

# Ordinance No. 00558

[CITY COUNCIL MEETING MINUTES JANUARY 7, 2013](#)

Amended 1/7/13

## ORDINANCE NO. 558

An ordinance of the City of Lakewood, Washington, granting a six (6) year, nonexclusive telecommunications franchise to Zayo Group, LLC; providing for severability; and establishing an effective date.

WHEREAS, the Public Rights-of-Way within the City of Lakewood ("the City") belong to the public and are built and maintained at public expense for the use of the general public, the primary purpose of which is public travel, and must be managed and controlled consistent with that intent; and

WHEREAS, the use of Public Rights-of-Way for uses unrelated to public travel, such as water mains, gas pipes, pipelines, and telecommunications and cable facilities, is secondary and subordinate to the primary use for travel; such secondary use is permissible only when not inconsistent with the primary purpose of the establishment of such Public Rights-of-Way; and, such use as a place of private business or as a main instrumentality of private business is accorded in most instances as a mere privilege under state law and there is no inherent right in a private individual to conduct private business in the public streets; and

WHEREAS, the failure of service providers to abide by Public Rights-of-Way management standards and the failure of local government to adequately control Public Rights-of-Way can lead and has led to damage to the use of the Public Rights-of-Way and other property interests; and

WHEREAS, the requirement of a performance bond ensures that work done in the Public Rights-of-Way complies with or can be made to comply with requirements that ensure public safety and limit liability of the City; and

WHEREAS, insurance and indemnity requirements protect the City from monetary loss in the event of City liability due to acts of the secondary users of the Public Rights-of-Way; the City should not be exposed to liability of any kind as a result of the presence in the Public Rights-of-Way of the facilities of secondary users because the secondary user controls the design, construction, and installation of those facilities, profits from use of those facilities, is better suited and positioned to protect against such harms, and, but for the existence of those facilities, no injury would have occurred; and

WHEREAS, the City has a substantial government interest in knowing the identity of those persons with facilities in its Public Rights-of-Way so that it may, among other things, provide notice of hazardous or defective conditions, violations of regulatory or contractual requirements, joint trenching opportunities, relocation requirements for public or private improvements, identify locations of facilities, or identify the proper parties in the event of litigation; and

WHEREAS, the City has a substantial government interest in requiring notice and approval of a transfer of the rights, duties, and obligations of those persons Franchised to be in the Public Rights-of-Way to ensure that the City does not lose any legal rights or protection as a result of the transfer, to ensure that such persons are aware of and agree to comply with all rights, duties, and obligations previously agreed to, to ensure that companies do not simply transfer agreements to avoid complying with regulatory or contractual requirements, and to ensure that the City has accurate contact information for the operator of the facilities in the Public Rights-of-Way in the event of an emergency; and

WHEREAS, the increasing demand for use of Public Rights-of-Way is causing, and will continue to cause, local governments to expand management services and responsibilities which includes more frequent inspections, repairs, and re-paving, sophisticated mapping technologies and systems and increased personnel; and

WHEREAS, the recovery of administrative costs incurred by the City in preparing, considering, awarding authorization to use or construct or install facilities within the Public Rights-of-Way is a cost of regulation and management of the Public Rights-of-Way and is authorized under state and federal law; and

WHEREAS, Zayo Group, LLC, has made application to the City of Lakewood for a nonexclusive franchise to provide telecommunications services using the Public Rights-of-Way; and

WHEREAS, based on representations and information provided by Zayo Group, LLC, and in response to its request for the grant of a franchise, the City Council has determined that the grant of a nonexclusive franchise, on the terms and conditions herein and subject to applicable law, are consistent with the public interest; and

WHEREAS, the City is authorized by applicable law to grant such a nonexclusive franchise within the boundaries of the City;

NOW, THEREFORE, for and in consideration of the mutual benefits and the terms and conditions of the below Franchise Agreement, THE CITY COUNCIL OF THE CITY OF LAKEWOOD, WASHINGTON DO ORDAIN, AS FOLLOWS:

#### Section 1. Definitions.

1.1 Where used in this franchise (the "Franchise") the following terms shall mean:

1.1.1 "Franchisee" means Zayo Group, LLC, a Delaware limited Liability Company, and its successors and assigns.

1.1.2 "City" means the City of Lakewood, an optional code city of the State of Washington, and its successors and assigns.

1.1.3 "Days" means calendar days.

1.1.4 "Franchise Area" means any, every and all of the roads, streets, avenues, alleys and highways of the City as now laid out, platted, dedicated or improved; and any, every and all roads, streets, avenues, alleys and highways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended.

1.1.5 "Facilities" means any part or all of the facilities, equipment and appurtenances of Franchisee whether underground or overhead and located within the Public Rights-of-Way as part of the Franchisee's Utility System, including but not limited to, conduit, case, pipe, line, fiber, cabling, equipment, equipment cabinets and shelters, vaults, generators, conductors, poles, carriers, drains, vents, guy wires, encasements, sleeves, valves, wires, supports, foundations, towers, anchors, transmitters, receivers, antennas, and signage.

