

RESOLUTION NO. 3052

RESOLUTION AUTHORIZING THE MAYOR OF SELAH TO SIGN A SEVEN-PAGE TELECOMMUNICATIONS FRANCHISE AGREEMENT WITH ZAYO GROUP, LLC, THAT GRANTS A NONEXCLUSIVE FRANCHISE FOR FIBER OPTIC CABLE SYSTEMS

WHEREAS, the entity known as Zayo Group, LLC, desires to obtain a nonexclusive franchise from the City of Selah so that it can locate fiber optic cable systems, both underground and above ground, within rights-of-way owned by the City; and

WHEREAS, state law – specifically RCW 35A.47.040 – authorizes the City to grant nonexclusive franchises for such purpose; and

WHEREAS, a proposed seven-page Telecommunications Franchise Agreement has been drafted and its terms are acceptable to City staff; and

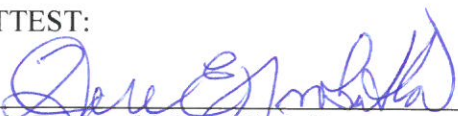
WHEREAS, the City Council finds that good cause exists to authorize the Mayor to sign the Agreement and to thus grant the franchise;

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SELAH, WASHINGTON, that the Mayor be and is authorized to sign the seven-page Telecommunications Franchise Agreement in the form appended hereto, and to thus grant the franchise.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF SELAH, WASHINGTON, this 26<sup>th</sup> day of September, 2023.

  
\_\_\_\_\_  
Sherry Raymond, Mayor

ATTEST:

  
\_\_\_\_\_  
Dale E. Novobielski, Clerk/Treasurer

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Rob Case, City Attorney

**TELECOMMUNICATIONS FRANCHISE AGREEMENT  
BETWEEN ZAYO GROUP, LLC AND THE CITY OF SELAH, WASHINGTON**

**THIS TELECOMMUNICATIONS FRANCHISE AGREEMENT** ("Franchise") is entered into by and between Zayo Group, LLC ("Zayo"), a Delaware Limited Liability Company, and the City of Selah, Washington ("City").

**RECITALS**

1. In order to maintain control over the use of City's right-of-ways by fiber optic and telecommunications providers operating within the City, it is appropriate to enter into franchise agreements with such telecommunications providers.
2. Zayo Group, LLC has negotiated this Franchise with the City, and this Franchise is acceptable to both parties.

**Section 1. Definitions.** Where used in this Franchise, the following terms shall mean:

- A. "Affiliate" means an entity which owns or controls, is owned or controlled by, or is under common ownership with Zayo.
- B. "City" means the City of Selah, a municipal corporation of the State of Washington.
- C. "Emergency Situation" means an emergency involving likely loss of life or substantial property damage as determined by City in good faith.
- D. "Facilities" means Zayo's fiber optic cable system constructed and operated within the City's Rights-of-Way, and shall include all cables, wires, conduits, ducts, pedestals and any associated converter, equipment or other facilities within the City's Rights-of-Way, designed and constructed for the purpose of providing Telecommunications Service and other lawful services not prohibited by this Franchise.
- E. "Franchise" means this Telecommunications Franchise Agreement
- F. "Franchise Area" means the present municipal boundaries of the City, and shall include any additions thereto by annexation or other legal means.
- G. "Person" means an individual, partnership, association, joint stock company, trust, corporation, or limited liability company.
- H. "Rights-of-Way" means land acquired by or dedicated to the City for public roads and streets, but does not include:
  1. State highways
  2. Land dedicated for roads, streets, and highways not opened and not improved for motor vehicle use by the public;
  3. Structures, including poles and conduits, located within the right-of-way;
  4. Federally granted trust lands or forest board trust lands;
  5. Lands owned or managed by the State Parks and Recreation Commission.
- I. "Telecommunications Service" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means for hire, sale, or resale to the general public. For the purpose of this chapter, telecommunications service excludes the over-the-air transmission of broadcast television or broadcast radio signals.

