

MEMORANDUM TO: All Members of the Metropolitan Council

FROM: Jon Cooper, Director
Metropolitan Council Office

DATE: **June 12, 2012 - Adjourned Meeting**

RE: **Analysis Report**

– BILL ON SECOND READING –

ORDINANCE NO. BL2012-163 (MCGUIRE) – This ordinance authorizes the department of law to compromise and settle the lawsuit against XO Communications Services, LLC ("XO") for unpaid right-of-way franchise fees. The ordinance also approves a new interim franchise agreement with XO and approves a two year extension of a contract with XO for the use of dark fiber by Metro. XO's predecessor, U.S. Signal of Nashville, LP, was granted a franchise by the council in 1994 for the use of Metro right-of-way to install and maintain fiber optic cable. The franchise ordinance required XO to pay 5% of its gross revenues to Metro for the use of the right-of-way. The franchise also required XO to provide two dark fibers for use by Metro, which is used to carry most of the Internet services for Metro. XO paid a total of \$60,000 in 1995 and 1996, but then stopped paying. Metro subsequently brought suit against XO for the unpaid franchise fees. In defending the lawsuit, XO argued that the franchise fee in the amount of 5% of its gross revenues was not legal because it was not reasonably related to Metro's costs for maintaining the right-of-way. XO further counterclaimed that Metro owed XO \$2,500,000 for the value of the dark fiber it provided.

This lawsuit has been pending for ten years. The trial court recently ruled that 5% of gross revenue is not a legal basis for the amount of the franchise fee. Instead, Metro can only charge for its reasonable costs associated with XO's use of the right-of-way. Metro hired experts to determine an appropriate fee. The experts painstakingly calculated the total costs incurred by Metro to maintain the right-of-way and essentially divided that by the amount of space XO's facilities take up within the right-of-way. This formula would result in a charge to XO over the 16 year period of approximately \$8,000,000. XO disputed this valuation saying the amount should be based solely upon the additional costs XO's facilities actually cause Metro, not Metro's total costs for maintaining the right-of-way.

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ORDINANCE NO. BL2012-163, continued

Metro and XO have finally reached a settlement both parties have determined is fair and reasonable. XO agrees to pay \$1,000,000 to Metro within seven days after this settlement agreement is approved and executed. XO will also give Metro a \$480,000 credit toward Metro's use of the dark fiber and extends the dark fiber contract for two years. The ordinance also approves a new interim franchise agreement with XO that will require the company to pay \$60,000 per year for the use of the right-of-way. The interim agreement will be in effect until Metro adopts a new comprehensive telecommunications franchise ordinance. If AT&T is authorized to continue to operate under its existing franchise, XO will be allowed to operate under the same terms for a period not to exceed seven years.

The council office is of the opinion that approval of this settlement is in the best interest of the Metropolitan Government. While the Metro department of law could legitimately continue to fight in court about the methodology for ascertaining the amount of the franchise fee, doing so would require Metro to continue to pay our experts. Metro has paid approximately \$500,000 to experts over the past ten years as a result of this lawsuit.

Since this ordinance has a revenue implication, it is appropriate that it be considered on third reading at the same time as the operating budget ordinance.

– BILLS ON THIRD READING –

ORDINANCE NO. BL2012-145 (MCGUIRE) – This ordinance approves a lease agreement between the Metropolitan Government and G4S Youth Services, LLC for 56,200 square feet of space on property located at 5131 Harding Place to be used as a secure facility to house female youth currently housed at New Visions Youth Development Center in Nashville. This property was formerly used by the sheriff's office as the offender re-entry center for the purpose of housing work-release inmates. The facility is no longer being used by the sheriff's office.

The lease is for a five year term to begin upon the date of occupancy and extending through June 6, 2017, with an optional three year extension. The rent to be paid to Metro for the first year will be \$105,375, which is to increase four percent every year thereafter, including throughout the renewal option period. G4S Youth Services is accepting the property in its present condition "as is". G4S will have the right to make additions and improvements to the property at its own expense with the prior written consent of Metro. All such work must be inspected and approved by Metro after its completion. G4S agrees to comply with Metro's signage standards and will not put up any signs without Metro's consent.