1.1.6 "Ordinance" shall mean this Ordinance setting forth the terms and conditions upon which the Franchisee shall be granted a Franchise.

1.1.7 "Public Works Director" means the head of the Public Works Department or his/her designee.

#### Section 2. Nonexclusive Franchise Granted.

2.1 Subject to the terms and conditions of this Franchise, the City hereby grants to the Franchisee the right, privilege, authority and franchise to set, erect, lay, construct, extend, support, attach, connect and stretch wire cable between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along, across and through the Franchise Area for purposes of maintaining and operating a telecommunications network.

2.2 Nothing in this Franchise shall prevent the City from constructing sewers; grading, changing grade, paving, repairing or altering any Public Rights-of-Way; laying down, repairing or removing water mains; or installing conduit or fiber optic cable.

2.3 This Franchise merely authorizes Franchisee to occupy and use public ways and offer telecommunications services within the City. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the public ways of the City to the Franchisee.

#### Section 3. Non-interference of Facilities.

3.1 Franchisee's Facilities shall be located, constructed, installed, maintained and repaired within the Franchise Area in accordance with applicable safety standards, and so as not to unreasonably interfere with the free and safe passage of pedestrian and/or vehicle traffic therein or with the reasonable ingress or egress to properties abutting thereto and in accordance with the laws of the State of Washington. Franchisee shall exercise its rights within the Franchise Area in accordance with applicable City codes and ordinances governing use and occupancy of the Franchise Area; provided, however, in the event of any conflict or inconsistency of such codes and ordinances with the terms and conditions of this Franchise, the terms and conditions of this Franchise shall govern and control; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded Franchisee by such City codes and ordinances.

3.2 In the event that the Public Works Director reasonably determines, after providing written notice to Franchisee and a reasonable opportunity for Franchisee to respond to his or her concerns, that any one or more of Franchisee's Facilities within the Franchise Area interferes with the free and safe passage of pedestrian and/or vehicular traffic therein or with the

reasonable ingress or egress to properties abutting thereto, then Franchisee shall promptly take such action as is reasonably necessary to eliminate such interference. In so doing, the City shall fully cooperate with Franchisee. In the event such interference requires relocation of Franchisee facilities within the Franchise Area, such relocation shall be accomplished in accordance with Section 9 below. Any such interference, resulting from new development, with ingress or egress to properties abutting the Franchise Area in proximity to Franchisee's Facilities existing within the Franchise Area prior to the development shall be subject to Section 9.5.

3.3 During the term of this Franchise and with respect to poles, if any, which are Facilities and which are wholly owned by the Franchisee and which are within the Franchise Area, the City may, subject to Franchisee's prior written consent, which consent shall not be unreasonably withheld, install and maintain City-owned overhead wires upon such poles for traffic signal communications and to provide for communications to various City buildings such as City Hall, Police building(s), Public Works operation building(s), Sounder Station and other public buildings as they presently exist or may exist in the future. The foregoing rights of the City to install and maintain such wires are further subject to the following:

3.3.1 Such installation and maintenance shall be done by the City at its sole risk and expense in accordance with all applicable laws (including, but not limited to, RCW 70.54.090), and subject to such reasonable requirements as the Franchisee may specify from time to time (including without limitation, requirements accommodating Franchisee's Facilities or the facilities of other parties having the right to use the Franchisee's Facilities).

3.3.2 Franchisee shall have no obligation under Section 11 (or arising under the purview of Section 11) in connection with any City-owned wires so installed or maintained.

3.3.3 Franchisee shall not charge the City a fee for the use of such poles as a means of deriving revenue therefrom; provided however, nothing herein shall require Franchisee to bear any cost or expense in connection with such installation and maintenance by the City including Franchisee's administrative review of and consent to City's request to make use of such poles or any relocation required of City-owned wires under Section 9 hereof.

3.3.4 All installation of City-owned wires shall be done by a qualified contractor with approval by the State electrical inspector and in accordance with all applicable regulations including but not limited to the National Electric Safety Code.

3.3.5 If any work by City contractors or the City involving the installation and maintenance of City-owned wires shall cause Franchisee to replace a utility pole, the City shall reimburse Franchisee for the cost of such.

Section 4. Dangerous Conditions, Authority for the City to Abate.

4.1 In the event that Franchisee's Facilities or operations cause or contribute to a condition that appears to endanger any person or substantially impair the lateral support of the Franchise Area or public or private property adjacent thereto, the Public Works Director may direct Franchisee, at no charge or expense to the City, to promptly take such action as may be reasonably necessary to resolve such condition to eliminate such endangerment. Such directive may include compliance within a prescribed period of time.

