

# CITY OF RIO COMMUNITIES

## ORDINANCE NO. 2017-55

### Chapter 16: Franchises

#### Article 4: QWEST Corporation D/B/A CenturyLink

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#### 16-4-1 SCOPE OF FRANCHISE

AN ORDINANCE GRANTING A FRANCHISE TO QWEST CORPORATION D/B/A CENTURYLINK ON BEHALF OF ITSELF AND ITS OPERATING AFFILIATES ("CENTURYLINK") TO OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM ("THE SYSTEM") IN THE CITY OF RIO COMMUNITIES, NEW MEXICO ("THE CITY") AND TO USE THE STREETS, AVENUES, EASEMENTS, RIGHT-OF-WAY, ALLEYS, HIGHWAYS, SIDEWALKS, PATHS, BRIDGES AND OTHER STRUCTURES AND PUBLIC PLACES AND GROUNDS IN SAID CITY FOR A PERIOD OF THREE (3) YEARS; AND PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS HEREIN MENTIONED, AND PROVIDING FOR THE PAYMENT TO SAID CITY OF A PERCENTAGE MENTIONED, AND PROVIDING FOR THE PAYMENT TO SAID CITY OF A PERCENTAGE OF CERTAIN REVENUES OF GRANTEE FROM ITS OPERATIONS HEREIN.

**16-4-2 SHORT TITLE**

This Ordinance shall be known and may be cited as the CenturyLink Franchise Ordinance.

**16-4-3 GRANT OF FRANCHISE**

That the City of Rio Communities, New Mexico (hereinafter called "City"), which term includes all areas within the boundaries of said City, as now existing or hereafter extended), hereby grants to and vests in QWEST Corporation D/B/A CenturyLink and duly qualified to do business in the State of New Mexico (hereinafter called the "Company"), The City hereby grants to Company 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 in the City ("Public Ways"), including for the purpose of providing telecommunication services to the City's inhabitants, provided the Company complies with all federal, state and local laws, ordinances and regulations, pertaining to the conditions and terms of this franchise.

**16-4-4 ACCEPTANCE BY THE COMPANY**

**16-4-4A** The Company shall, within thirty (30) days after the passage and approval of this ordinance, file in the office of the Municipal Clerk of the City, a written statement of acceptance duly signed and acknowledged by the proper officer of the Company authorized to execute such acceptance.

**16-4-4B** In the event such acceptance is not filed within said period, this ordinance and the rights, privileges, powers and obligations contained herein shall be terminated and void; PROVIDED, HOWEVER, the City may by resolution extend the time herein for the filing of such acceptance for an additional period.

**16-4-5 TERM**

All grants and privileges herein granted and conferred upon the Company, its legal representatives, successors and assigns, shall continue in full force and effect for a period of three (3) years from the date of this ordinance, and shall automatically renew from year to year unless either party gives advance written notice to the other party at least 120 days prior to expiration of the current term.

**16-4-6 RECORDS INSPECTION**

The Company shall make available to the City, upon reasonable advance written notice of no fewer than sixty (60) days, such information pertinent only to enforcing the terms of this Ordinance in such form and at such times as the Company 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 Ordinance. Any such information provided to the City shall be immediately returned to the Company following review. The City will not make copies of such information.

**16-4-7 NON-EXCLUSIVE FRANCHISE**

The right to use and occupy the Public Ways shall be nonexclusive, and the City reserves the right to use the Public Ways for itself or any other entity. The City's use, however, shall not unreasonably interfere with the Company's Facilities or the rights granted the Company herein.

**16-4-8 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 the Company of any such changes potentially applicable to this Franchise.

**16-4-9 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 the Company of its Facilities. The Company shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of the Company's use of the Public Ways. The City shall: (a) give prompt written notice to the Company of any claim, demand or lien with respect to which the City seeks indemnification hereunder; and (b) permit the Company to assume the defense of such claim, demand, or lien. The Company shall not be subject to liability for any settlement made without its consent. Notwithstanding the other provisions contained herein, the Company 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.

