

ORDINANCE NO. 2203

AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS
FRANCHISE TO ZAYO GROUP, LLC

Recitals

- A. The City requires utilities to obtain a franchise to place utility facilities in City rights of way.
- B. Zayo Group; LLC. has applied for a franchise to place facilities in City rights of way.

THE CITY OF BEND ORDAINS AS FOLLOWS:

- Section 1. Grant of Authority.** City grants to Zayo Group, LLC the right and privilege, subject to all City of Bend ordinances, policies, rules and regulations, to construct, install, maintain and operate over, in, on and under the present and future City rights of way of the City of Bend, Facilities necessary for the purpose of providing telecommunication services. This franchise is not exclusive, and City reserves the right to grant a similar privilege to any other Person at any time during the period of this franchise. This grant is further subject to all prior rights, interests, agreements, permits easements or licenses granted by the City, and to the City's right to use the rights of way for any purpose it deems fit, including the same or similar purposes allowed Zayo Group, LLC..
- Section 2. Terms of Franchise.** This franchise is granted on the terms stated in the Franchise Agreement in substantially the form attached as Exhibit A.
- Section 3. Authority of City Manager.** The City Manager is authorized to sign the Franchise Agreement with Zayo Group, LLC. in substantially the form attached as Exhibit A.
- Section 4. Effectiveness.** This agreement shall only be effective if Franchisee signs the Franchise Agreement within 30 days of passage of this ordinance and provides a certificate of insurance to the City covering the insurance required by the Franchise Agreement.

First Reading Date: June 5, 2013
Second Reading Date: June 19, 2013

Adopted by roll call vote of the Bend City Council on June 19, 2013.

YES: Mayor Clinton
Councilor Jodie Barram
Councilor Mark Capell
Councilor Victor Chudowsky
Councilor Doug Knight
Councilor Sally Russell

NO: none

Attest:



Robyn Christie, City Recorder

Approved as to form:



Mary Winters, Legal Counsel



Jim Clinton, Mayor

**NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE AGREEMENT BETWEEN
THE CITY OF BEND AND
ZAYO GROUP, LLC.**

This agreement is between the City of Bend, an Oregon Municipal Corporation ("City") and Zayo Group, LLC. ("Franchisee").

Section 1. Definitions

Any term defined in the Bend Code and not in this Agreement shall have the meaning provided by the Bend Code definition.

"Facilities" means the conduits, cables, optic fibers, poles, wires, vaults, fixtures, underground lines, and other physical components of Franchisee's Telecommunication System.

"Gross Revenues" means gross revenues derived by Franchisee for the provision of telecommunications services within the City of Bend

"Telecommunications System" means all facilities owned, operated or used by Franchisee to provide telecommunication services and located in rights of way administered by the City.

"Ultimate consumer" means any entity that obtains telecommunications services transmitted over Franchisee's Facilities for its own use by any means, including purchase, lease or direct receipt of such services.

Section 2. Grant of Authority.

City grants to Franchisee the right to construct, install, maintain and operate Facilities over, in, on and under present and future City rights of way for the purpose of providing telecommunication services on the terms stated in this agreement.

This franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity at any time during the period of this franchise. This franchise is subject to all prior rights, interests, agreements, permits easements or licenses granted by the City, and to the City's right to use rights of way for any purpose.

Section 3. Compliance with Laws, Rules and Regulations.

The locations and methods of installation and maintenance of all Franchisee's Facilities shall be subject at all times to regulation by the City (including City's ordinances, standards and specifications, and regulations on street cuts and use of rights-of-way). All Facilities shall be constructed and maintained as to interfere as little as practicable with traffic and other use of rights of way. Right of way permits must be obtained prior to installation or construction of Facilities. All Facilities shall be installed and at all times maintained by Franchisee in accordance with telecommunications industry standards.

Section 4. Franchisee Liability, Indemnification of City and Insurance.