4.2 In the event Franchisee fails to promptly take action as directed by the City pursuant to Section 4.1, or fails to fully comply with such direction, or if emergency conditions exist which require immediate action to prevent imminent injury or damage to persons or property, the City may take action as it reasonably believes is necessary with respect to Franchisee's Facilities or operations to protect persons or property and in such event Franchisee shall be responsible to reimburse the City for its costs incurred in so doing.

Section 5. Permit Required.

5.1 Whenever Franchisee works in the Franchise Area for purposes of installation, construction, repair, maintenance or relocation of its Facilities, it shall apply to the City for a permit to do so in accordance with all ordinances and regulations of the City. In no case shall any such work commence within the Franchise Area without a permit, except as otherwise provided in this Franchise.

5.2 Franchisee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during any period of construction or maintenance activities within the Right-of-Way as required by City or state regulations, including RCW 39.04.180, for the construction of trench safety systems.

5.3 In the event of any emergency where any Facilities located in the Franchise Area are broken or damaged, or if Franchisee's work area within the Franchise Area is in such a condition as to endanger any person or property, Franchisee shall immediately take any necessary emergency measures to repair or remove its Facilities or otherwise make its work area safe without first applying for and obtaining a permit as required by Section 5.1. This provision shall not relieve the Franchisee from later obtaining any necessary permit for the emergency work. Franchisee shall apply for the required permit the next business day following the emergency work or, in the case of an extended state of emergency, as soon thereafter as practical.

Section 6. Restoration.

6.1 Franchisee shall, after any installation, construction, relocation, maintenance, or repair of Facilities within the Franchise Area, promptly restore the Franchise Area to at least the same condition as existed immediately prior to any such installation, construction, relocation, maintenance or repair in accordance with City standards at its sole cost and expense. All survey monuments which are to be disturbed or displaced by such work shall be referenced and restored per WAC 332-120, as the same now exists or may hereafter be amended, and to all pertinent federal, state and City standards and specifications. The Public Works Director shall have final approval of the condition of the Franchise Area after restoration.

6.2 The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. The Franchisee shall be given written notice at least 90 days prior to the commencement of the project. Required trenching due to

an emergency, or in the case that no commercially viable alternative route exists, will not be subject to the five year street trenching moratorium, however the respective pavement restoration in such instances shall include a trench patch meeting with the city, as well as city approval of asphalt over lay of the street itself. For trenches which cross the street pavement or portions thereof, the limits of the overlay shall extend 100 linear feet along said street as measured in both directions from the center line of the trench patch. Further, prior to installing the overlay, the existing pavement within the area to be overlaid shall first be ground down to the thickness of the anticipated overlay, including along any curbs if such curbs are present, such that the final driving surface with respect to ride and appearance shall be almost indistinguishable as reasonably determined by the City from the before condition. For trenches which parallel the roadway the overlay shall encompass the full roadway width and like crossings. The existing roadway pavement shall first be ground down to the thickness of the anticipated overlay including along any curbs, if such curbs area present, such that the final roadway driving surface with respect to ride and appearance shall be almost indistinguishable as reasonably determined by the City from the before condition. The limits of the full roadway width overlay shall extend 100 linear feet beyond the end or ends of the trench cut. Where the paralleling trench cut is limited to one side or the other of the road center line then subject to the approval of the City, the grinding and asphalt overlay restoration work can be limited to the affected half-street portion.

6.3 If it is determined that Franchisee has failed to restore the Franchise Area in accordance with Section 6, the City shall provide Franchisee with written notice including a description of actions the City reasonably believes necessary to restore the Franchise Area. If the Franchise Area is not restored in accordance with the City's notice within thirty (30) days of that notice, the City, or its authorized agent, or contractor, may restore the Franchise Area. Franchisee shall be responsible for all costs and expenses incurred by the City in restoring the Franchise Area in accordance with this section. The remedy granted to the City under this section shall be in addition to those otherwise provided by this Franchise.

6.4 All work by Franchisee pursuant to this Section 6 shall be performed in accordance with the permit issued by the City, together with the laws of the State of Washington, Lakewood Municipal Code and applicable regulations and standards of the City as the same now exists or as may be hereafter amended or superseded.

#### Section 7. Bonding Requirement.

7.1 Before undertaking any of the work authorized by this Franchise, the Franchisee shall furnish an on-going performance bond executed by the Franchisee and a corporate surety authorized to do surety business in the State of Washington, in a sum to be set and approved by the Public Works Director as reasonably sufficient to ensure performance of Franchisee's obligations under this Franchise. The bond shall be conditioned so that Franchisee shall observe all the covenants, terms and conditions and faithfully perform all of the obligations of this Franchise, and restore or replace any defective work or materials discovered in the restoration of the Franchise Area within a period of two (2) years from the final City inspection date of any such restoration. Franchisee may meet the obligations of this section with one (1) or more bonds with an "A VII" rating or better. In the event that a bond furnished pursuant to this section is cancelled by the surety, after proper notice and pursuant to the terms of said bond, the Franchisee shall, prior to the expiration of said bond, procure a replacement bond which complies with the terms of this section.

