



August __, 2021

DRAFT

Jim Nugent
City Attorney
435 Ryman Street
Missoula, MT 59802

Re: Report regarding TDS Metrocom, LLC Application for a Cable Franchise – City of Missoula, Montana

Dear Jim:

TDS Metrocom, LLC ("TDS") has requested a cable franchise ("Franchise") from the City of Missoula, Montana ("City") to provide cable services in the City.

The City contacted Moss & Barnett seeking input regarding the appropriate procedure to be followed to consider the award of a Franchise to TDS or any other applicant. Moss & Barnett reviewed applicable federal law with City representatives (attached hereto as *Exhibit A*) and developed a franchise procedure for the City to follow.

Section 5.80.060A of the Missoula City Code sets forth certain requirements for an application for a cable franchise. The City prepared a Request for Proposals - Official Application Form and applications were due July 23, 2021. The City received only one application - from TDS. Upon receipt of any application for a Franchise the City has 120 days to prepare a report and make recommendations to the City Council.

Pursuant to Section 5.80.060A, in making any determinations as to any application, the City shall give due consideration to the character and quality of the service proposed, rates to subscribers, experience, character, background and financial responsibility of any applicant, and its management and owners, technical and performance quality of equipment, willingness and ability to meet construction and physical requirements, and to abide by policy conditions, franchise limitations and requirements, and any other consideration deemed pertinent by the City for safeguarding the interest of the City and the public.

The City Council is required to consider an application at a public hearing and, in its discretion, determine to accept or reject such application. Thereafter the City Council shall decide and specify the terms and conditions of any Franchise to be granted.

I. Overview of TDS

TDS is a Delaware limited liability company qualified to do business in the State of Montana and is an applicant for a competitive cable franchise agreement (hereinafter referred to as the

"Franchise") from the City. TDS is a wholly-owned subsidiary of TDS Long Distance Corporation. TDS Long Distance Corporation is a wholly-owned subsidiary of TDS Telecommunications LLC which is a wholly-owned subsidiary of Telephone and Data Systems, Inc., a Fortune 1000 company ("TDS"). On January 25, 2021, TDS became qualified to do business in the state of Montana and is active and in good standing with the Montana Secretary of State. The Business Search details from the Montana Secretary of State are attached hereto as *Exhibit B*. TDS owns and operates cable systems in the following 12 states: Colorado, Idaho, Minnesota, New Hampshire, New Mexico, North Carolina, Oregon, Tennessee, Texas, Utah, Washington, and Wisconsin. TDS has recently been granted a franchise from Billings, Montana.

TDS is headquartered in Madison, Wisconsin. TDS delivers high-speed internet, TV entertainment and phone services to nearly 900 rural, suburban, and metropolitan communities across the United States. TDS proposes to construct an all fiber, fiber to the home, cable system in Missoula which will provide capacity to offer cable television services to residences and businesses in the City. TDS will deploy fiber-optic based infrastructure, employing FTTX technologies. Once at the residential household the signal will be delivered wirelessly to set top boxes.

The cable business is inherently capital intensive, requiring capital for build-out and maintenance of its communications systems. TDS estimates the cost of constructing the proposed cable system in the City will be \$46 million and will take between 24-48 months to complete.

II. Financial Qualifications

Cable providers and telecommunication companies operate in a competitive environment and the financial performance of cable television operators, like TDS, is subject to many factors, including, but not limited to, the general business conditions, programming costs, incumbent cable operators, digital broadcast satellite service, technology advancements, changes in consumer behavior, regulatory requirements, advertising costs, and customer preferences, as well as competition from multiple sources which provide and distribute programming, information, news, entertainment and other communication services.

TDS provided a copy of its 10-K financial statement for year-end 2020. This financial statement is for TDS's parent company, Telephone and Data Systems Inc., a publicly traded company. Financial statements of TDS Metrocom, LLC were not provided. TDS also provided a 2020 Annual Report for Telephone and Data Systems Inc.

Federal law and FCC regulations provide franchising authorities, such as the City, with limited guidance concerning the evaluation of the financial qualifications of an applicant for a cable franchise or a competitive cable franchise. In evaluating the financial capabilities of a cable operator, the City may wish to consider the performance of an applicant based on the applicant's historical performance and its projected or budgeted financial information along with its financial capabilities (for funding and financing its entire operation). The City was not provided with such information for TDS Metrocom, LLC, as the applicant. Many large cable operators have multiple operating subsidiaries that hold groups of franchises and operating systems and do not provide or disclose separate subsidiary financial information. However, a general review of Telephone

and Data Systems Inc.'s financial information provides some insight into the general financial operations of TDS with respect to its application.