- J. "Zayo" means Zayo Group, LLC, a Delaware limited liability company, and its respective Affiliates, successors, and assigns.

## **Section 2. Franchise Area and Authority Granted.**

- A. Facilities within Franchise Area. Subject to and in accordance with all applicable laws, the City does hereby grant to Zayo the right, privilege, authority and franchise to construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate, use, and remove Facilities in, upon, over, under, along and across Rights-of-Way in the Franchise Area for the purpose of providing Telecommunications Services. This grant is non-exclusive. This grant does not convey any right, title or interest in the right-of-way, but shall be deemed a Master Permit only to use and occupy the right-of-way for the limited purposes and term stated in the grant. Further, no Master Permit shall be construed as any warranty of title.
- B. Permission Required to Enter Onto Other City Property. Nothing contained in this Franchise is to be construed as granting permission to Zayo to go upon any public place other than Rights-of-Way within the Franchise Area in this Franchise. Permission to go upon any other property owned or controlled by the City must be sought on a case by case basis from the City.
- C. Compliance with WUTC Regulations. At all times during the term of the Franchise, Zayo shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission.
- D. Fees and Charges. Subject to the limitations under federal and State law, the City reserves the right to require compensation for use of the rights-of-way as a condition of granting permission to use and occupy the rights-of-way or other permitted areas. The City may impose on Zayo all fees, taxes, and requirements authorized by RCW § 35.21.860, as written or hereafter amended. Zayo shall, within 30 days after written demand, reimburse the City for all direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of this Franchise when such is requested by Zayo. In addition, Zayo shall, within 30 days after written demand, reimburse the City for any and all costs the City reasonably incurs in response to any Emergency Situation involving Zayo's facilities. Within 30 days after written demand, Zayo shall reimburse the City for Zayo's proportionate share of all actual, identified expenses incurred by the City in planning, constructing, installing, repairing or altering any municipal infrastructure as a result of the presence in the right-of-way of Zayo's Facilities.

## **Section 3. Construction and Maintenance.**

- A. Zayo's Facilities shall be located, relocated and maintained within the Rights-of-Way in accordance with applicable law, and so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property. Whenever it is necessary for Zayo, in the exercise of its rights under this Franchise, to make any excavation in the Rights-of-Way, Zayo shall obtain prior approval from the City, pay the applicable permit fees, and obtain any necessary permits for the excavation work. Upon completion of such excavation, Zayo shall restore the surface of the Rights-of-Way to the same condition the property was in prior to such excavation. If Zayo should fail to leave any portion of the excavation in a condition the property was in prior to such excavation, the City may, on 30 days' written notice to Zayo, which notice shall not be required in case of an Emergency Situation, cause all work necessary to restore the excavation to a safe condition. Zayo shall pay to the City the reasonable cost of such work within 30 days of receipt of a detailed invoice from the City.
- B. Any surface or subsurface failure occurring during the term of this Franchise caused by any excavation by Zayo shall be repaired within thirty (30) days, or, upon five (5) days written notice to Zayo, the City may order all work necessary to restore the damaged area to a safe and acceptable condition and Zayo shall pay the reasonable costs of such work to the City, including City overhead (provided that in no event shall such overhead exceed 5% of the total costs, fees and expenses of third parties).

- C. In the event of an Emergency Situation, Zayo may, without prior notice, commence such emergency and repair work as required under the circumstances, provided that Zayo shall notify the City in writing as promptly as possible before such repair or emergency work commences, or as soon thereafter as possible. The City may act, at any time, without prior written notice in the case of an Emergency Situation, but shall notify Zayo in writing as promptly as possible under the circumstances.
- D. Zayo agrees that if any of its actions under the Franchise materially impair or damage any City property, survey monument, or property owned by a third-party, Zayo will restore, at its own cost, the impaired or damaged property to the same condition the property was in prior to such work. Such repair work shall be performed and completed to the reasonable satisfaction of the City.