7.2 With respect to undertaking any of the work authorized by this Franchise, in the event the Franchisee fails to perform its obligations under this Franchise and further fails to cure any deficiency within a reasonable period of time after receipt of written notice of such deficiency by the City, then the City may use any bond(s) furnished by the Franchisee pursuant to Section 7.1 to cure such deficiency. Neither the amount of such bond(s) nor the City's use thereof shall limit the City's full recovery from the Franchisee of costs incurred by the City to cure such deficiency.

7.3 In the event the City makes use of such bond(s) furnished by the Franchisee pursuant to Section 7.2, the City shall promptly provide written notice of same to the Franchisee. Within thirty (30) days of receipt of such notice, the Franchisee shall replenish or replace such bond(s) as provided in Section 7.1.

7.4 The rights reserved to the City by this Section 7 are in addition to other rights of the City whether reserved by this Franchise or authorized by law, and no action, proceeding, or exercise of right under this Section 7 shall constitute an election or waiver of any rights or other remedies the City may have.

#### Section 8. Underground Installation of Facilities.

8.1 This Section 8 shall govern all matters related to underground installation of the Franchisee's Facilities within the Franchise Area.

8.2 Franchisee acknowledges that the City desires to promote a policy of underground installation of Facilities within the Franchise Area.

8.3 New extensions of Facilities constructed by the Franchisee within the Franchise Area during the term of this Franchise shall be located underground unless existing above-ground installations are in place and City consents to placement above ground.

8.4 If, during the term of this Franchise, the City shall direct the Franchisee to replace (convert) its overhead Facilities then existing within the Franchise Area or portion thereof with underground Facilities, the Franchisee will cooperate and participate with the City and underground its Facilities within the Franchise Area including paying all costs thereof.

8.5 If the City undertakes any Public Works improvement which would otherwise require relocation of Franchisee's above-ground facilities in accordance with subsection 9.1 below, or if subsection 9.5 below applies, the City may, by written notice to Franchisee, direct that Franchisee convert any such Facilities to underground Facilities. All costs for such conversion shall be paid by the Franchisee.

8.6 All equipment to be installed within the Franchise Area shall be installed underground; provided, however, that such equipment or Facilities may be installed above ground if so authorized by the City, such as splice boxes, which authorization shall not be unreasonably withheld or delayed, consistent with the provision of the City's Land Use Code and applicable development standards.

#### Section 9. Relocation of Facilities.

9.1 Whenever the City undertakes (or causes to be undertaken at City expense) the construction of any public works improvement within the Franchise Area, or the Public Works Director reasonably determines that the Franchisee's Facilities interfere with the free and safe passage of pedestrian and/or vehicular traffic pursuant to Section 3 above, and such public works improvement or interference necessitates the relocation of the Franchisee's Facilities then existing within the Franchise Area, the City shall:

- (i) provide the Franchisee, within a reasonable time prior to the City's commencement of activities requiring such public works improvement, written notice requesting such relocation; and
- (ii) provide the Franchisee with copies of relevant portions of the City's plans and specifications for such public works improvement.

After receipt of such notice and such plans and specifications, the Franchisee shall relocate such Facilities within the Franchise Area at no charge to the City. If, during the construction of any such public works improvement, an emergency posing a threat to public safety or welfare, or a substantial risk of severe economic consequences to the City, arises requiring the relocation of the Franchisee's Facilities within the Franchise Area, the City shall give Franchisee notice of the emergency as soon as reasonably practicable. Upon receipt of such notice from the City, the Franchisee shall endeavour to respond as soon as reasonably practicable to relocate the affected Facilities at no charge to the City.

9.2 The City shall act in good faith and shall use its best efforts to provide sufficient space within the Franchise Area for the safe and efficient installation, operation, repair and maintenance of the relocated and/or underground converted Facilities. The Franchisee shall act in good faith and shall use its best efforts to install relocated and/or underground converted Facilities in such space within the Franchise Area, consistent with prudent utility practice. If the City and Franchisee agree that there is not sufficient space for the relocated and/or underground converted Facilities in the existing Franchise Area, then, unless otherwise mutually agreed by the City and Franchisee, the City shall as is reasonably practicable provide sufficient space for the relocated and/or underground converted Facilities by obtaining additional Right-of-Way or other equivalent rights mutually agreeable to the City and Franchisee, which shall be Franchise Area, title of which shall be in the City's name.

9.3 Franchisee may install relocated and/or underground converted Facilities on property outside of the Franchise Area, the rights for which shall be obtained by Franchisee at no expense to the City. Notwithstanding the use of best efforts by the City and the Franchisee as outlined above, if the City and the Franchisee do not agree whether there is or will be sufficient space within the Franchise Area for the relocated and/or underground converted Facilities, or if the City and Franchisee disagree whether underground converted Facilities within such space within the Franchise Area would be inconsistent with prudent utility practice, the City and the Franchisee shall each act in good faith and use their respective best efforts to mutually agree on the location of such relocated and/or underground converted Facilities outside of the Franchise Area. Absent such mutual agreement, nothing in this Section 9 shall limit the rights of the City or the Franchisee with respect to acquisition or use of property rights outside of the Franchise Area.

