



Staff Report

File #: 18-212

Version: 1

Date: 5/14/2018

Item #: 7.1a.

TO: Mayor and City Council
THROUGH: Steve Powers, City Manager
FROM: Ryan Zink, Franchise Administrator

SUBJECT:

Granting a franchise to Comcast of Oregon I, Inc. for placement of facilities in the City rights-of-way.

Ward(s): All Wards

Councilor(s): All Councilors

Neighborhood(s): All Neighborhoods

ISSUE:

Shall the City Council authorize the City Manager to execute the Cable Television Franchise Agreement and Side Letter Agreement between the City of Salem and Comcast of Oregon I, Inc.; and advance to second reading, Ordinance Bill No. 5-18, granting a franchise to Comcast of Oregon I, Inc. to make lawful use of the City rights-of-way to construct, operate, maintain, reconstruct, and repair a cable system for the purpose of providing cable services?

RECOMMENDATION:

Authorize the City Manager to execute the Cable Television Franchise Agreement and Side Letter Agreement between the City of Salem and Comcast of Oregon I, Inc.; and advance to second reading, Ordinance Bill No. 5-18, granting a franchise to Comcast of Oregon I, Inc. to make lawful use of the City rights-of-way to construct, operate, maintain, reconstruct, and repair a cable system for the purpose of providing cable services.

SUMMARY AND BACKGROUND:

Comcast of Oregon I, Inc. (Comcast) currently operates a nonexclusive cable system in the City of Salem. Granting this franchise to Comcast will allow them to continue to operate this system and give them continued authorization to place facilities necessary for operation of their system within the City's public rights-of-way.

Salem Revised Code (SRC) Chapter 43, the Cable Communications Franchise Code, provides for and

specifies the means to grant or renew nonexclusive cable television franchises to construct, operate, maintain and reconstruct cable television systems within the City limits. Since 2010, Comcast has been operating under limited duration extensions of its previous cable television franchise. During this time, staff and Comcast have negotiated the terms of Comcast's cable television franchise renewal.

The terms of the franchise, as set out in Ordinance No. 5-18 (Attachment 1), are contained in the Cable Television Franchise Agreement Between the City of Salem and Comcast of Oregon I, Inc. (Agreement) (Attachment 2), and all applicable local, state, and federal, laws and rules, and regulations, unless waived by action of the City Council.

FACTS AND FINDINGS:

Aspects of New Franchise: The terms of the new franchise with Comcast are comprehensive, including the following general categories: 1) Grant of the franchise, 2) Competitive equity (for both governmental and non-governmental cable providers, 3) Franchise fees and financial controls (auditing, insurance, and liability provisions), 4) Customer service requirements, 5) Public, Education, and Government (PEG) funding and High Definition (HD) channels, 6) Construction and Relocation, 7) Franchise violations and remedies.

The new franchise will be for a period of 10 years beginning July 1, 2018. To compensate the City for use of its rights-of-way, Comcast will continue to pay an annual franchise fee of five percent of gross revenues, and will pay an additional one and one-half percent of gross revenues to support PEG programming. Comcast will provide two HD PEG channels, one within 120 days of the effective date of the Agreement and a second after three years. Comcast will continue to provide, at no cost to the City, one outlet of cable service to all public use buildings designated by the City, and libraries and schools, as of the effective date of the Agreement, with provisions for additional outlets contained in the Agreement. The Agreement address the issue of grants of additional cable television franchises to other wireline competitors, and states that if the City or another governmental agency provides comparable video services it may be considered a competitor.

Side Letter Agreement: The Side Letter Agreement (Side Letter) (Attachment 3) sets forth commitments between the City and Comcast that are in addition to, but not part of, the new Agreement. The Side Letter addresses a unique aspect of the current franchise (originally negotiated with a predecessor to Comcast) in which Comcast provided an institutional network by means of *dark fiber* to the City for public, educational, and governmental use, including the interconnectivity of municipal buildings. The new Agreement does not include a provision allowing the City to continue use of this fiber, as cable companies are generally moving away from providing institutional networks as part of the negotiated terms. The Side Letter provides the terms under which the City, during the term of the Agreement, will return the fiber back to Comcast, as the City builds out its own network and no longer needs the fiber provided by Comcast. Additionally, the Side Letter sets the rate the City will pay to Comcast for any fiber the City continues to use after five years from the effective date of the Agreement. Under the Side Letter, the City will be returning 150 strands of fiber within 30 days, an additional 23 strands within 60 months, and the remaining nine strands by the end of

the ten-year Agreement. The attachment to the Side Letter is a list of all strands of fiber currently provided by Comcast (Attachment 4). Staff anticipates that the City will be able to meet these return obligations.

Resolution 2018-21 Waiving Certain Section and Provisions of the Cable Communications Franchise Code: During negotiations, staff determined that it was appropriate for certain terms of the Agreement to vary from the provisions of SRC Chapter 43-most of which were adopted in 1994. While certain terms of the Agreement conflict with SRC Chapter 43, the terms of the Agreement are highly negotiated for the convenience, safety, and general welfare of the public and potential subscribers to Comcast's cable service, and are similar to terms negotiated by other local communities. SRC 43.450 allows for any provision of SRC Chapter 43 to be waived by Council resolution. Adoption of Resolution 2018-21 will waive certain sections and provision of SRC Chapter 43 as set forth in Exhibit A to the Resolution, and summarized below:

Section 1. Definitions:

- a. Waiving the definition of *gross annual receipts*. The definition of Gross Revenue in the Agreement contains a comprehensive itemization regarding the calculation of gross revenue (e.g., addresses bundled services), was highly negotiated, and is consistent with the definition negotiated by other local communities.
- b. The definition of *school* is modified by removing the word "nonprofit." This broadens the definition of school and aligns it with the Agreement.