#### **Section 4. Location, Relocation, and Removal of Facilities.**

- A. **Location.** Zayo shall place any new Facilities underground where existing telecommunications and cable facilities are located underground. Any new Facilities to be located above-ground shall be placed on utility poles.
- B. **Relocation.** Subject to and in accordance with all applicable Laws, Zayo will, at Zayo's cost and expense, remove, relocate, change, and/or alter the position or location of any Facilities located within the Right-of-Way whenever City determines that such removal, relocation, change, and/or alteration is necessary for any of the following reasons: (a) an Emergency; (b) construction, repair, installation, and/or maintenance of any City and/or other public work or improvement; (c) City's operations (or those of other governmental entities) in, on, and/or under the Right-of-Way requires the removal, relocation, change, and/or alteration of the Facilities; (d) a beautification, streetscape, and/or other City improvement project; and/or (e) public convenience and/or necessity (as reasonably determined by City). If any moving and/or relocation work is done for or at the request of a private individual, entity, developer, and/or development, the costs of such moving or relocation work will be borne by the requesting private individual, entity, developer, and/or development. Nothing contained in this Franchise will be construed in any way to prevent City from sewerage, grading, planking, rocking, paving, repairing, altering, and/or improving any Right-of-Way in and/or on which the Facilities are or will be placed.
- C. **Removal.** Upon the termination or expiration of this Franchise, City may require Zayo to remove Facilities located in the Right-of-Way. Removal of the Facilities will be at Zayo's cost and expense. Upon removal, Zayo shall restore the Right-of-Way to the condition of the property prior to such removal. Notwithstanding the expiration of this Franchise, and so as long as the parties are negotiating in good faith, and until such time as either a new agreement has been reached or Zayo has determined not to renew this Franchise, Zayo shall have the right to continue to occupy and use the Right-of-Way pursuant to the terms of this Franchise.

#### **Section 5. Indemnification.**

- A. In accordance with and subject to applicable law, and except to the extent of City's negligence or willful misconduct, Zayo will defend, indemnify, and hold City and its employees, officers, agents, and representatives harmless for, from, and against all third party claims, actions, proceedings, damages, liabilities, losses, and expenses of every kind, including, without limitation, attorney fees and costs, resulting from or arising out of, whether directly or indirectly, the following: (a) the acts or omissions of Zayo and/or its employees, officers, agents, and representatives, whether such acts or omissions are authorized, allowed, or prohibited by this Franchise; (b) damage, injury, and/or death to person or property caused directly or indirectly by the acts or omissions of Zayo and/or its employees, officers, agents, and representatives; and/or (c) Zayo's breach and/or failure to perform any of its representations, warranties, covenants, and/or obligations under this Franchise. Zayo's indemnification obligations provided in this section will survive the termination of this Franchise. Except for third party claims covered under the indemnification provisions in this Franchise, in no event shall either party be liable to the other party for any incidental, special, punitive, or consequential damages arising out of or in connection with this Franchise.

- B. In the event of liability for damages arising out of bodily injury to persons or damages to property resulting from or arising out of, whether directly or indirectly, concurrent negligence of Zayo and/or its employees, officers, agents, and representatives, and the City and/or its employees, officers, agents, and representatives, Zayo's liability hereunder shall be only to the extent of Zayo's negligence.
- C. Notwithstanding any other provisions of this section, Zayo assumes the risk of damage to its facilities located in the City's public rights-of-way, easements, and property from activities conducted by the City, its employees, officers, agents, and representatives. Zayo releases and waives any and all claims against the City, its employees, officers, agents, and representatives for damage to or destruction of Zayo's Facilities caused by or arising out of activities conducted by the City, its employees, officers, agents, and representatives, in the public rights-of-way, easements, or property subject to this Franchise, except to the extent any such damage or destruction is caused by or arises from the negligence, willful misconduct, or malicious action on the part of the City, its employees, officers, agents, or representatives.
- D. The provisions of this Section 5 shall survive the expiration or termination of this Franchise.