**16-4-10 INSURANCE REQUIREMENTS**

The Company will maintain in full force and effect for the Term of the Franchise, at the Company's expense, a comprehensive liability insurance policy written by a company authorized to do business in the State of New Mexico, 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 the Company. Such insurance will be in an amount not less than \$1,000,000.00. The Company will also maintain Worker's Compensation coverage throughout the term of this Franchise as required by law. Evidence of such insurance will be provided to the City upon request.

**16-4-11 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.

**16-4-12 PLAN, DESIGN, CONSTRUCTION AND INSTALLATION OF THE COMPANY'S FACILITIES**

**16-4-12A** All Facilities under authority of this Ordinance shall be used, constructed and maintained in accordance with applicable law.

**16-4-12B** The Company 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. The Company will provide as-built route maps of new facilities placed in the Public Ways pursuant to a permit issued by the City. The Company will abide by all applicable ordinances and reasonable rules, regulations and requirements of the City consistent with applicable law, and the City may inspect the manner of such work and require remedies as may be reasonably necessary to assure compliance. Notwithstanding the foregoing, The Company shall not be obligated to obtain a permit to perform emergency repairs.

**16-4-12C** 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.

**16-4-12D** If, during the course of work on its Facilities, the Company causes damage to or alters the Public Way or other public property, the Company shall replace and restore such Public Way or public property at the Company's expense to a condition reasonably comparable to the condition that existed immediately prior to such damage or alteration.

**16-4-12E** The Company 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.

**16-4-12F** 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 the Company's Facilities, the City shall give written notice to the Company, 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 the Company's poles, wires, conduits, conductors, pipes, and appurtenances.

**16-4-12G** The Company 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.

#### **16-4-13 RELOCATION OF FACILITIES**

**16-4-13A** Relocation for the City. The Company shall, upon receipt of advance written notice of not fewer than ninety (90) days, protect, support, temporarily disconnect, relocate, or remove any the Company property located in a Public Way when required by the City consistent with its police powers. The Company shall be responsible for any costs associated with these obligations to the same extent as other users of the respective Public Way.

**16-4-13B** Relocation for a Third Party. The Company 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 the Company property, provided that the cost of such action is borne by the person requesting it and the Company is given reasonable advance written notice. In such situation, the Company may also require advance payment. For purposes of this subsection, “reasonable advance written notice” shall mean no fewer than fourteen (14) days for a temporary relocation, and no fewer than one hundred twenty (120) days for a permanent relocation.

**16-4-13C** Alternatives to Relocation. The Company may, after receipt of written notice requesting a relocation of Facilities, submit to the City written alternatives to such relocation. 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 the Company in writing if one or more of the alternatives are suitable. If requested by the City, the Company shall promptly submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by the Company full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, the Company shall relocate the components of the System as otherwise provided herein. Notwithstanding the foregoing, the Company shall in all cases have the right to abandon the Facilities.

**16-4-14 VEGETATION MANAGEMENT**

The Company 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.

**16-4-15 FRANCHISE FEE**

In consideration of the rights, privileges, and franchise hereby granted, said Company, its successors and assigns, shall pay the City from and after the date of the acceptance of this franchise an amount equal to three percent (3%) of the monthly recurring revenues received for basic local exchange service within the City for services listed in Appendix A. Payments shall be made on a monthly basis, on or before the 30th day following the close of such month.

**16-4-15A** The franchise fee and payments made hereunder are and shall be in lieu of any and all other franchise, license, privilege, occupation, excise or revenue taxes upon the business, revenue or property of CenturyLink, or any part thereof, situated in the City during the term of this franchise, provided that ad valorem property taxes and special assessments for local improvements as well as GRT’s shall remain applicable.

**16-4-16 REVOCATION OF FRANCHISE FOR NONCOMPLIANCE**

**16-4-16A** In the event that the City believes that the Company has not complied with the terms of the Franchise, the City shall informally discuss the matter with the Company. If these discussions do not lead to resolution of the problem, the City shall notify the Company in writing of the exact nature of the alleged noncompliance.

**16-4-16B** The Company shall have thirty (30) days from receipt of the written notice described in subsection 16A 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.

**16-4-16C** In the event that the Company does not comply with subsection 16B, above, the City shall schedule a public hearing to address the asserted noncompliance issue. The City shall provide the Company at least ten (10) days prior written notice of and the opportunity to be heard at the hearing.

