



CITY OF KIRKLAND
Department of Public Works
123 Fifth Avenue, Kirkland, WA 98033
425-587-3800

MEMORANDUM

To: Kurt Triplett, City Manager

From: Julie Underwood, Director of Public Works
John Starbard, Deputy Director of Public Works
Stephanie Croll, Senior Assistant City Attorney

Date: August 26, 2021

Subject: PROPOSED COMMUNICATIONS MASTER USE PERMIT—ZAYO—FIRST
READING

RECOMMENDATION:

It is recommended that the City Council satisfy a statutory procedure to have a first reading of a proposed Communications Master Use Permit that may be granted to Zayo Group, LLC, at a future City Council meeting.

BACKGROUND DISCUSSION:

Certain utility entities that are not operated directly by the municipality itself—e.g., electricity, natural gas—have franchise agreements with those municipalities in which they operate. The franchise agreements regulate the use of the local public rights-of-way by those utilities. In 2000, the Legislature amended the *Revised Code of Washington* concerning telecommunication and cable television services so that they were to be regulated by “Master Permits,” meaning an agreement “in whatever form” the local government chose to use provided that form was consistent with RCW 35.99. Practically, a franchise agreement and a Master Permit are synonymous. In 2009, in conjunction with other amendments the City was addressing related to telecommunications and cable television services, the Council repealed and adopted a new title 26 in the *Kirkland Municipal Code*, “Right-of-Way—Communications,” that uses the term “Communications Master Use Permit” (CMUP), identifies the process for obtaining one, and details how they are regulated.

On December 7, 1999, the City granted Metromedia Fiber Network Services (MFNS) a franchise agreement. The initial term was ten years with two five-year renewal options for a potential total of twenty years. Subsequent to the execution of the initial franchise, there were two changes in ownership:

- AboveNet became the successor in interest to MFNS, then
- Zayo became the successor in interest to AboveNet.

On July 29, 2010, the City and AboveNet extended the franchise for an additional five year term through December 15, 2014. The City cannot find a record of the franchise being extended beyond December 15, 2014.

Separate from its acquisition of AboveNet facilities in the City, Zayo acquired different telecommunication facilities in the City from Electric Lightwave LLC. The City and Electric Lightwave entered into a franchise agreement in April 2012 that had a term lasting until June 2028, unless terminated sooner. Zayo acquired the Electric Lightwave facilities on March 1, 2017, and the Electric Lightwave franchise was assigned to Zayo at that time. Unlike the expired franchise that was assigned to Zayo from AboveNet, the franchise it acquired from Electric Lightwave is still in full force and effect, but only for the facilities that had been owned by Electric Lightwave.

Were this proposed CMUP to be approved by the Council at a future meeting, it would apply to all Zayo-owned facilities in Kirkland and would make the "Electric Lightwave/Zayo franchise" redundant. Zayo wishes to terminate that franchise coincident with the effective date of this proposed CMUP, which may be approximately September 26, 2021. Such termination is administrative, and Zayo agrees to the form of the termination instrument as supplied by the City (see Attachment A, Termination of Franchise Agreement).

Zayo and staff have been working for quite some time to have Zayo obtain a CMUP. The parties have agreed to a proposed CMUP for the Council's consideration and future action. Action is anticipated to be September 21, 2021. The CMUP is in the form of an ordinance (see Attachment B), and its terms are summarized below.

- Section 2. The permitted area is only the public rights-of-way within the City limits, including any annexation areas subsequent to the effective date of the ordinance, but does not include any other City-owned property (e.g., park land, the Cross Kirkland Corridor, etc.).
- Section 3. Zayo's facilities in the rights-of-way shall not interfere with free and safe passage by others within the rights-of-way. All excavation work requires a City permit.
- Section 4. Underground facilities shall be placed where similar underground utilities are located. Above ground facilities shall be on utility poles. No new poles shall be permitted, but replacement poles may be permitted. The City has the right, per law, to require Zayo to move its facilities.
- Section 7. This is not an exclusive permit for Zayo. The City may issue other permits in the same area and for the same or other purposes.
- Section 8. The permit term is ten years with the option to extend for another ten years by mutual agreement. If the parties fail to renew the permit, it shall continue either until it is renewed or either party gives at least 180 days' notice to terminate the permit.
- Section 10. New Zayo facilities shall be underground, consistent with Section 4. If the City undertakes a street improvement where Zayo has above ground facilities, the City may direct Zayo to relocate them underground at Zayo's expense.
- Section 12. If either the City or Zayo are performing trenching, either party may ask the other to share the trench for its needs, if agreed. Also, if Zayo is doing trenching, the City may ask for additional conduit or access

structures that benefit the City, provided the City pays the incremental cost. The City may require Zayo to joint trench with a third party.

