

## ORDINANCE O-4766

AN ORDINANCE OF THE CITY OF KIRKLAND ("CITY") GRANTING ZAYO GROUP, LLC, A DELAWARE LIMITED LIABILITY COMPANY ("ZAYO"), AS SUCCESSOR-IN-INTEREST TO ABOVENET COMMUNICATIONS, INC. ("ABOVENET"), A NON-EXCLUSIVE COMMUNICATIONS MASTER USE PERMIT FOR THE RIGHT, PRIVILEGE, AND AUTHORITY TO MAKE USE OF THE PERMIT AREA FOR WIRELINE COMMUNICATIONS PURPOSES.

1 WHEREAS, the City adopted Ordinance No. 3716 on December  
2 7, 1999 granting Metromedia Fiber Network Services, Inc. ("MFNS"), a  
3 Delaware corporation, the right, privilege, authority and franchise to  
4 construct and maintain, repair, replace, operate upon, over, under,  
5 along and across the franchise area for purposes of its telephone  
6 business ("1999 Franchise"); and  
7

8 WHEREAS, Section 9 of the 1999 Franchise provided that the  
9 initial term of the Franchise would be ten (10) years from the effective  
10 date of the Ordinance, provided that the term of the Franchise could be  
11 extended for up to two (2) additional five (5) year terms upon  
12 agreement of the parties; and  
13

14 WHEREAS, Ordinance No. 3716 took effect on or about  
15 December 12, 1999; and  
16

17 WHEREAS, in 2003 AboveNet became the successor-in-interest  
18 to MFNS; and  
19

20 WHEREAS, On September 1, 2009, the City passed Ordinance  
21 4205 to repeal Title 26 of the Kirkland Municipal Code and replace it  
22 with a new Title 26 entitled "Right of Way—Communications," which,  
23 among other things, created a process for a Communications Master  
24 Use Permit for communications companies to use the right-of-way.  
25 Going forward, as existing communications franchises expire, they will  
26 be replaced by Communications Master Use Permits; and  
27

28 WHEREAS, On July 29, 2010, City and AboveNet extended the  
29 1999 Franchise for an additional five (5) year term through December  
30 15, 2014 ("First Extension"); and  
31

32 WHEREAS, in 2012 Zayo became the successor-in-interest to  
33 AboveNet; and  
34

35 WHEREAS, the parties cannot locate a second extension to the  
36 1999 Franchise, though Zayo has been operating continuously in the  
37 rights-of-way since the expiration of the First Extension; and

38 WHEREAS, in April 2012 the City granted a franchise ("2012  
39 Franchise") to Electric Lightwave LLC to operate in the City's rights-of-  
40 way for its telecommunications business, the term of which 2012  
41 Franchise was until June 18, 2018 unless terminated sooner; and  
42

43 WHEREAS, the facilities formerly owned by AboveNet are  
44 different that the facilities formerly owned by Electric Lightwave, but  
45 Zayo now operates all such facilities in the City; and  
46

47 WHEREAS, by and through this Ordinance, the City and Zayo  
48 accept, acknowledge and agree that all rights and privileges granted  
49 under the 1999 Franchise and the First Extension thereto are now  
50 continued, assumed, owned, and legally held in Zayo and that all  
51 facilities installed under the 1999 Franchise and its Extensions are  
52 accepted and in compliance with the City's permitting rules and  
53 regulations; and  
54

55 WHEREAS, Zayo Group, LLC ("Grantee") has requested to obtain  
56 the right to install, operate and maintain a wireline fiber optic cable  
57 communications system within the public rights-of-way of the City for  
58 all its facilities by being granted a Communications Master Use Permit  
59 (CMUP); and  
60

61 WHEREAS, were the CMUP to be granted, the 2012 Franchise  
62 would be redundant, and therefore Zayo desires to terminate the 2012  
63 Franchise coincident with the effective date of the CMUP; and  
64