#### **Section 6. Default.**

No party's act or omission will be considered a default under this Franchise unless and until the alleged defaulting party has received ten (10) days' prior written notice from the non-defaulting party specifying with reasonable particularity the nature of the default the non-defaulting party believes exists (the "Default Notice"). Commencing from the defaulting party's receipt of the Default Notice, the alleged defaulting party will have thirty (30) days within which to cure or remedy the default (the "Cure Period") before the defaulting party will be deemed in default of this Franchise; provided, however, that if the nature of the default is such that it cannot be completely remedied or cured within the Cure Period, there will not be a default by the alleged defaulting party under this Franchise if the alleged defaulting party begins correction of the default within the Cure Period and thereafter proceeds with reasonable diligence to effect the remedy as soon as practicable. Subject to the immediately preceding sentence, if the alleged defaulting party is Zayo, and Zayo fails to cure or remedy the default within the Cure Period or an extension thereto, the non-defaulting party may terminate this Franchise based on such default and may pursue all rights and remedies available to the non-defaulting party under this Franchise and/or applicable law.

#### **Section 7. Nonexclusive Franchise.**

This Franchise is not and shall not be deemed to be an exclusive agreement, and shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area. 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 8. Franchise Term.**

- A. This Franchise is and shall remain in full force and effect for a period of ten years from and after the Effective Date of this Franchise.
- B. At the end of the initial ten year term, this Franchise shall continue to renew automatically every year unless either party provides the other party with notice of intent to terminate this Franchise no more than six months and no less than three months prior to the expiration of the then current term.

#### **Section 9. Compliance with Codes and Regulations.**

- A. The rights, privileges and authority herein granted are subject to and governed by this Franchise, the applicable laws of the State of Washington and the applicable laws of the United States, and all other

applicable ordinances and codes of the City, as they now exist or may hereafter be amended. Nothing in this Franchise limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, construction, or excavation by Zayo shall be performed in accordance with applicable federal, state and city rules and regulations.

- B. In the event that any territory served by Zayo is annexed to the City after the effective date of this Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

**Section 11. Record of Installations and Service.**

- A. Upon written request of the City, Zayo shall provide the City with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes only within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.
- B. Zayo shall make as-built drawings and maps of the precise location of any Facilities placed by Zayo in any Rights-of-Way available to the City within ten (10) working days of the City's written request. These plans and maps shall be provided at no cost to the City and shall include hard copies and/or digital copies in a format commonly used in the telecommunications industry.
- C. If Zayo provides any books, records, and/or information to the City that Zayo reasonably believes to be confidential or proprietary, and Zayo clearly and specifically identifies such books, records, and/or information as confidential or proprietary upon initial submission to the City, the City will take reasonable steps to protect the confidentiality of such books, records, and/or information subject to the City's obligations under applicable public records laws.

**Section 12. Shared Use of Excavations and Trenches.**

- A. If either the City or Zayo shall at any time after installation of the Facilities plan to make excavations in the Franchise Area and as described in this Section, the party planning such excavation shall afford the other, upon receipt of written request to do so, an opportunity to share such an excavation, *provided that*: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs; (2) such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. In addition, pursuant to RCW 35.99.070, the City may request that Zayo install additional conduit, ducts and related access structures for the City pursuant to contract, under which Zayo shall recover its incremental costs of providing such facilities to the City.
- B. The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. Zayo shall be given written notice at least ninety (90) days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five (5) year street trenching moratoriums.
- C. The City reserves the right to require Zayo to joint trench with other franchisees if both entities are anticipating trenching within the same area where Zayo is planning to trench, and provided that the terms of this Section are met.