- A. Franchisee shall conduct its operations under this Franchise, including installation, construction and maintenance of its Facilities, in a safe and workmanlike manner so as not to present a danger to the public or City.
- B. Franchisee shall defend, indemnify, and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as 'claims') that may be based on, or arise out of damage or injury (including death) to persons or property caused by or resulting from any act or omission sustained in connection with the performance of this franchise agreement or by conditions created thereby or based upon violation of any statute, ordinance or regulation. This indemnification required shall not apply to claims caused by the sole negligence or willful misconduct of the City, its officers, agents, employees and volunteers. Franchisee agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.
- C. Franchisee shall purchase and maintain, at Franchisee's expense at all times during the term of this Franchise, Commercial General Liability and Commercial Automobile insurance covering bodily injury and property damage in an amount of \$5 million per occurrence and \$10 million in aggregate. The insurance policy obtained by franchisee shall be primary and non-contributory. Franchisee shall remain fully responsible for any claims resulting from negligence or intentional misconduct of Franchisee or its subcontractors and their officials, agents and employees in performance of this agreement, even if not covered by, or in excess of insurance limits.
- D. Commercial General Liability coverage shall name, by certificate and endorsement the City, its officers, agents, employees and volunteers as additional insured with respect to Franchisee's work or services conducted under this agreement. Franchisee will require that its insurance carrier give the City 30 days written notice of any cancellation of or reduction in insurance coverage. Any failure to comply with this provision will not affect the insurance coverage provided to City.
- E. Franchisee shall obtain and maintain Workers' Compensation insurance as required by ORS chapter 656 and meeting the minimum requirements therein. Franchisee shall ensure that each contractor obtains and maintains workers' compensation insurance and that the carrier notifies the state of Oregon or files a guaranty contract with the state of Oregon Workers' Compensation Division before performing work.
- F. Coverages provided by Franchisee must be underwritten by an insurance company authorized to do business in the state of Oregon and with a Best's rating of A-VII or higher.

- G. As evidence of the insurance coverage required by this Franchise, Franchisee shall provide proof of coverage required by acceptable Certificate of Insurance and signed Endorsement from the carrier(s). The Certificate and Endorsement shall provide that there will be no cancellation, termination, material change or reduction in limits of the insurance coverage without a minimum 30-day written notice to the City. The Certificate and Endorsement shall also state the deductible or self-insured retention level. This Agreement shall not be in effect until the required certificates and signed endorsements have been received and approved by City. Renewal certificates and endorsements will be sent to City 10 days prior to coverage expiration. The City may terminate the Franchise for failure to maintain the required insurance.
- H. Franchisee grants Waiver of Subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Franchisee's work or service. Further, Franchisee agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance, recovery shall be solely with their insurance carrier, and also grants to City on behalf of any insurer providing coverage to either Franchisee or City with respect to the work or services of Franchisee a waiver of any right to subrogation which any insurer or subcontractor may acquire against City by virtue of the payment of any loss under such insurance coverage.

Section 5. Performance Bond.

Franchisee shall provide a performance bond, in the amount of \$100,000 or other lesser amount as agreed to in writing by the City as being sufficient to assure proper restoration of any street, sidewalk or other surface disturbed by Franchisee. Franchisee shall keep the bond in full force and effect during any activities that disturb the surface of any Rights of Way and for a period of at least one year after restoration of Rights of Way. The bond may be withdrawn after one year after restoration of rights of way, but shall be restored prior to any further action that would disturb any street, sidewalk, or other surface. The bond shall be issued by surety authorized to do business in the state of Oregon and with a Best's rating of A- VII or higher.

City may, in the event of any construction which is likely to be substantially greater than \$100,000, or in the event the City's cost to complete or repair such construction upon Franchisee's failure to perform the same would be greater than \$100,000, as reasonably determined by the City, require the amount of the performance bond to be increased. The performance bond is subject to increase each time Franchisee applies for permits to perform work within the City. Franchisee shall provide to City all necessary documentation demonstrating Franchisee's cost estimation in a format reasonably acceptable to the City.

Section 6. Construction and Conditions on Right of Way Occupancy.

- A. Use. Franchisee shall construct, install, maintain and operate its Facilities in designated City rights of way to industry standards and City's commercially reasonable satisfaction, in compliance with all City ordinances, rules, standards and specifications, policies and regulations; and in a manner so as to cause minimum

interference with the proper use of streets, alleys, and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, alleys or other public ways or places.

All work in the City right of way will require a permit prior to any work being started and will require a traffic plan that is fully compliant with the City of Bend Design Standards and Specifications.

