RECORD COPY

ORDINANCE NO. 2109

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, GRANTING TO QWEST CORPORATION D/B/A CENTURYLINK ON BEHALF OF ITSELF AND ITS OPERATING AFFILIATES ("CENTURYLINK"), A FRANCHISE TO OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM ("THE SYSTEM") IN THE CITY OF MILWAUKIE, OREGON ("THE CITY").

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

SECTION 1. Grant of Franchise. The City hereby grants to CenturyLink the right, privilege and authority to construct, maintain, operate, upgrade, and relocate its cables and related appurtenances ("Facilities") in, under, along, over and across the present and future streets, alleys and public ways of the City ("Public Ways"), for the purpose of providing telecommunication services to the City's inhabitants.

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

SECTION 3. Term. The Term of this Franchise is ten (10) years commencing on the date of Acceptance by CenturyLink as set forth in Section 2, above, but no sooner than thirty (30) days after the passage of this ordinance.

SECTION 4. Franchise Fee. Throughout the Term of this Franchise, CenturyLink will pay the City seven percent (7%) of CenturyLink's gross revenue as defined in ORS §§221.515 and 403.105, less net uncollectables for local exchange services rendered subscribers within the City limits.

Payment shall be made quarterly on or before sixty (60) days after the end of the preceding quarter (January-March; April-June; July-September; and October-December) during the Term of this Franchise.

Payments shall be accompanied by a statement of how the total due amount was calculated. Interest on late payments shall accrue from the due date at a rate equal to nine percent (9%) per annum and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether the City has provided notice of delinquency. However, should payment be insufficient due to an error in computation, interest payments shall not begin to accrue until after the discovery of the error by CenturyLink or receipt by CenturyLink of notice of the error.

In consideration of CenturyLink's agreement to pay the franchise fee, the City shall not impose other taxes on the Company during the Term of this Franchise. This provision does not exempt the property of the company from lawful ad valorem taxes, local improvement district

assessments, or conditions, exactions, fees and charges that are generally applicable to businesses within the City as required by city ordinance.

The obligation to pay the franchise fee imposed shall survive expiration of the Term of this Franchise as long as CenturyLink continues to exercise the rights granted under this Agreement. In the event this Agreement is terminated, CenturyLink shall pay the City appropriate pro rata fee for use of the City's right of way as determined in this Agreement through the date of termination within ninety (90) days of the termination date.

SECTION 5. Records Inspection. CenturyLink shall make available to the City, upon reasonable advance written notice of no less than thirty (30) days, such information pertinent only to enforcing the terms of this Franchise in such form and at such times as CenturyLink can reasonably make available. Subject to applicable laws, any information that is provided to the City and/or that the City reviews in camera is confidential and proprietary and shall not be disclosed or used for any purpose other than verifying compliance with the terms of this Franchise. Any such information provided to the City shall be immediately returned to CenturyLink following review. The City will not make copies of such information.

Any difference of payment due the City following audit shall be payable within sixty (60) days after written notice to CenturyLink, and shall bear interest at the rate of nine percent (9%) per annum if not paid within this timeframe. In the event the audit discloses that CenturyLink has underpaid by more than three percent (3%) of its annual payment obligation, CenturyLink shall pay the City's reasonable and actual expenses of performing the audit. The City shall not employ an auditor on a contingency fee basis.

SECTION 6. Non-Exclusive Franchise. The right to use and occupy the Public Ways of the City shall be nonexclusive, and the City reserves the right to use the Public Ways for itself or any other entity.

SECTION 7. City Regulatory Authority. The City reserves the right to adopt such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties consistent with applicable federal and state law. The City agrees to promptly notify CenturyLink of any such changes potentially applicable to this Franchise. Where such changes negatively impact any of CenturyLink's material rights hereunder, the Parties shall negotiate in good faith to revise the relevant terms of this Agreement; in the interim, the terms of this Agreement shall continue to apply.

SECTION 8. Indemnification. The City shall not be liable for any property damage or loss or injury to or death of any person that occurs in the construction, operation or maintenance by CenturyLink of its Facilities. CenturyLink shall indemnify, defend and hold harmless the City, its elected officials, employees, agents, and contractors, from and against claims, demands, liens and all liability or damage of whatsoever kind on account of CenturyLink's performance of this Franchise. The City shall: (a) give prompt written notice to CenturyLink of any claim, demand or lien with respect to which the City seeks indemnification hereunder; and (b) permit CenturyLink to assume the defense of such claim, demand, or lien. CenturyLink shall not be subject to liability for any settlement made without its consent. Notwithstanding the other provisions contained

herein, CenturyLink shall in no event be required to indemnify the City for any claims, demands, or liens arising from the negligence or wrongful actions or inactions of the City, its officials, boards, commissions, agents, contractors, and/or employees.