65 WHEREAS, the City Council finds it desirable for the welfare of  
66 the City and its residents that such a non-exclusive permit be granted  
67 to Grantee; and  
68

69 WHEREAS, the City Council has the authority under state and  
70 local law to grant permits for the use of its street rights of way; and  
71

72 WHEREAS, the City is willing to grant the rights requested by  
73 Grantee subject to certain terms and conditions.  
74

75 NOW, THEREFORE, the City Council of the City of Kirkland  
76 do ordain as follows:

77 Section 1. Definitions. For purposes of this Communications  
78 Master Use Permit (the "Permit"), the terms defined in Kirkland  
79 Municipal Code ("KMC") 26.08.020 shall apply. In addition, the terms  
80 below have the following meanings:  
81

82 A. "Affiliate" means an entity which owns or controls, is owned  
83 or controlled by, or is under common ownership with Grantee.

84 B. "City" means the City of Kirkland, a municipal corporation of  
85 the State of Washington.

86  
87 C. "Communications Master Use Permit" shall mean the initial  
88 authorization or renewal thereof, granted by the City, through this  
89 Ordinance, or a subsequently adopted Ordinance, which authorizes the  
90 use of rights-of-way in the Permit Area for construction and operation  
91 of the Grantee's facilities for the purpose of offering communications  
92 service.

93  
94 D. "Communications Service" means any communications  
95 service, including, but not limited to telecommunications and  
96 communications services as defined by federal and state law,  
97 communications capacity, or dark fiber, provided by the Grantee using  
98 its Facilities, either directly or as a carrier for its Affiliates, or any other  
99 person engaged in Communications Services, including, but not limited  
100 to, the transmission of voice, data or other electronic information,  
101 facsimile reproduction, burglar alarm monitoring, meter reading and  
102 home shopping, or other subsequently developed technology that  
103 carries an electronic signal over fiber optic cable. Communications  
104 Service shall also include non-switched, dedicated and private line, high  
105 capacity fiber optic transmission services to firms, businesses or  
106 institutions within the City. However, Communications Service shall not  
107 include the provision of cable television, open video, or similar services,  
108 as defined in the Communications Act of 1934, as amended, and the  
109 Telecommunications Act of 1996, as amended, for which a separate  
110 Master Permit would be required.

111  
112 E. "Facilities" means all appurtenances or tangible things  
113 owned, leased, operated, or licensed by the Grantee, including but not  
114 limited to the plant, equipment, and property used in the provision of  
115 communication and telecommunication services and not owned by the  
116 City, including but not limited to poles wires, pipe, conduits, pedestals,  
117 antenna, vaults, duct runs, and other appurtenances placed in, on, or  
118 under the public rights-of-ways.

119  
120 F. "Permit Area" means the present municipal boundaries of the  
121 City, and shall include any additions thereto by annexation or other legal  
122 means during the term of the Permit. The Facilities geographic area as  
123 set forth in **Exhibit A** attached hereto and incorporated herein by  
124 reference.

125  
126 G. "Person" means an individual, partnership, association, joint  
127 stock company, trust, corporation, limited liability company or  
128 governmental entity.

129  
130 H. "Rights-of-way" means land acquired or dedicated for public  
131 roads and streets. It does not include (1) state highways; (2) structures,

including poles and conduits located within the right-of-way; (3) federally granted trust lands or forest board trust lands; (4) lands owned or managed by the state Parks and Recreation Commission; (5) federally granted railroad rights-of-way acquired under 43 U.S.C. 912 and related provisions of federal law that are not open for motor vehicle use; or (6) parks or other public property not used as a public right-of-way, including the Cross Kirkland Corridor.

## Section 2. Permit Area and Authority Granted.

A. Facilities within Permit Area. The City does hereby grant to Grantee the right, privilege, authority and Permit to use rights-of-way in the Permit Area to construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across rights-of-way in the Permit Area for purposes of communications services.