- B. Construction. Prior to beginning construction, Franchisee shall provide the City Engineer with a construction schedule for work in City rights of way. When construction is complete, Franchisee shall provide the City Engineer with a map showing the location of installed Facilities in City rights of way, as built. The City Engineer may require additional information on the as-as built drawings.
- C. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Franchisee, Franchisee shall, at its own cost and expense and in compliance with the City's standards and specifications, promptly replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley disturbed. If Franchisee fails to make restoration as required, City may cause the repairs to be made at the expense of Franchisee.
- D. Notification. Franchisee shall comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations.
- E. Relocation. City may require Franchisee to relocate its Facilities. If the removal or relocation of Facilities is caused directly by an identifiable development of property or other third-party project and the removal or relocation of Facilities occurs within the area to be developed, or is made for the convenience of a customer, Franchisee may charge the expense of removal or relocation to the developer or customer. Franchisee shall be solely responsible for enforcing collection from the developer or customer. If the removal or relocation of Facilities results from City's need to provide public facilities, is a City project, or is otherwise requested by City and is made for the purpose of improving a street to City standards or other improvement for the benefit of the public, Franchisee will remove or relocate its Facilities at Franchisee's expense within a reasonable time frame after notification by City. City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities with City rights of way. In cases of capital improvement projects undertaken by City, Franchisee shall convert existing overhead distribution Facilities to underground at Franchisee's expense if requested to do so by City. City agrees to comply with provisions of applicable law when requiring such conversion. In the event that City receives third-party funding for a City project or improvement to a City street that covers Franchisee's expenses, City shall remit payment to Franchisee from the third-party funding for reimbursement for Franchisee's relocation expenses.
- F. Placement of Facilities. Franchisee shall not knowingly place its Facilities where they will interfere with any existing or future City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer or water facility. Franchisee will consult with City Engineer prior to placement of Facilities, and will comply with all City ordinances, policies, rules and regulations in connection with its placement of

Facilities. Whenever all existing electric utilities, cable facilities and telecommunications facilities are located underground within a public right of way of the City, Franchisee must also locate and relocate its Facilities underground.

- G. Temporary Rearrangement of Facilities. Franchisee shall, consistent with City policies, ordinances, rules and regulations, arrange to temporarily raise, lower, or otherwise move its Facilities to permit the moving of buildings or other objects if the Person or entity wishing to move the building or other object makes a reasonable arrangement to reimburse Franchisee for its expenses in rearranging its Facilities. Nothing in this section precludes City from requiring Franchisee to move its Facilities at Franchisee's expense when public convenience requires the move.

Section 7. Transfer of Franchise.

Franchisee shall not sell, assign, dispose of, lease or transfer in any manner whatsoever any interest in this Franchise or in the Facilities authorized by this Franchise, or any part of the Facilities, without prior written approval of City, which consent shall not be unreasonably withheld. The City may impose reasonable conditions on its approval of any transfer, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Franchise. City shall have the right to collect from Franchisee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee.

Section 8. City Rights in Franchise.

- A. City Supervision and Inspection. City shall have the right to supervise all construction or installation of Franchisee's Facilities subject to the provisions of this Franchise and make such inspections as it shall find necessary to insure compliance with governing laws, ordinances, rules and regulations.
- B. Termination or Abandonment of Franchise. Upon any termination of this Franchise, all Facilities installed or used by Franchisee shall be removed by Franchisee at Franchisee's expense and the property upon which the Facilities were used restored by Franchisee to the condition it was in before installation.
- C. Co-location. Franchisee shall offer the City the opportunity to co-locate City conduit and lines in trenches dug by Franchisee in City rights of way and shall charge the City only any incremental additional costs incurred in making the trenches available for City use.

Section 9. Franchise Fee.

- A. Franchisee shall pay monthly to City the sum of 3% of Franchisee's gross revenues earned in the delivery of services within the corporate limits of the City to parties (including lessees of the Facilities) who are not the ultimate consumers of those services, but who redistribute services to third parties, plus 7% of Franchisee's gross revenues earned in the delivery of services within the corporate limits of the

City to Ultimate Consumers of those services. Franchisee also may at its option deduct uncollectible accounts of customers within the corporate limits of City from these gross revenues. The intention of the parties in charging different fees for telecommunications service providers and ultimate consumers is to prevent any end user from paying a permit or franchise fee to City more than once for the same use of the Facilities, while at the same time charging a fair amount for the use of City's rights of way.

- B. The fee required by this section shall be due and payable within 60 days after the end of each applicable calendar month. Any payment not made when due shall bear interest at the rate of 9% per annum, compounded monthly, from the date due until paid.
- C. With each payment, Franchisee shall furnish City with a written statement in the format as provided in Exhibit A, under oath, executed by an officer of Franchisee, verifying the amount of gross revenues of Franchisee within City for the monthly period covered by payment computed on the basis set out in Subsection A of this section.
- D. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this franchise.
- E. Franchisee agrees and covenants that it will not challenge the validity of the franchise fees under this ordinance as long as they do not exceed the maximum amounts established by applicable statutes.

Section 10. Franchisee Records and Reports

Franchisee shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this franchise. Franchisee shall produce all books and records directly concerning its gross revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon no less than 10 days prior written notice, during normal working hours. City may require periodic reports from Franchisee relating to its operation within City.

