be moved to an entirely different channel neighborhood, nowhere near local broadcast channels. Such a result would be inconsistent with the Needs Report and Model Ordinance. Such relocation would have a significant adverse impact on subscriber's ability to locate and view PEG programming and is inconsistent with the Needs Report.

6. **Promotion of PEG access channels**. The Commission and Member Cities have a need for 30 second promotional spots inserted in unsold ad avail timeslots on the cable system consistent with Comcast's past practices under its existing Franchise. The Comcast proposal is silent on this issue.

7. **PEG financial support.** The Needs Report and Model Ordinance outlined a demonstrated need for a PEG fee in the amount of three percent (3%) of Comcast's gross revenues to support PEG programming consistent with applicable law. Comcast's proposal provides for a monthly PEG fee of $1.39 per subscriber. The difference between these proposals is substantial. Comcast's proposal represents less than 50% of the demonstrated need set forth in the Needs Report and Model Ordinance. Comcast does not rely upon the Needs Report prepared by the Commission and the Member Cities, but rather upon its own alternative ascertainment – the Comcast September 2015 Ascertainment Issues Survey ("Comcast Survey").

   Moreover, Comcast fails to mention that within the Twin Cities market, Comcast recently agreed to renew a cable franchise with a similarly situated cable commission, and in that franchise Comcast agreed to remit a PEG fee in the amount of three percent (3%) of gross revenues.[2] Comcast has not argued in its Formal Proposal that the PEG fee remitted in that

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2 *See* Section 6.8 of the North Suburban Communications Commission Cable Television Franchise Ordinance. The 3% PEG fee commenced January of 2018.

other franchise area is unreasonable based upon the associated cost. Presumably Comcast still manages to maintain a viable business model and generate a return on investment in this recently renewed franchise area despite the financial support provided for PEG. Within its Formal Proposal Comcast references its recent SEC 10-K filings to support its strong financial position and strength as a leader in the cable communications industry. Because Comcast refused to provide system specific financial data as requested in the RFRP, the Commission and Member Cities are unable to assess the financial impact of the identified needs and interests, including the 3% PEG fee, on Comcast's cable system serving the Commission franchise area.

8. **PEG technical support.** The Model Ordinance outlines a number of existing technical provisions that Comcast currently provides under its existing Franchises with the Member Cities. The Commission and Member Cities have sought to maintain these commitments going forward and have outlined such technical provisions in its Needs Report and Model Ordinance. Comcast's Formal Proposal is largely silent on these technical support obligations, or in the alternative, Comcast substantially changes the manner in which these historical commitments will be maintained going forward.

9. **Video-on-demand.** The Commission and Member Cities have included a commitment to continue the existing video-on-demand services made available for PEG programming by Comcast in the Commission franchise area. Comcast's Formal Proposal and Model Franchise are completely silent on the provision of any PEG video-on-demand.

10. **Interconnection**. The Commission and Member Cities have outlined the need to maintain interconnection with adjacent cable systems for the purpose of sharing Twin Cities PEG programming both within the Needs Report and within the Model Ordinance. Comcast presents a far different approach to interconnection, which may or may not be maintained by Comcast over the term of the franchise and would not be an enforceable obligation by the Member Cities.

For all of the reasons set forth above, the Formal Proposal presented by Comcast to support PEG access programming is unacceptable.

Exhibit C – Service to Public and Private Buildings. The list of institutions included in the Model Ordinance includes continuing existing Comcast service to numerous locations that are not proposed to be served by Comcast within its Model Franchise. Comcast's failure to provide service to the locations listed within Exhibit C of the Model Ordinance is unacceptable.

Exhibit D – List of Fiber Return Locations. A detailed list of fiber return locations was included by the Commission and Member Cities to maintain the existing functionality offered by Comcast on its cable system. Comcast provides a substantially reduced list of fiber return locations. In fact the total number of fiber return locations was reduced by Comcast by over eighty percent (80%). For this reason, Comcast's proposal is unacceptable.

End of Exhibit

EXHIBIT B

Rules for the Conduct of an Administrative Hearing

Section 1. The Commission hereby establishes procedural guidelines for purpose of the administrative hearing under the Cable Communications Policy Act of 1984 as follows:

A. The Commission shall appoint an administrative law judge ("hearing officer") to conduct the administrative hearing and issue recommended findings of fact for consideration by the Commission. Comcast and the Commission will jointly determine the process for selecting an administrative law judge, if necessary. The administrative hearing will be conducted, to the extent practicable and consistent with the requirements of the Cable Communications Policy Act of 1984, pursuant to the provisions for administrative hearings in the Minnesota Administrative Procedures Act. The specific requirements for the administrative hearing shall be as follows:

B. Pre-Hearing Discovery:

1. Each side is permitted limited requests for production of documents and twenty (20) interrogatories. With respect to interrogatories, the following rules apply:

    a. Interrogatories are to be answered by any officer or agent of either party, who shall furnish such information as is available to the party;
    b. Each interrogatory is to be answered separately and fulling in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and answer to the extent that the interrogatory is not objectionable. All objections shall be stated with specificity and any ground for objection which is not stated in a timely manner is waived unless the party's failure is excused by the Commission for good cause shown; and
    c. Interrogatories will be answered within the timeframe established by the hearing officer.

2. No depositions shall be permitted.
3. The hearing officer will rule on all discovery disputes which may arise.
4. Discovery shall close fifteen (15) days before the administrative hearing.

C. Pre-Hearing Disclosures:

1. Each side shall disclose to the other the identity of any person who may be used at the hearing to present expert testimony prior to the hearing date. The disclosure must be accompanied by a written report prepared and signed by the expert which shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the date or other information considered by the expert informing his or her opinions; and any exhibits to be used as a summary or in support of the opinions so rendered; the qualifications of the witness; the compensation to be paid

for the study and testimony of the expert; and a listing of other cases in which the expert has testified at trial within the preceding four (4) years.

2. Exhibits and witness lists will be mutually exchanged one (1) week prior to hearing date. Witness lists will briefly state the subject of the expected testimony of each witness.

D. Administrative Hearing

1. The hearing will be conducted on a date established by the hearing officer;
2. Each side may be represented by an attorney and shall be afforded the opportunity to present relevant evidence and to call and examine witnesses and cross-examine witnesses of the other party.
3. Commission members may not be called as witnesses nor may the Commission's or Comcast's legal counsel be called as witnesses;
4. Witnesses will be sworn;
5. The hearing shall be transcribed by a court reporter;
6. The hearing officer will determine evidentiary objections. Strict compliance with the federal rules of evidence will not be necessary;
7. Post-hearing briefs will be permitted in lieu of closing argument. Briefs will be mutually exchanged at a date established by the hearing officer; and
8. The hearing officer will issue recommended findings of fact based upon the record of the proceeding and stating the reasons therefore, pursuant to the Cable Communications Policy Act of 1984, as amended.

E. The Commission will review the recommended findings of fact from the hearing officer and will, upon request of the parties, permit oral argument before the Commission not to exceed thirty (30) minutes per party. Thereafter, the Commission will issue a written decision recommending to the Member Cities to grant or deny the proposal for renewal pursuant to the Cable Communications Policy Act of 1984, as amended.

Section 2. Neither the Commission's Needs Report dated April 4, 2018 nor Comcast's Formal Proposal dated August 15, 2018 have been amended or modified in any way since the dates submitted.

Section 3. The Commission finds that its actions are appropriate and reasonable in light of the mandates contained in federal law including 47 U.S.C. § 546.

End of Exhibit