9.4 The Franchisee shall have the right as a condition of any relocation described in this Section 9.4 to require such person or entity other than the City to make payment to the Franchisee, at a time and upon terms acceptable to the Franchisee, for any and all costs and expenses incurred by the Franchisee in the relocation of the Franchisee's Facilities whenever:

- (i) any person or entity, other than the City, requires the relocation of the Franchisee's Facilities to accommodate the work of such person or entity within the Franchise Area, including but not limited to, activities relating to development, roadway frontage improvements or mitigation of impacts; or
- (ii) the City requires any person or entity to undertake work (other than work undertaken at the City's cost and expense) within the Franchise Area and such work requires the relocation of the Franchisee's Facilities within the Franchise Area.

Unless agreed to specifically in writing between the City and the Franchisee, work funded by the creation of a local improvement district (LID) shall be considered the work of the City and the Franchisee shall not be entitled to recover costs and expenses incurred by the Franchisee in the relocation of Franchisee's facilities as necessary to facilitate construction of improvements funded through an LID.

9.5 Any condition or requirement imposed by the City upon any other person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits obtained pursuant to any zoning, land use, construction or other development regulation) which requires the relocation of the Franchisee's Facilities within the Franchise Area shall be a condition or requirement causing relocation of the Franchisee's Facilities to occur subject to the provisions of Section 9.4 above; provided, however:

- (i) in the event the City reasonably determines and notifies the Franchisee that the primary purpose of imposing such condition or requirement upon such person or entity is to cause the construction of a public works improvement within a segment of the Franchise Area on the City's behalf, and
  - (ii) such public works improvement is otherwise reflected in the City's adopted Six-Year Capital Improvement Program; Transportation Improvement Program; or Transportation Facilities Program;
- then only those costs and expenses incurred by the Franchisee in connecting such relocated Facilities with the Franchisee's

other Facilities shall be paid to the Franchisee by such person or entity, and the Franchisee shall otherwise relocate its Facilities within such segment of the Franchise Area in accordance with Sections 9.1-9.3.

9.6 As to any relocation of the Franchisee's Facilities whereby any part of the cost and expense thereof is to be borne by the Franchisee in accordance with Sections 9.1-9.3, the Franchisee may, after receipt of written notice requesting such relocation, submit in writing to the City alternatives to relocation of its Facilities. Upon the City's receipt from the Franchisee of such written alternatives, the City shall evaluate such alternatives and shall advise the Franchisee in writing if one or more of such alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the Franchisee's Facilities. In evaluating such alternatives, the City shall give each alternative proposed by the Franchisee full and fair consideration with due regard to all facts and circumstances which bear upon the practicality of relocation and alternatives to relocation. No alternatives proposed by Franchisee shall be evaluated by the City in an arbitrary or capricious manner. In the event the City determines that such alternatives are not appropriate, the Franchisee shall relocate its Facilities as otherwise provided in Sections 9.1-9.3.

9.7 Nothing in this Section 9 shall require the Franchisee to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other prior rights not derived from this Franchise.

#### Section 10. Street Vacation.

If any Public Right-of-Way or portion thereof used by Franchisee is to be vacated during the term of this Franchise, unless as a condition of such vacation the Franchisee is granted the right to continue its Facilities in the vacated Public Right-of-Way, Franchisee shall, without delay or expense to City, remove its Facilities from such Public Right-of-Way, and restore, repair or reconstruct the Public Right-of-Way where such removal has occurred, and place the Public Right-of-Way in such condition as may be required by the City.

#### Section 11. Records of Installation and Planning.

11.1 Upon the City's reasonable request, the Franchisee shall provide to the City copies of available plans for improvements, relocations and conversions to its Facilities within the Franchise Area; provided, however, any such plans so submitted shall be for informational purposes only and shall not obligate the Franchisee to undertake any specific improvements within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

11.2 Upon the City's reasonable request, the Franchisee shall provide to the City copies of available drawings in use by the Franchisee showing the approximate location of the Franchisee's Facilities at specified locations within the Franchise Area. The Franchisee shall further provide, upon the City's reasonable request in connection with the City's design of new streets, intersections and/or other municipally funded public works projects and major renovations of existing streets and intersections, field marking of the Franchisee's underground Facilities within the Franchise Area, if such Facilities can be so field marked with reasonable accuracy using devices designed and accepted as the industry standard, to respond to the presence of the Franchisee's underground Facilities. Notwithstanding the foregoing, however, the Franchisee does not warrant the accuracy or sufficiency of any such drawings or field markings or other information provided by the Franchisee, and the Franchisee shall not be liable to the City or others for any errors or defects in the same.