B. Permission Required to Enter onto Other City Property. Nothing contained in this Ordinance is to be construed as granting permission to Grantee to go upon any other public place other than rights-of-way within the Permit Area in this Ordinance. 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 this Permit, Grantee shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission.

## Section 3. Construction and Maintenance.

A. Grantee's Facilities shall be located, relocated and maintained within the Permit Area 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 and in accordance with the laws of the State of Washington. Whenever it is necessary for Grantee, in the exercise of its rights under this Permit, to make any excavation in the right of way, Grantee shall obtain prior approval from the City of Kirkland Public Works Department, pay the applicable permit fees, and obtain any necessary permits for the excavation work. Grantee shall meet the City's specifications per the Kirkland Municipal Code ("KMC") and the Public Works Pre-Approved Plans and Policies.

## Section 4. Location and Relocation of Facilities.

A. Grantee 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 existing utility poles. No new utility poles shall be installed in

180 connection with placement of new above-ground facilities, unless such  
181 new utility pole is a like-kind replacement for an existing utility pole and  
182 is approved by the City.

183  
184 B. Except as otherwise required by law, Grantee agrees to  
185 relocate, remove or reroute its facilities as ordered by the City, at no  
186 expense or liability to the City, except as may be required by KMC  
187 26.36.050. The City's decision to require the relocation of Grantee's  
188 facilities shall be made in a reasonable, uniform and non-discriminatory  
189 manner. Pursuant to the provision of Section 5, Grantee agrees to  
190 protect and save harmless the City from any customer or third-party  
191 claims for service interruption or other losses in connection with any  
192 such change or relocation.

193  
194 C. The Grantee shall indemnify, hold harmless and pay the costs  
195 of defending the City against any and all claims, suits, actions, damages,  
196 or liabilities for delays on City construction projects caused by or arising  
197 out of the failure of the Grantee to relocate its Facilities in a timely  
198 manner; provided, that the Grantee shall not be responsible for  
199 damages due to delays caused solely by the City, or circumstances  
200 beyond the control of the Grantee.

201  
202 D. In the event that the City orders the Grantee to relocate its  
203 Facilities for a project which is primarily for private benefit, the private  
204 party or parties causing the need for such project shall reimburse the  
205 Grantee for the cost of relocation in the same proportion as their  
206 contribution to the total cost of the project, pursuant to RCW  
207 35.99.060(4).

208  
209 E. In the event of an unforeseen emergency that creates a  
210 threat to public safety, health or welfare, the City may require the  
211 Grantee to relocate its Facilities at its own expense, any other portion  
212 of this Section notwithstanding.

213  
214 Section 5. Indemnification.

215  
216 A. Grantee agrees to indemnify, defend, and hold the City  
217 harmless as set forth in KMC 26.40.030. In addition, Grantee shall  
218 indemnify, defend and hold the City, its agents, officers, employees,  
219 volunteers and assigns harmless from and against any and all claims,  
220 demands, liability, loss, cost, damage or expense of any nature  
221 whatsoever, including all costs and attorney's fees, made against them  
222 on account of injury, sickness, death or damage to persons or property  
223 which is caused by or arises out of, in whole or in part, the willful,  
224 tortious or negligent acts, failures and/or omissions of Grantee or its  
225 agents, servants, employees, contractors, subcontractors or assigns in  
226 the construction, operation or maintenance of its Facilities or in  
227 exercising the rights granted Grantee in this Permit; *provided, however,*

such indemnification shall not extend to injury or damage caused solely by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

B. In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify Grantee thereof, and Grantee 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 be begun against the City based upon any such claim or demand, the it shall likewise promptly notify Grantee thereof, and Grantee 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 6. Default.