SECTION 9. Insurance Requirements. CenturyLink will maintain in full force and effect for the Term of the Franchise, at CenturyLink's expense, a comprehensive liability insurance policy written by a company authorized to do business in the State of Oregon, or will provide self-insurance reasonably satisfactory to the City, protecting it against liability for loss, personal injury and property damage occasioned by the operation of the System by CenturyLink. CenturyLink shall provide the City sufficient evidence of such insurance, including the City as an additional insured, and with the following coverage:

1. Comprehensive general liability insurance with limits not less than:
    a. Three million dollars for bodily injury or death to each person per occurrence and in the aggregate;
    b. Three million dollars for property damage resulting from any one accident per occurrence and in the aggregate; and,
    c. Three million dollars for all other types of liability per occurrence and in the aggregate.

2. Automobile liability for owned, non-owned and hired vehicles with a limit of one million dollars for each person and three million dollars for each accident.

3. Workers' compensation within statutory limits and employers' liability insurance with limits of not less than one million dollars.

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

SECTION 11. Plan, Design, Construction and Installation of CenturyLink's Facilities.

11.1 All Facilities under authority of this Ordinance shall be used, constructed and maintained in accordance with applicable law.

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

with written or oral notice of emergency work as soon as reasonably possible, but no later than one (1) business day after the emergency work has commenced.

11.3 To the extent practical and consistent with any permit issued by the City, all Facilities shall be located so as to cause minimum interference with the Public Ways and shall be constructed, installed, maintained, cleared of vegetation, renovated or replaced in accordance with applicable rules, ordinances and regulations of the City.

11.4 If, during the course of work on its Facilities, CenturyLink causes damage to or alters the Public Way or other public property, CenturyLink shall replace and restore such Public Way or public property at CenturyLink's expense to a condition reasonably comparable to the condition that existed immediately prior to such damage or alteration.

11.5 CenturyLink shall have the right to excavate the Public Ways subject to reasonable conditions and requirements of the City. Before installing new underground facilities or replacing existing underground facilities, each party shall first notify the other of such work and allow the other party, at its own expense, to share the trench for laying its own facilities therein, provided that such action will not unreasonably interfere with the first party's use of the trench or unreasonably delay project completion.

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

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

SECTION 12. <u>Relocation of Facilities</u>.

12.1 Relocation for the City. CenturyLink shall, upon receipt of advance written notice of not less than thirty (30) days, protect, support, temporarily disconnect, relocate, or remove any CenturyLink property located in a Public Right of Way when required by the City consistent with its police powers. CenturyLink shall be responsible for any costs associated with these obligations to the same extent as other users of the Right of Way (other than the City, if applicable). If CenturyLink fails to remove or relocate any property when required to do so by the City for a public project, CenturyLink shall be responsible for paying the full cost of the removal or relocation and any administrative costs incurred by the City in removing the property and obtaining reimbursement.

12.2 Relocation for a Third Party. CenturyLink shall, at the request of any person holding a lawful permit issued by the City, protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Street, as applicable, any CenturyLink property, provided that the cost of

such action is borne by the person requesting it and CenturyLink is given reasonable advance written notice. In such situation, CenturyLink may also require advance payment. For purposes of this subsection, "reasonable advance written notice" shall mean no less than fourteen (14) days for a temporary relocation, and no less than one hundred twenty (120) days for a permanent relocation.

12.3 Alternatives to Relocation. CenturyLink may, after receipt of written notice requesting a relocation of Facilities, submit to the City written alternatives to such relocation within five (5) business days after receipt of written notice from the City. Such alternatives shall include the use and operation of temporary transmitting facilities in adjacent Public Ways. The City shall promptly evaluate such alternatives and advise CenturyLink in writing if one or more of the alternatives are suitable. If requested by the City, CenturyLink shall promptly submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by CenturyLink full and fair consideration. In the event the City, acting in good faith, ultimately determines that there is no other reasonable alternative, CenturyLink shall relocate the components of the Facilities.

12.4 Abandoned Facilities. Within one year of CenturyLink's permanent cessation of use of City's Public Ways, or any portion thereof, CenturyLink shall remove the affected facilities or make other arrangements reasonably acceptable to the City. CenturyLink may abandon in place its facilities with the written approval of the City.