Metro's only maintenance responsibilities will be for the roof, foundation, electrical wiring, and major repairs and replacement of the HVAC system. G4S will be responsible for all other maintenance and repairs, and will be required to pay \$24,420 for utilities. The utility payment will be reviewed every six months and adjusted based upon past actual usage. G4S is required to maintain commercial general liability insurance in the amount of \$1,000,000 plus \$750,000 in property insurance and a \$5,000,000 excess insurance policy. G4S agrees to indemnify Metro (continued on next page)

ORDINANCE NO. BL2012-145, continued

from all damages or theft on the property, as well as all claims arising from the negligence of G4S's employees or contractors. This lease agreement may be terminated by either party upon 120 days written notice.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2012-156 (MCGUIRE & CLAIBORNE) - This ordinance amends the Metro code to shift the collection authority for certain taxes from the county clerk to the department of finance. In 1991, the Tennessee General Assembly enacted legislation authorizing the council to designate a tax collection official for certain taxes. Using this state enabling legislation, the council designated the county clerk as the tax collection official. This ordinance has been brought in response to recent issues pertaining to the inability of the county clerk's office to collect certain taxes and/or post the tax collection in a timely manner. There also has not been an adequate mechanism in place in the county clerk's office to monitor and ensure compliance with the payment of required taxes.

The ordinance will move the collection of hotel occupancy and other tourist accommodation taxes (such as the rental car tax and the tax on contract vehicles leaving the airport pledged toward the convention center debt), wholesale beer and liquor taxes, and franchise fees from the county clerk's office to the finance department. These taxes/fees account for approximately \$60 million in annual revenue.

The mayor's proposed budget includes a \$157,300 reduction in the county clerk's budget for the transfer of two FTE positions as a result of this ordinance.

ORDINANCE NO. BL2012-159 (MCGUIRE) – This ordinance adopts the capital improvements budget for 2012-2013 through 2017-2018. A separate analysis including a list of projects by district has been provided to the council. The capital improvements budget is a planning document and does not in itself appropriate any money. All capital projects must be provided for in this document before a capital improvement can be approved by the council, except in the case of a public emergency.

This budget is amendable on third and final reading. The Charter requires the council to adopt the capital improvements budget not later than June 15th of each year. Once adopted, future amendments to the capital improvements budget must be approved by the planning commission, be recommended by the mayor, and then be adopted by resolution of the council receiving twenty-seven (27) affirmative votes.

ORDINANCE NO. BL2012-160 (STEINE) – This ordinance amends the victim-offender mediation litigation tax provisions to authorize the collection of an additional \$1.00 litigation tax on all cases in the general sessions and juvenile courts to fund centers that handle victim-offender mediation and other community mediation matters. The council enacted a \$1.00 litigation tax in 2004 for all cases in the general sessions and juvenile courts to provide funds that must be used exclusively for victim mediation centers duly certified under state law. At the (continued on next page)

ORDINANCE NO. BL2012-160, continued

time, state law allowed local governments to impose such a tax as long as all of the revenue is distributed monthly to qualified victim-offender mediation centers. The 2004 ordinance provided that the district attorney would be responsible for developing guidelines for the administration of the funds in consultation with judicial officials and the Nashville Bar Association. The ordinance was amended by Ordinance No. BL2011-2 in December 2011 to allow the tax funds to be used for other mediation programs as a result of a 2011 state law change.

The state law was amended again in 2012 to allow local governments to increase this litigation tax by \$1.00 for a total tax of \$2.00 to be used for mediation services. This ordinance would approve the \$1.00 increase and would provide that all funds be deposited into the Metro general fund and be administered by the finance department. The district attorney no longer deems it necessary that his office have involvement in the collection and disbursement of the funds. The proceeds of this litigation tax are to be disbursed on a monthly basis to the Nashville Conflict Resolution Center, as provided in the fiscal year 2013 operating budget ordinance.