City shall have the right during the term of this franchise or within 180 days thereafter to conduct audits of Franchisee's records. Such audits shall be undertaken by a qualified person or entity selected by City. The cost of any such audit shall be borne by City, unless the results of any such audit reveal an underpayment of more than 8% of the franchise fee for the period audited. In the case of such underpayment, the full cost of such audit shall be paid by Franchisee. Franchisee shall immediately pay the amount of the underpayment as determined by such audit to City together with 12% per annum interest from the date such payment should have been made to the date the payment is actually made.

Any audit information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law, except that this obligation shall not prevent the City from introducing audit results in any forum where enforcement of the provisions of this franchise is at issue.

Section 11. Permit and Inspection Fees.

Nothing in this ordinance shall be construed to limit the right of City to require Franchisee to pay reasonable costs incurred by City in connection with the issuance of a franchise or permit, making an inspection, or performing any other service for or in connection with Franchisee or its Facilities, whether pursuant to this ordinance or any other ordinance or regulation now in effect or hereafter adopted by City.

Section 12. Enforcement and Termination of Franchise for Violation.

- I. Default: Time of payment and performance are of the essence in the franchise. The following shall be events of default:
- J. Default in Payments. The failure of Franchisee to pay City when due any amounts required by the franchise pursuant to Section 9 and such failure continues for a period of 10 days after the due date.
- K. Default in Other Covenants. The failure of Franchisee to perform any of the covenants and conditions required herein to be kept and performed by Franchisee, and such failure continues for a period of 30 days after notice from City of such failure. Upon the occurrence of an event of default, Franchisee shall pay to City the sum of \$200 per day for each day the default continues along with any additional damages suffered by City as a result of Franchisee's default.
- L. Termination for Defaults Not Cured. The City may terminate this Franchise for defaults that are not cured within the time allowed by this section by providing notice to Franchisee at least 30 days prior to termination. Franchisee may avoid termination by completely curing the default, including payment of the penalty required by Subsection B of this section, unless the notice of termination is the third notice of termination within a 12 month period for unrelated defaults. Franchisee may challenge a notice of termination by providing a written protest to the City Manager within 10 business days of the date of the notice of termination. The City Manager, on receipt of the protest shall either grant the protest, in which case the franchise will remain in place, or refer the matter to the City Council for a decision. The termination will not become final until after the decision by the City Manager or City Council.

Section 13. Remedies not Exclusive; Waiver.

All remedies granted the City under this ordinance are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Remedies contained in this ordinance are not exclusive and City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to City at law or in equity. Failure to enforce any provision of this ordinance shall not be construed as a waiver of a breach of any other term, condition or obligation of this ordinance.

Section 14. Franchise Term.

This Franchise is granted for a term of five years beginning on the date on which this Franchise ordinance is approved. City agrees to renegotiate in good faith a renewal of this franchise for a similar term.

Section 16. Severability.

If any section, subsection, sentence, clause or portion of this Franchise is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity or constitutionality of the remaining portion thereof. If for any reason, the franchise fee is invalidated or amended by the act of any court or governmental agency, then the highest reasonable franchise fee allowed by such court or other governmental agency shall be the franchise fee charged by this ordinance.

Section 17. Notices.

Any notice required or permitted under this Franchise shall be deemed given when received or when deposited with postage prepaid in the United States Mail as registered or certified mail addressed as follows:

TO CITY: City Manager
 710 NW Wall Street
 Bend, OR 97701

TO FRANCHISEE: Zayo Group, LLC.

or to such other address as may be specified from time to time by either parties in writing.

Section 18. Interpretation/Jurisdiction.

Interpretation of the Franchise shall be governed by laws of the State of Oregon and any legal action relating to this Franchise shall be brought in Deschutes County Circuit Court.

CITY OF BEND

ZAYO Group, LLC.

Eric King, City Manager

Date: _____

By: _____

Title: _____

Date: _____

EXHIBIT A

Company: _____

Reporting Period: _____

Description	Amount
Gross revenues	\$ _____
Less: Revenues exempt from franchise fees	
Other adjustments to gross revenues	
Net revenues subject to franchise fees	\$ _____
Franchise fee	7%
Franchise fee remitted to City of Bend Finance Department PO Box 1024 Bend, OR 97709	\$ _____

Certification by Officer or Authorized Representative:

I declare under the penalties for perjury that the information provided herein is true, complete and accurate to the best of my knowledge and belief.

Signature: _____ Date: _____

Name: _____

Title: _____