11.3 In addition, whenever in the City's reasonable and prudent judgment that it is beneficial to both parties in connection with the design of new streets, intersections and/or municipally funded public works projects and major renovations of existing streets and intersections, the Franchisee shall verify the actual location of its underground Facilities within the Franchise Area by excavating, including pot holing. The cost of such work shall be at Franchisee's expense.

11.4 Notwithstanding the foregoing, nothing in this Section 10 is intended (nor shall be construed) to relieve either party of their respective obligations arising under applicable law with respect to determining the location of utility facilities.

#### Section 12. Indemnification.

Franchisee shall indemnify and hold the City harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in connection with this Franchise or Franchisee's use of the Public Rights-of-Way, except for those injuries or damages caused by the sole negligence of the City; provided, however, that in the event any such claim or demand be presented to or filed with the City, the City shall promptly notify the Franchisee thereof, and the Franchisee shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand; provided further, that in the event any suit or action is begun against the City based upon any such claim or demand, the City shall likewise promptly notify the Franchisee thereof, and the Franchisee shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

#### Section 13. Insurance.

13.1 Franchisee shall procure and maintain for the duration of the Franchise, insurance, or in lieu thereof provide self-insurance, against all claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to the Franchisee, its agents, representatives or employees. The Franchisee shall provide certificate(s) of insurance (Form CG2010 ISO or equivalent) and/or evidence of self-insurance, together with an endorsement naming the City, its officers, elected officials, agents, employees, representatives, consultants and volunteers as additional insured, to the City for its inspection prior to the commencement of any work or installation of any Facilities pursuant to this Franchise. Such certificate(s) of insurance and/or evidence of self-insurance shall specify the following minimum coverage:

(i) Commercial general liability insurance or excess liability insurance, including coverage for premises operations, explosions and collapse hazard, underground hazard and products completed hazard, written on an occurrence basis, with limits not less than:

- A. \$2,000,000 for bodily injury or death to each person; and
- B. \$2,000,000 for property damage resulting from any one accident.

(ii) Automobile liability for owned, non-owned and hired vehicles with a limit of \$2,000,000 for each person and \$2,000,000 for each accident.

(iii) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$2,000,000.

13.2 Franchisee shall maintain the liability insurance policies required by this Section 13 throughout the term of this Franchise. Any deductibles or self-insured retentions must be declared to the City. Payment of deductibles and self-insured retentions shall be the sole responsibility of the Franchisee.

13.3 Franchisee's insurance shall be primary insurance with respect to the City, its officers, elected officials, agents, employees, representatives, consultants and volunteers. Any insurance maintained by the City, its officers, elected officials, agents, employees, representatives, consultants and volunteers shall be in excess of the Franchisee's insurance and shall not contribute with it.

13.4 The cancellation clause of any certificate(s) of insurance (ACORD Form 25 or equivalent) provided to the City pursuant to Section 13.1 shall include the following provision:

"Should any of the policies described by this certificate be cancelled before the expiration date thereof, the issuing company will provide at least thirty (30) days written notice thereof to the certificate holder."

13.5 In the event any of the insurance required by this Section 13 is cancelled or otherwise not renewed during the term of this Franchise, the Franchisee shall promptly acquire replacement insurance or shall utilize self-insurance to restore and maintain the amount of coverage required by this Section 13 and shall promptly provide to the City certificate(s) of insurance or evidence of self-insurance as provided in this Section 13 as may be applicable.

Section 14. Administrative Fees and Reimbursement of Costs.

As specifically provided by RCW 35.21.860, the City may not impose a franchise fee or any other fee or charge of whatever nature or description upon the Franchisee. However, as provided in RCW 35.21.860, the City may recover from the Franchisee actual administrative expenses incurred by the City that are directly related to: (i) receiving and approving a permit, license or this Franchise, (ii) inspecting plans and construction, or (iii) preparing a detailed statement pursuant to Chapter 43.21C RCW. The Franchisee agrees to pay the City \$1,000 as an administrative fee to cover the cost to the City of preparing this franchise.

Section 15. Moving Buildings Within the Franchise Area.

If any person or entity obtains permission from the City to use the Franchise Area for the moving or removal of any building or other object, the City shall, prior to granting such permission, require such person or entity to make any necessary arrangements with the Franchisee for the temporary adjustment of the Franchisee's wires and/or cable to accommodate the moving or removal of said building or other object. Such necessary arrangements with the Franchisee shall be made, to the Franchisee's satisfaction, not less than thirty (30) days prior to the moving or removal of said building or other object. In such event, the Franchisee shall at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its wires and/or cables which may obstruct the moving or removal of such building or other object, provided that:

- (i) The moving or removal of such building or other object which necessitates the adjustment of wires and/or cable shall be done at a reasonable time and in a reasonable manner so as not to unreasonably interfere with the Franchisee's business;
- (ii) Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route approved by the City; and
- (iii) The person or entity obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and save the Franchisee harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence of the person or entity moving or removing such building or other object or the negligence of the agents, servants or employees of the person or entity moving or removing such building or other object.