SECTION 13. Vegetation Management. CenturyLink shall have the authority to trim trees and other natural growth in the Public Ways in order to access and maintain the Facilities in compliance with applicable law and industry standards.

SECTION 14. Renewal. At least one hundred twenty (120) days prior to the expiration of this Franchise, CenturyLink and the City shall either agree to extend the Term or use best faith efforts to renegotiate a replacement Franchise agreement.

SECTION 15. Revocation of Franchise for Noncompliance.

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

15.2 CenturyLink shall have thirty (30) days from receipt of the written notice described in subsection 15.1 to either respond to the City, contesting the assertion of noncompliance, or otherwise initiate reasonable steps to remedy the asserted noncompliance issue, notifying the City of the steps being taken and the projected date that they will be completed.

15.3 If CenturyLink cures the basis for termination or if CenturyLink initiates efforts satisfactory to the City to remedy the basis for termination and the efforts continue in good faith within the thirty (30) day cure period, the City shall not exercise its remedy rights. If CenturyLink fails to cure the basis for termination or if CenturyLink does not undertake and/or

maintain efforts satisfactory to the City to remedy the noncompliance within the thirty (30) day cure period, then the City Council may exercise the remedies specified herein.

15.4 In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate. In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code or other law, the City reserves the right at its sole option to impose a financial penalty of up to $1,000.00 per violation of a material provision of this Franchise when the opportunity to cure has passed.

15.5 In the event that CenturyLink does not comply with subsection 15.2, above, or, if CenturyLink does comply with subsection 15.2 but the City and CenturyLink remain in disagreement over whether CenturyLink is, in fact, not compliant with a material provision of this Franchise, the City shall schedule a public hearing to address the asserted noncompliance issue. The City shall provide CenturyLink at least ten (10) days prior written notice of and the opportunity to be heard at the hearing.

15.6 Subject to applicable federal and state law, in the event the City, after the hearing set forth in subsection 15.5, determines that CenturyLink is noncompliant with this Ordinance, the City may:

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

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

15.8 Notwithstanding the foregoing provisions in this Section 15, neither party waives any of its rights under applicable law.

SECTION 16. <u>No Waiver of Rights</u>. Neither the City nor CenturyLink shall be excused from complying with any of the terms and conditions contained herein by any failure of the other, or

any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions. Each party expressly reserves any and all rights, remedies, and arguments it may have at law or equity, without limitation, and to argue, assert, and/or take any position as to the legality or appropriateness of any provision in this Franchise that is inconsistent with State or Federal law, as may be amended.

SECTION 17. Transfer of Franchise. CenturyLink's right, title, or interest in the Franchise shall not be sold, transferred, assigned, or otherwise encumbered without notice to the City, except when said sale, transfer, assignment, or encumbrance is to an entity controlling, controlled by, or under common control with CenturyLink, or for transfers in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of CenturyLink in the Franchise or Facilities in order to secure indebtedness.

SECTION 18. Amendment. Amendments to the terms and conditions contained herein shall be mutually agreed upon by the City and CenturyLink and formally adopted by the City Council as an ordinance amendment.

SECTION 19. Notices. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within two days after such notice is deposited in the United States Mail, postage prepaid, certified, and addressed to the Parties as set forth below:

The City:
City of Milwaukie
Attn: Finance Director
10722 SE Main Street
Milwaukie, Oregon 97222

CenturyLink:
Franchise Rights-of-Way Attorney
1801 California St., 9th Floor
Denver, Colorado 80202

SECTION 20. Severability. If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority, including any state or federal regulatory authority having jurisdiction thereof, or unconstitutional, illegal or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

Read the first time on 12/1/15, and moved to second reading by 4:0 vote of the City Council.

Read the second time and adopted by the City Council on 12/1/15.

Signed by the Mayor on 12/1/15.

Mark Gamba, Mayor

ATTEST:

Pat DuVal, City Recorder

APPROVED AS TO FORM:
Jordan Ramis PC

City Attorney

ACCEPTANCE AND GUARANTEE

City Manager
City of Milwaukie, City Hall
10722 SE Main Street
Milwaukie, OR 97222

This is to advise the City of Milwaukie, Oregon (the "City") that CenturyLink hereby accepts the terms and provisions of Ordinance No. 2109, passed by the City Council on December 1, 2015 granting a franchise. CenturyLink agrees to abide by all provisions, terms and conditions of the agreement subject to applicable federal, state and local law.

Authorized Signature: **CenturyLink**

BY: _____

TITLE: VP OPERATIONS

DATE: 22 DEC 2015