A. If Grantee shall fail to comply with any of the provisions of this Permit, unless otherwise provided in this Permit, the City may, in addition to the remedies provided in KMC Chapter 26.44, serve upon Grantee a written order to comply within thirty (30) days from the date such order is received by Grantee. If Grantee is not in compliance with this Permit after expiration of the thirty (30) day period, the City may act to remedy the violation and may charge the reasonable costs and expenses of such action to Grantee. The City may act without the thirty (30) day notice in case of an emergency. If any failure to comply with this Permit by Grantee cannot be corrected with due diligence within said thirty (30) day period, then the time within which Grantee may so comply shall be extended for such time as may be reasonably necessary and so long as Grantee works promptly and diligently to effect such compliance. If Grantee is not in compliance with this Permit, and is not proceeding with due diligence in accordance with this section to correct such failure to comply, then the City may in addition, by ordinance and following written notice to Grantee, declare an immediate forfeiture of this Permit.

B. In addition to other remedies provided in KMC Chapter 26.44, this Permit, or otherwise available at law, if Grantee is not in compliance with requirements of the Permit, and if a good faith dispute does not exist concerning such compliance, the City may withhold issuance of pending Grantee right-of-way use permits until compliance is achieved.

Section 7. Nonexclusive Permit. This Permit is not and shall not be deemed to be an exclusive Permit. This Permit shall not in any manner prohibit the City from granting other and further Permits over, upon, and along the Permit Area. This Permit shall not prohibit or prevent the City from using the Permit Area or affect the jurisdiction of the City over the same or any part thereof.

276           Section 8. Permit Term.

277  
278           A. This Permit is and shall remain in full force and effect for a  
279 period of ten (10) years from and after the effective date of the  
280 Ordinance ("Initial Term"). Following the Initial Term, provided that  
281 Grantee is not in default of any of the terms and conditions of this  
282 Ordinance, this Ordinance may be renewed for an additional ten (10)  
283 year term ("Extension Term") upon the written mutual agreement of  
284 Grantee and the City.

285  
286           B. If the City and Grantee fail to formally renew this Permit prior  
287 to the expiration of its term or any extension thereof, this Permit shall  
288 automatically continue in full force and effect until renewed or until  
289 either party gives written notice at least one hundred eighty (180) days  
290 in advance of intent to terminate the Permit.

291  
292           Section 9. Compliance with Codes and Regulations.

293  
294           A. The rights, privileges and authority herein granted are  
295 subject to and governed by this ordinance and all other applicable  
296 ordinances and codes of the City of Kirkland, as they now exist or may  
297 hereafter be amended, including but not limited to the provisions of  
298 Kirkland Municipal Code Title 26, Title 19, Title 5, and Kirkland Zoning  
299 Code Title 117. Nothing in this ordinance limits the City's lawful power  
300 to exercise its police power to protect the safety and welfare of the  
301 general public. Any location, relocation, erection or excavation by  
302 Grantee shall be performed by Grantee in accordance with applicable  
303 federal, state and city rules and regulations, including the City's Public  
304 Works Pre-Approved Plans and Policies, and any required permits,  
305 licenses or fees, and applicable safety standards then in effect.

306  
307           B. In the event that any territory served by Grantee is annexed  
308 to the City after the effective date of this Permit, such territory shall be  
309 governed by the terms and conditions contained herein upon the  
310 effective date of such annexation.

311  
312           Section 10. Undergrounding. New Facilities shall be installed  
313 underground pursuant to Section 4 of this Permit. Grantee  
314 acknowledges the City's policy of undergrounding of Facilities within the  
315 Permit Area. Grantee will cooperate with the City in the undergrounding  
316 of Grantee's existing Facilities within the Permit Area. If, during the term  
317 of this Permit, the City shall direct Grantee to underground Facilities  
318 within any Permit Area, such undergrounding shall be at no cost to the  
319 City, except as may be provided in RCW Chapter 35.99. Grantee shall  
320 comply with all federal, state, and City regulations on undergrounding.  
321 If the City undertakes any street improvement which would otherwise  
322 require relocation of Grantee's above-ground facilities, the City may, by

323 written notice to Grantee, direct that Grantee convert any such Facilities  
324 to underground Facilities.