Section 16. Forfeiture, Revocation and Remedies.

If the Franchisee shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon the Franchisee a written notice to so comply within thirty (30) days from the date such order is received by the Franchisee. If the Franchisee is not in compliance with this Franchise after expiration of said thirty (30) day period, the City may act to remedy the violation and may charge the costs and expenses of such action to the Franchisee, provided, however, if any failure to comply with this Franchise by the Franchisee cannot be corrected with due diligence within said thirty (30) day period (the Franchisee's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which the Franchisee may so comply shall be extended for such time as may be reasonably necessary and so long as the Franchisee commences promptly and diligently to effect such compliance.

The City may act without the thirty (30) day notice in case of an emergency. In the event the Franchisee fails to substantially

cure defaults on more than two (2) occasions, the City may in addition, by motion of City Council, declare an immediate forfeiture of this Franchise.

#### Section 17. Nonexclusive Franchise.

This Franchise is not, and shall not be deemed to be, an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area that do not interfere with the Franchisee's rights under this Franchise. This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

#### Section 18. Shared Use of Excavations.

18.1 The Franchisee and the City shall exercise best efforts to coordinate construction work either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities within the Franchise Area informed of its intent to undertake such construction work. This includes the Franchisee's attendance at the City-hosted monthly utility coordination meetings. The Franchisee and the City shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

18.2 If at any time either the Franchisee, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the other upon receipt of a written request to do so, an opportunity to use such excavation, provided that:

- (a) Such joint use shall not unreasonably delay the work of the party causing the excavation to be made; and
- (b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. The parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

The party causing the excavation to be made shall give the other parties a written notice at least 90 days prior to the commencement of the project except in cases due to an emergency. The City reserves the right to require the Franchisee to joint trench with other facilities if both parties are anticipating trenching within the same Franchise Area and provided that the terms of (a) and (b) above are met.

#### Section 19. Franchise Term.

The initial term of the franchise shall be ten (10) six (6) years commencing on the date of acceptance by the Franchisee. At the expiration of the initial term, this franchise shall be automatically extended for an additional term of five (5) years unless either party gives the other written notice of intent to terminate, which notice shall be given at least six (6) months before the expiration date.

#### Section 20. Assignment.

Franchisee shall not have the right to assign its rights, benefits and privileges in and under this Franchise without the prior written consent of the City, which consent shall not be unreasonably withheld. Any assignee shall, within thirty (30) days of the date of any assignment, file written notice of the assignment with the City together with its written acceptance of all terms and conditions of this Franchise. Notwithstanding the foregoing, Franchisee shall have the right, without such notice or such written acceptance, to mortgage its rights, benefits and privileges in and under this Franchise for the benefit of bondholders.

#### Section 21. Franchisee's Employees "Employment Eligibility" Requirements.

The Franchisee and any subcontractors shall comply with E-Verify as set forth in Lakewood Municipal Code Chapter 1.42. The Franchisee shall enroll in, participate in and document use of E-Verify as a condition of award of this franchise. The Franchisee shall continue participation in E-Verify throughout the course of the franchise. If the Franchisee uses or employs any subcontractor in the performance of work under this franchise, or any subsequent renewals, modification or extensions of this franchise, the subcontractor shall register with and participate in E-Verify and certify such participation to the City. The Franchisee shall show proof of compliance with this section, and/or proof of subcontractor compliance with this section, within three (3) working days of the date of the City's request for such proof.

#### Section 22. Miscellaneous.

22.1 The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

22.2 This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 11 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by Franchisee of any and all rights, benefits, privileges, obligations or duties in and under this Franchise, unless such permit, approval, license, agreement or other document specifically:

- (i) references this Franchise; and
- (ii) states that it supersedes this Franchise to the extent it contains terms and conditions that change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.

22.3 Upon the expiration, termination, revocation or forfeiture of the Franchise, the Franchisee shall no longer have the right to occupy the Franchise Area for the purpose of providing services authorized herein. However, the Franchisee's obligations



under this Franchise to the City shall survive the expiration, termination, revocation or forfeiture of these rights according to its terms for so long as the Franchisee's Utility System or any part thereof shall remain in whole or in part in the Public Rights-of-Way, the Franchisee transfers ownership of all Facilities in the Franchise Area to a third-Party, or the Franchisee abandons said Facilities in place, all as provided herein. Said obligations include, by way of illustration and not limitation, Franchisee's obligations to indemnify, defend, and protect the City, to provide insurance, to relocate its facilities, and to reimburse the City for its costs to perform Franchisee work.