III. Summary

TDS's operations include both cable television services and non-cable television services. The TDS financial information includes all of Telephone and Data Systems Inc.'s operations, including the non-cable television services.

We are not aware of any state or federal standards by which to assess the financial qualifications of a competitive cable operator seeking a Franchise in the City. The FCC has provided minimum standards to consider when assessing the qualifications of a prospective transferee when a cable system is sold or control of the franchise changes. This FCC financial qualification standard is found in FCC Form 394.

Using the FCC Form 394 to establish an absolute minimum standard of financial qualifications that a proposed applicant must demonstrate in order to be qualified to obtain and operate a cable system, TDS would have the burden of demonstrating to the City's satisfaction that TDS has "sufficient net liquid assets on hand or available from committed resources" to obtain and operate the system in the City, together with its existing operations, for three (3) months. This minimum standard is not easy to apply to a company that is in growth mode and expanding its operations and must construct the cable system in the City before commencing operations. As stated above, the 10-K Financial Statements and 2020 Annual Report provided by TDS relate solely to TDS's parent entity, Telephone and Data Systems Inc.

Based solely on Telephone and Data Systems Inc. financial information, TDS has demonstrated it has sufficient funding to finance, operate and expand TDS's operations in the past. Due to the limited financial information that was provided regarding the applicant – TDS Metrocom, LLC, and the many uncertainties regarding future operations, there is not enough information that has been made available to make any definitive conclusions regarding the future financial qualifications of TDS Metrocom, LLC independently, to own and operate a cable system serving the City. However, based upon the strength of the information provided by Telephone and Data Systems Inc. and the standards for review established under applicable law, we see no basis on which the City can deny the TDS application due to a lack of financial qualifications.

In the event the City elects to proceed with approving the issuance of a Franchise, the assessment of TDS Metrocom, LLC and its parent entity Telephone and Data Systems Inc.'s, financial qualifications should not be construed in any way to constitute an opinion as to the financial capability or stability of TDS to (i) complete construction of a competitive cable television system in the City, and (ii) operate the cable system. The City is solely responsible in determining the assessment of TDS's financial qualifications and its capability to operate a competitive system in the City. Consequently, we make no representation regarding the sufficiency of the financial information provided or used either for the purpose for which this analysis of financial qualifications was requested or for any other purpose.

Moss & Barnett has prepared a proposed Resolution regarding TDS's Application for a cable franchise - attached hereto as *Exhibit C*.

Jim Nugent
August __, 2021
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After you have had a chance to review this information, please contact me with any questions you may have or if I can provide any additional information.

Very truly yours,

[Sent via E-Mail]

Brian T. Grogan

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EXHIBIT A APPLICABLE LAW

Statutory Requirements:

A. Federal Regulatory Scheme: Competition among Cable Television Providers and the Federal Cable Act

The Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996 (hereinafter collectively referred to as the "Cable Act"), contains many provisions relevant to the application before the City. According to the Cable Act, one of its primary purposes is to:

*promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.*¹

Furthermore, 47 U.S.C. Section 541(a)(1) provides that a franchising authority may award one or more franchises within its jurisdiction. To that end, the Cable Act states:

*that a franchising authority may not grant an exclusive franchise and **may not unreasonably refuse to award an additional competitive franchise.***²

Any applicant whose application for a second franchise has been denied by a final decision of a franchising authority is not without recourse. The applicant may appeal an adverse decision pursuant to the provisions of Section 635 of the Cable Act.

The Cable Act also provides that a city may require certain assurances from the prospective franchisee. Subsection 4 of 47 U.S.C. Section 541(a) provides that:

in awarding a franchise, the franchising authority –

- a. *shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;*
- b. *may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and*
- c. *may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.*

When Congress passed the 1992 amendments to the Cable Act, Congress suggested that it favors competition in the delivery of cable communications services. The Senate report that accompanied the amendments concluded that:

¹ 47 U.S.C. Section 521(b).

² 47 U.S.C. Section 541(a)(1) (emphasis added).