325  
326 Section 11. Record of Installations and Service.

327  
328 A. With respect to excavations by Grantee and the City within  
329 the Permit Area, Grantee and the City shall each comply with its  
330 respective obligations pursuant to Chapter 19.122 RCW and any other  
331 applicable state law.

332  
333 B. Upon written request of the City, Grantee shall provide the  
334 City with the most recent update available of any plan of potential  
335 improvements to its Facilities within the Permit Area; provided,  
336 however, any such plan so submitted shall be for informational purposes  
337 within the Permit Area, nor shall such plan be construed as a proposal  
338 to undertake any specific improvements within the Permit Area.

339  
340 C. As-built drawings and maps of the precise location of any  
341 Facilities placed by Grantee in any Right of Way shall be made available  
342 by Grantee to the City within 10 (ten) working days of the City's request.  
343 These plans and maps shall be provided at no cost to the City and shall  
344 include hard copies and/or digital copies in a format specified by the  
345 City.

346  
347 Section 12. Shared Use of Excavations and Trenches.

348  
349 A. If either the City or Grantee shall at any time after installation  
350 of the Facilities plan to make excavations in the area covered by this  
351 Permit and as described in this Section, the party planning such  
352 excavation shall afford the other, upon receipt of written request to do  
353 so, an opportunity to share such an excavation, *provided that*: (1) such  
354 joint use shall not unreasonably delay the work of the party causing the  
355 excavation to be made or unreasonably increase its costs; (2) such joint  
356 use shall be arranged and accomplished on terms and conditions  
357 satisfactory to both parties. In addition, pursuant to RCW 35.99.070,  
358 the City may request that Grantee install additional conduit, ducts and  
359 related access structures for the City pursuant to contract, under which  
360 Grantee shall recover its incremental costs of providing such facilities to  
361 the City.

362  
363 B. The City reserves the right to require Grantee to joint trench  
364 with other Permittees if both entities are anticipating trenching within  
365 the same general area and provided that the terms of this Section are  
366 met.



368           Section 13. Insurance.

369  
370           A. Grantee shall procure and maintain for the duration of this  
371 Permit, insurance against claims for injuries to persons or damage to  
372 property which may arise from or in connection with the performance  
373 of work under this Permit by Grantee, its agents, representatives or  
374 employees in the amounts and types set forth in KMC 26.40.020.

375  
376           B. Grantee's insurance coverage shall be primary insurance as  
377 respects the City. Any insurance, self-insurance or insurance pool  
378 coverage maintained by the City shall be in excess of Grantee's  
379 insurance and shall not contribute with it.

380  
381           C. Grantee shall furnish the City with certificates of the  
382 foregoing insurance coverage or a copy of amendatory endorsements,  
383 including but not necessarily limited to the additional insured  
384 endorsement.

385  
386           D. Grantee shall have the right to self-insure any or all of the  
387 above-required insurance. Any such self-insurance is subject to  
388 approval by the City.

389  
390           E. Grantee's maintenance of insurance as required by this  
391 Permit shall not be construed to limit the liability of Grantee to the  
392 coverage provided by such insurance, or otherwise limit City's recourse  
393 to any remedy to which the City is otherwise entitled at law or in equity.

394  
395           Section 14. Assignment.

396  
397           A. All of the provisions, conditions, and requirements herein  
398 contained shall be binding upon Grantee, and no right, privilege, license  
399 or authorization granted to Grantee hereunder may be assigned or  
400 otherwise transferred without the prior written authorization and  
401 approval of the City, which the City may not unreasonably withhold.  
402 Notwithstanding the foregoing, Grantee, without the consent of, but  
403 upon notice to the City, may assign this agreement in whole or in part  
404 to: (a) an Affiliate (as defined in this Permit); or (b) the surviving entity  
405 in the event of a merger or acquisition of substantially all of Grantee's  
406 assets.