22.4 In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, whether in contract or in tort or both, is instituted to enforce any word, article, section, subsection, paragraph, provision, condition, clause or sentence of this Franchise or its application to any person or circumstance, the prevailing Party shall be entitled to recover from the losing Party its reasonable attorneys, paralegals, accountants, and other experts fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as allowed by Washington law and as determined by the judge or arbitrator at trial or arbitration, as the case may be, or on any appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorneys' fees related to or with respect to proceedings in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law. This provision shall not apply to dispute resolution proceedings under Section 6.1 of this Franchise and shall not apply to the extent that the suit, action, arbitration or other proceeding is brought to interpret any term, condition, provision, section, article or clause of this Franchise.

22.5 This Franchise shall be governed and construed in accordance with the laws of the State of Washington. Any action brought relative to enforcement of this Franchise, or seeking a declaration of rights, duties or obligations herein, shall be initiated in Pierce County Superior Court.

### Section 23. Alteration of Franchise.

23.1 The City and Franchisee hereby reserve the right to alter, amend or modify the terms and conditions of this Franchise in accordance with the provisions of this Section.

23.2 At any time during the term of this Franchise, the City or Franchisee may request, by written notice, that the other promptly participate in negotiations to alter, amend or modify the terms and conditions of this Franchise.

23.3 Within a reasonable time after receipt of the notice required by Section 23.2, the City and Franchisee shall, at a mutually agreed-upon time and place, commence negotiations to alter, amend or modify the terms and conditions of this Franchise. The City and Franchisee shall conduct such negotiations in good faith and with due regard to all pertinent facts and circumstances; provided, however, that neither the City nor Franchisee shall be obligated to agree to any proposed alteration, amendment or modification. Further, no rights or privileges granted by this Franchise shall be prejudiced, impaired or otherwise affected by the failure of the City or Franchisee to agree to any proposed alteration, amendment or modification.

23.4 Neither the City nor Franchisee shall be obligated to continue negotiations after the expiration of ninety (90) days from the date they commence such negotiations; provided, however, the City and Franchisee may agree to continue such negotiations for an additional period of time.

23.5 Any alteration, amendment or modification to which the City and Franchisee agree shall be submitted to the legislative authority of the City as a proposed ordinance. The ordinance so proposed shall expressly provide that, unless Franchisee properly files a written notice of acceptance within sixty (60) days of its effective date, the ordinance shall not be effective and this Franchise shall not be altered, amended or modified. To the extent permitted by law, the party proposing the alteration, amendment or modification shall bear all actual administrative costs directly related to approval thereof.

23.6 It is the understanding of the parties that this franchise is limited to facilities necessary for a telecommunications network. The parties to this agreement acknowledge that if the Franchisee endeavours to provide services or utilities beyond the scope of this agreement, such additional services or utilities may be added to this franchise only by written addendum. Additional services or utilities may be subject to franchise fees, and state or local taxes as allowed by law.

### Section 24. Police Powers.

Nothing contained herein shall be deemed to affect the City's authority to exercise its police powers. Franchisee shall not by this Franchise Agreement obtain any vested rights to use any portion of the City Right-of-Way except for the locations approved by the City and then only subject to the terms and conditions of this Franchise Agreement. This Franchise Agreement and the permits issued thereunder shall be governed by applicable City ordinances in effect at the time of application for such permits.

### Section 25. Future Rules, Regulations, and Specifications.

Franchisee acknowledges that the City may develop rules, regulations, and specifications, including a general ordinance or other regulations governing telecommunications operations in the City. Such regulations, upon written notice to Franchisee, shall thereafter govern Franchisee's activities hereunder; provided, however, that in no event shall regulations:

(i) materially interfere with or adversely affect Franchisee's rights pursuant to and in accordance with this Franchise Agreement; or

(ii) be applied in a discriminatory manner as it pertains to Franchisee and other similar users of such facilities.

Section 26. Notices.

Any notice to be served upon the City or Franchisee shall be delivered to the following addresses respectively:

City of Lakewood  
6000 Main Street SW  
Lakewood, WA 98499  
Attn: City Manager

Zayo Group L.L.C.  
400 Centennial Parkway,  
Suite 200  
Louisville, Co 80021

Section 27. Severability.

If any section, sentence, clause or phrase of this ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, the City may, at its sole option, deem the entire ordinance to be affected and thereby nullified. However, in the event that a determination is made that a section, sentence, clause, or phrase in this ordinance is invalid or unconstitutional, the City may elect to treat the portion declared invalid or unconstitutional as severable and enforce the remaining provisions of this ordinance.

Section 28. Effective Date.

This Ordinance shall be in full force and effect thirty (30) days after publication of the Ordinance Summary.

ADOPTED by the City Council this 7th day of January, 2013.

CITY OF LAKEWOOD

\_\_\_\_\_  
Douglas G Richardson, Mayor  
Attest:

\_\_\_\_\_  
Alice M. Bush, MMC, City Clerk  
Approved as to form:

\_\_\_\_\_  
Heidi Ann Wachter, City Attorney