**16-4-16D** Subject to applicable federal and state law, in the event the City, after the hearing set forth in subsection 16C, determines that the Company is noncompliant with this Ordinance, the City may:

- (1) Seek specific performance of any provision which reasonably lends itself to such remedy, as an alternative to damages; or
- (2) Commence an action at law for monetary damages or other equitable relief; or
- (3) In the case of substantial noncompliance with a material provision of the Ordinance, seek to revoke the Franchise in accordance with subsection 16E.

**16-4-16E** Should the City seek to revoke the Franchise after following the procedures set forth above, the City shall give written notice to the Company. The Company 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 the Company, 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 the Company an opportunity to state its position on the matter, after which the City shall determine whether or not the Franchise shall be revoked. The Company 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.

**16-4-16F** Notwithstanding the foregoing provisions in this Section 16, the Company does not waive any of its rights under applicable law.

**16-4-17 NO WAIVER OF RIGHTS**

Neither the City nor the Company 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 Ordinance that is inconsistent with State or Federal law, as may be amended.

**16-4-18 TRANSFER OF FRANCHISE**

The Company'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 the Company, or for transfers in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Company in the Franchise or Facilities in order to secure indebtedness.

**16-4-19 AMENDMENT**

Amendments to the terms and conditions contained herein shall be mutually agreed upon in writing by the City and the Company.

**16-4-20 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:

City Manager  
City of Rio Communities  
360 Rio Communities Blvd  
Rio Communities, NM 87002

CenturyLink:  
Director, Local Government Affairs  
CenturyLink  
400 Tijeras Ave NW, Suite 510  
Albuquerque, NM 87102

and

CenturyLink  
Franchise Rights-of-Way  
710 E. Mifflin Street  
Madison, Wisconsin 53706

**16-4-21 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.

**EFFECTIVE DATE**

This Ordinance shall, subject to the provisions of Section 9 and 10 herein, take effect on the 15 day of February, 2017 in accordance with statute (NMSA 3-42-1 franchises; authorization).

**PASSED, APPROVED AND ADOPTED THIS 10th DAY OF January 2017.**

**City of Rio Communities Governing Body**

\_\_\_\_\_  
Mark Gwinn,  
Mayor

\_\_\_\_\_  
Margaret (Peggy) Gutjahr,  
Councilor Mayor Pro-tem

\_\_\_\_\_  
William (Bill) Brown,  
Councilor

\_\_\_\_\_  
Arturo R. Sais,  
Councilor

\_\_\_\_\_  
Thomas J. Scroggins,  
Councilor

ATTEST:

\_\_\_\_\_  
Elizabeth (Lisa) Adair,  
Municipal Clerk



## Appendix A

### **Service categories included in revenue for calculation of Franchise fee:**

1. Business Local Access—including Flat Rate, Multiparty, and Extended Area Service
2. Business Measured Usage Local Access Service
3. Flat Usage Local Access Trunks
4. Low Income Telephone Assistance Program Local Access
5. Measured Rate Local Access Trunk Usage
6. Message Rate Local Access Trunk Usage
7. Public Access Line (PAL) Service
8. Residential Local Access—including Flat Rate, Multiparty, and Extended Area Service
9. Residential Measured Usage

### **A non-exclusive listing of categories of revenue not representing the retail sale of basic local exchange services, and therefore excluded from the calculation of any fee due to the City:**

1. Proceeds from the sale of bonds, mortgages, or other evidences of indebtedness, securities or stocks;
2. Bad debt write-offs and customer credits
3. Revenue from directory advertising
4. Any amounts collected from customers that are to be remitted to a federal or state agency as part of a Universal Service Fund or other government program, including but not limited to support for the hearing impaired
5. Any amounts collected for taxes, fees, or surcharges and paid to the federal, state or local governments
6. Revenues from internet access
7. Revenues from digital or other electronic content, such as computer software, music and video downloads
8. Revenues from equipment sales, rentals, installation and maintenance
9. Revenues from any carrier purchased for resale
10. Revenues from private line services not for switched local access service