*Based on the evidence and the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that **local franchising authorities should be encouraged to award second franchises**. Accordingly, [the Cable Act as amended], prohibits local franchising authorities from unreasonably refusing to grant second franchises.³*

B. Federal Communications Commission Observations on Competition in the Cable Television Industry

The Federal Communications Commission's ("FCC's") annual competition reports in video markets have found that subscribers have generally benefited from "head-to-head" competition in the delivery of cable services. Benefits enjoyed by consumers as a result of the increased competition include:

- a. lower monthly charges for services and equipment;*
- b. additional program offerings;*
- c. access to alternative sources of telecommunications and Internet services;*
- d. new digital services; and*
- e. better customer service from the incumbent cable operator.*

The FCC completed rulemaking proceedings on competition in the video marketplace resulting in the FCC's issuance of what is now known as the FCC 621 Order.⁴ The Sixth Circuit affirmed the FCC 621 Order in 2008.⁵ In the 621 Order the FCC summarized the evidentiary record in the following manner:

The record indicates that in today's market, new entrants face "steep economic challenges" in an "industry characterized by large fixed and sunk costs," without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace. According to commentators, "a competitive video provider who enters the market today is in a fundamentally different situation" from that of the incumbent cable operator: "[w]hen incumbents installed their systems, they had a captive market," whereas new entrants "have to 'win' every customer from the incumbent" and thus do not have "anywhere near the number of subscribers over which to spread the costs."

³ (emphasis added). S. Rep. No. 102-92, June 28, 1991, reprinted in 1992 U.S. Code Cong. & Admin. News 1133, 1141, 1146, 1151; H.Conf. Rep. No. 102-862, reprinted in 1992 U.S. Code Cong. & Admin. News 1231, 1259.

⁴ See *In the Matter of Implementation of Section 612(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 5101 (Mar. 5, 2007).

⁵ See *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

EXHIBIT B

MONTANA SECRETARY OF STATE BUSINESS SEARCH

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Business Search

TDS M

Q

Advanced ▾

Results: 1

Form Info	Status
<div>TDS Metrocom, LLC (E1194225)</div> <div>Foreign Limited Liability Company</div>	Active-Good Standin

TDS Metrocom, LLC (E1194225)

Foreign Limited Liability Company

Request Information

Filing Number	E1194225
Entity Type	Foreign Limited Liability Company
Entity SubType	Limited Liability Company
Status	Active-Good Standing
Managed By	Manager
Previous Entity Names	TDS Metrocam, LLC
Formed In	Delaware
Qualification Date	01/25/2021
Date Registered In State/Country of Jurisdiction	02/05/1997
Principal Address	N/A
Mailing Address	525 JUNCTION RD STE 7000 MADISON, WI 53717-2152
Business Physical Address of Office Required to be Maintained in State of Formation	N/A
Business Mailing Address of Office Required to be Maintained in State of Formation	N/A
Registration Date	01/25/2021
AR Due Date	04/15/2022
Commercial Registered Agent	Commercial F021623 CORPORATION SERVICE COMPANY 26 W SIXTH AVE HELENA, MT 59624-1691

View History

**EXHIBIT C
RESOLUTION**

CITY OF MISSOULA, MONTANA

RESOLUTION NO. _____

Regarding Application of TDS Metrocom, LLC for a Cable Franchise

RECITALS:

1. TDS Metrocom, LLC ("TDS") requested that the City of Missoula, Montana ("City") commence proceedings to consider the award of a cable franchise to TDS.
2. Federal law at 47 U.S.C. § 541(a) provides that a city "may not unreasonably refuse to award an additional competitive franchise."
3. The City conducted the procedure required to award a competitive cable franchise pursuant to federal law.
8. The City's Official Application Form required that proposals for a cable franchise include the information consistent with Section 5.80.060A of the Missoula City Code.
9. The City Council determined to call a Public Hearing to consider the application received from TDS at its regularly scheduled _____, 2021 City Council meeting.
10. All interested parties were provided an opportunity to speak to the City Council and to present information regarding this matter.
11. The City carefully reviewed all information and documentation presented to it regarding TDS's proposal and qualifications to operate a cable system within the City.
12. Based on information and documentation made available to the City, the City Council has reached conclusions regarding TDS's legal, technical and financial qualifications.

NOW THEREFORE, the City of Missoula, Montana hereby resolves as follows:

1. The City hereby finds that TDS's application received on July 21, 2021 complies with the requirements of applicable law and Section 5.80.060A of the Missoula City Code.
2. The City finds that TDS possesses the requisite legal, technical and financial qualifications to construct and operate a cable system to provide cable service within the City.

3. The City finds that its actions are appropriate and reasonable in light of the mandates contained in Section 5.80.060A of the Missoula City Code and applicable provisions of federal law including 47 U.S.C. § 541(a).

PASSED AND ADOPTED this _____ day of _____, 2021.

CITY OF MISSOULA, MONTANA

Its: _____

ATTEST:

Its: _____