**Section 13. Insurance.**

Zayo shall maintain in full force and effect during the term of this Franchise, comprehensive general liability insurance in the amount of One Million Dollars (\$1,000,000) combined single limit for bodily injury and property damages. Prior to commencing construction of the telecommunications system, Zayo shall provide the City with a

certificate of insurance designating the City as an additional insured. Such insurance shall be non-cancelable except upon thirty (30) days prior written notice to the City.

**Section 14. Assignment.**

Subject to the terms and conditions contained in this Franchise, Zayo will not transfer all or any part of the Facilities, Zayo's interest in or to this Franchise, or the telecommunications system without City's prior written consent, which consent will not be unreasonably withheld, conditioned, or delayed. If The City consents to a transfer, the following will apply: (a) the terms and conditions of this Franchise will in no way be deemed to have been waived or modified; and (b) consent will not be deemed consent to any further transfer. Nothing in this section shall prevent or limit Zayo from subletting or leasing capacity within Zayo's telecommunications system provided that Zayo maintains dominion and control over the portions of the telecommunications system that are within The City's right-of-way. Notwithstanding the foregoing, Zayo may assign this Franchise and the privileges granted herein without the consent of the City, to: (a) a subsidiary, a commonly owned affiliate, or a parent company provided that such assignee has the financial resources equivalent to or greater than Zayo and has the capability to perform its obligations under this Franchise; or (b) an entity which succeeds to all or substantially all of Zayo's assets as a result of a merger, sale or other similar transaction. Subject to the conditions contained in this Section 14, this Franchise will be binding on the parties and their respective heirs, executors, administrators, successors, and assigns, and will inure to their benefit

**Section 15. Abandonment and Removal of Facilities.**

Upon the termination or expiration of this Franchise, the City may require Zayo to remove Facilities located in the Right-of-Way. Removal of the Facilities will be at Zayo's cost and expense. Upon removal, Zayo shall restore the Right-of-Way the condition of the property prior to such removal. Notwithstanding the expiration of this Franchise, and so as long as the parties are negotiating in good faith, and until such time as either a new agreement has been reached or Zayo has determined not to renew this Franchise, Zayo shall have the right to continue to occupy and use the Right-of-Way pursuant to the terms of this Franchise.

**Section 16. Miscellaneous.**

- A. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise, which shall continue in full force and effect. 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 of paragraphs. In the event of any conflict between this Franchise and the City of Selah Municipal Code, the Municipal Code shall control.
- B. Failure of either party to declare any breach or default under this Franchise or any delay in taking action shall not waive such breach or default, but the non-defaulting party shall have the right to declare any such breach or default at any time. Failure of either party to declare one breach or default does not act as a waiver of that party's right to declare another breach or default.
- C. Notwithstanding anything to the contrary herein, any determination by the City with respect to matters contained in this Franchise and matters related to the Franchise shall be made in accordance with applicable law.

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**Section 17. Notice.**

Any notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

City

City of Selah  
ATTN: City Administrator  
ATTN: City Clerk-Treasurer  
ATTN: City Attorney  
115 West Naches Avenue  
Selah, WA 98942

Zayo

Zayo Group, LLC  
Attn: Legal - Underlying Rights  
1401 Wynkoop St., Suite 500  
Denver, CO 80202

Zayo Group, LLC

Attn: Legal - General Counsel  
1821 30<sup>th</sup> St., Unit A  
Boulder, CO 80301

For Emergencies:

Network Operations Center & Repair  
Phone: (888)404-9296  
Email: zayoncc@zayo.com

Notices under this Franchise shall be in writing and shall be deemed given upon receipt by hand delivery, certified mail return receipt requested, or nationally recognized overnight courier to the above addresses, or such other address as either party may designate from time to time by providing written notice of such change of address.

**Section 18. Effective Date.**

This Franchise shall be effective upon written acceptance by Zayo.

City

Zayo Group, LLC

By: Sherry Raymond

By: \_\_\_\_\_

Name: SHERRY RAYMOND  
[Title]

Name: \_\_\_\_\_  
[Title]

Date: 9-27-2023

Date: \_\_\_\_\_