Section 2.

- a. Waiving the provision requiring Comcast to notify and seek prior approval from City Council when more than 10 percent ownership of the company is transferred. A 50 percent threshold was highly negotiated in the Agreement, and is consistent with what other local communities are requiring.
- b. Waiving the word "character" from the list of elements the City may consider when reviewing qualifications of a prospective transferee. Determining the character of a prospective transferee is subjective, and not including "character" as part of the qualifications is consistent with what other local communities are requiring.

Section 3. Waiving Comcast's obligation to reimburse the City for costs related to the negotiation of the current franchise renewal, as the City has not incurred substantial external costs during the franchise renewal process and the City will not be seeking reimbursement for internal costs.

Section 4. Waiving Comcast's obligation to reimburse the City for the cost of auditing Comcast's records with regard to franchise payments if the audit indicates a franchise fee underpayment of two percent or more. A four percent threshold was negotiated in the Agreement and is consistent with terms negotiated by other local communities.

Section 5. Waiving the procedure used prior to revoking Comcast's franchise, if revocation is appropriate. The terms and conditions regarding franchise violations, remedies for franchise violations, and revocation of the franchise were highly negotiated.

Section 6. Waiving additional provisions related to Comcast's obligation to reimburse the City for cost of negotiating the current franchise renewal, as the City has not incurred substantial external costs during the franchise renewal process and the City will not be seeking reimbursement for internal costs.

Section 7. Waiving SRC 43.140 regarding the *annual review of quality of service* of Comcast's cable communications system. The Agreement provides for various quality of service reviews, including a mid-term performance evaluation, and is consistent with terms negotiated by other local communities.

Section 8. Waiving provisions regarding certain system and services review procedures. The Agreement provides for various system and quality of service reviews, including a mid-term performance evaluation, and is consistent with terms negotiated by other local communities.

Section 9. Waiving the provision that the required performance bond run in favor of *any person* who may suffer damages as a result of Comcast's provision of cable services. The Agreement requires that the performance bond run in favor of the City, and is consistent with industry standards.

Section 10. Waiving the provision that the franchise grantee shall indemnify, defend and hold harmless the City, its officers, boards, commissions, agents, and employees, for liabilities arising out of the granting of the franchise. The Agreement provides for such indemnification, except that Comcast is not obligated to indemnify the City if the City intervenes in the proceedings, and is consistent with terms negotiated by other local communities.

Section 11. Waiving provision of service requiring all requests for service be fulfilled within 30 days. The Agreement provides for fulfilling service requests incorporating multiple factors for service response times, and is consistent with terms negotiated by other local communities.

Section 12. Waiving SRC 43.300 regarding consumer protections as it conflicts, in part with SRC 43.303, which also relates to consumer protections and service standards. No conflict exists between the Agreement and SRC 43.303 which sufficiently and comprehensively provides for such protections and standards.

Section 13. Waiving the City's right to recover from Comcast additional damages, losses, costs and expenses, including attorney fees, as may have been suffered or incurred by the City by reason of or arising out of breach of the franchise, beyond any civil penalties collected for such breach. This is consistent with terms negotiated by other local communities.

Section 14. Waiving a remedy procedure in which no penalty shall be imposed if Comcast corrects or is diligently proceeding to fully remedy a violation after receiving notice from the City of such violation. The Agreement allows monetary penalties to be assessed even if Comcast remedies a violation.

Section 15. Waiving SRC 43.425 regarding *separability [of] non material provisions*. Separability language in the Agreement is preferred by staff, provides appropriate protections, and is consistent

with terms negotiated by other local communities.

Section 16. Waiving SRC 43.430 regarding *separability [of] material provisions*. Separability language in the Agreement is preferred by staff, provides appropriate protections, and is consistent with terms negotiated by other local communities.

It is the intent of the City that only those provisions of SRC Chapter 43 specifically set forth in Exhibit A to Resolution 2018-21 be waived. Should it be subsequently determined that any provision of the Agreement conflicts with SRC Chapter 43, SRC Chapter 43 shall prevail.

The Agreement allows for modification by mutual consent of the parties. The City Manager may execute amendments to the Agreement if the following requirements are met:

- a. The amendments do not substantially expand the City's obligations;
- b. The amendments do not broaden the scope of the Agreement to other subject matters.
- c. The amendments do not increase the City's financial obligations; and,
- d. The amendments may extend the term or renew the Agreement so long as any other changes to the Agreement do not substantially expand the City's obligations.

RYAN ZINK
FRANCHISE ADMINISTRATOR

Attachments:

1. Ordinance Bill No. 5-18
2. Ord. No. 5-18 Exhibit A (Cable Television Franchise Agreement)
3. Side Letter Agreement
4. Side Letter Agreement Attachment