407  
408           B. Grantee may lease the Facilities or any portion thereof to  
409 another or provide capacity or bandwidth in its Facilities to another,  
410 *provided that:* Grantee at all times retains exclusive control over such  
411 Facilities and remains responsible for locating, servicing, repairing,  
412 relocating or removing its Facilities pursuant to the terms and conditions  
413 of this Permit.

414        Section 15. Abandonment and Removal of Facilities. Grantee's  
 415 Facilities may be considered abandoned pursuant to KMC 26.20.105. In  
 416 the event of abandonment, the parties shall refer to their options in KMC  
 417 26.20.105.

418  
 419        Section 16. Miscellaneous.

420  
 421        A. If any term, provision, condition or portion of this Permit shall  
 422 be held to be invalid, such invalidity shall not affect the validity of the  
 423 remaining portions of this Permit which shall continue in full force and  
 424 effect. The headings of sections and paragraphs of this Permit are for  
 425 convenience of reference only and are not intended to restrict, affect,  
 426 or be of any weight in the interpretation or construction of the provisions  
 427 of such sections of paragraphs.

428  
 429        B. Grantee shall pay for the City's reasonable administrative  
 430 costs in drafting and processing this Ordinance and all work related  
 431 thereto. Grantee shall further be subject to all permit fees associated  
 432 with activities and the provisions of any such permit, approval, license,  
 433 agreement of other document, the provisions of this Permit shall control.

434  
 435        C. Failure of either party to declare any breach or default under  
 436 this Permit or any delay in taking action shall not waive such breach or  
 437 default, but that party shall have the right to declare any such breach  
 438 or default at any time. Failure of either party to declare one breach or  
 439 default does not act as a waiver of that party's right to declare another  
 440 breach or default.

441  
 442        Section 17. Notice. Any notice or information required or  
 443 permitted to be given to the parties under this Permit may be sent to  
 444 the following addresses unless otherwise specified:

445  
 446        City:

447  
 448 City of Kirkland  
 449 Director of Public Works  
 450 123 Fifth Ave.  
 451 Kirkland, WA 98033

452  
 453        Grantee:

454  
 455 Zayo Group, LLC  
 456 Attn: Director, Underlying Rights – West Region  
 457 1805 29th Street, Suite 2050  
 458 Boulder, CO 80301

459 With a Copy to:

460

461 Zayo Group, LLC

462 Attn: General Counsel – Central Region

463 1805 29th Street, Suite 2050

464 Boulder, CO 80301

465

466 For Emergencies:

467

468 Network Operations Center & Repair

469 Phone: (888) 404 9296

470 E-mail: [zayoncc@zayo.com](mailto:zayoncc@zayo.com)

471

472 Notice shall be deemed given upon receipt in the case of personal  
473 delivery, three days after deposit in the United States Mail in the case  
474 of regular mail, or the next day in the case of overnight delivery.

475

476 Section 18. Effective date. This Ordinance, being in compliance  
477 with RCW 35A.47.040, shall be in force and effect five days from and  
478 after its passage by the Kirkland City Council and publication pursuant  
479 to Section 1.08.017 Kirkland Municipal Code in the summary form  
480 attached to the original of this ordinance and by this reference approved  
481 by the City Council.

482

483 Passed by majority vote of the Kirkland City Council in open  
484 meeting this \_\_\_\_ day of \_\_\_\_\_, 2021.

485

486 Signed in authentication thereof this \_\_\_\_ day of  
487 \_\_\_\_\_, 2021.

\_\_\_\_\_  
Penny Sweet, Mayor

Attest:

\_\_\_\_\_  
Kathi Anderson, City Clerk

Approved as to Form:

\_\_\_\_\_  
Kevin Raymond, City Attorney