- Section 14. Zayo may not assign or transfer the CMUP to another party without the City's prior approval; but may, with notice to the City, assign it in whole or in part to an affiliate or the surviving entity in the event of a merger or acquisition.

The wireless communication industry is regulated by the Federal Communications Commission (FCC). In recent years, particularly in 2019, the FCC has accommodated the interests of the wireless industry and has greatly reduced state and local government's regulatory authority for wireless facilities. The main stated reason for limiting local regulatory authority is to benefit the United States by allowing the industry to provide this technology to the public quickly. No city in the United States can deny the deployment of this technology completely. Further, the FCC specifies the length of time a local government is allowed to review a wireless permit, restricts the dollar amounts that can be charged for permits, and limits a local government's discretion primarily to aesthetics. People concerned about the FCC's regulations should contact their federal representatives because state and local governments cannot modify them through local legislative.

NEXT STEPS:

The City Attorney's Office advises that CMUPs should be adopted according to the same procedures used for franchise agreements specified in RCW 35A.47.040. Under that statute, the City Council may not act on an ordinance or resolution adopting a franchise agreement (CMUP) until at least five days have passed from the item's introduction. The introduction does not need to be held as a public hearing.

In this case, the proposed CMUP will be introduced on September 7. Staff anticipates returning on September 21—fourteen days after introduction—to seek the Council's action on the proposed CMUP.

Attachment A: Termination of Franchise Agreement
Attachment B: Proposed Ordinance for First Review

TERMINATION OF FRANCHISE AGREEMENT
BETWEEN ZAYO GROUP, LLC, A DELAWARE LIMITED LIABILITY COMPANY ("ZAYO"),
AND THE CITY OF KIRKLAND, WASHINGTON ("CITY").

WHEREAS, the City and Electric Lightwave LLC entered into an Agreement through Ordinance 4352, which was passed by the City Council of the City of Kirkland ("City Council") on April 17, 2012; and

WHEREAS, the purpose of the Agreement was to grant Electric Lightwave LLC ("ELI") a franchise for the right, privilege, and authority to construct and maintain, repair, replace, operate upon, over, under, along, and across the franchise area a wireline communications system to support its telecommunications business (the "ELI Franchise"); and

WHEREAS, the ELI Franchise was to remain in full force and effect through June 18, 2028 unless terminated sooner; and

WHEREAS, Zayo became the successor-in-interest to ELI on March 1, 2017 and thereby the ELI Franchise was assigned or otherwise transferred to Zayo; and

WHEREBY, Zayo has other telecommunication facilities in the City that were acquired by Zayo when it became the successor-in-interest to facilities formerly owned by AboveNet; and

WHEREAS, Zayo applied to the City for a Communications Master Use Permit (CMUP), which replaces franchises for telecommunication purposes so that all its facilities in the City (those facilities formerly owned by AboveNet and those facilities formerly owned by ELI) are regulated under one instrument;

WHEREAS, the City Council conducted a first reading of the proposed CMUP for Zayo on September 7, 2021; and

WHEREAS, the City Council passed Ordinance #### on [REDACTED], 2021, granting Zayo a non-exclusive communications mater use permit for the right, privilege, and authority to make use of the permit area for wireline communications purposes (the "Zayo CMUP"); and

WHEREAS, the permit area for the Zayo CMUP includes the present municipal boundaries of the City, and shall include any additions thereto by annexation or other legal means during the term of the CMUP, which permit term is ten years after the effective date of Ordinance ####; and

WHEREAS, the ELI Franchise is now redundant to the Zayo CMUP;

NOW, THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS.

Section 1. The ELI Franchise between Zayo as successor-in-interest to ELI and the City, which currently is not set to expire until June 18, 2028, shall be terminated as of the effective date set forth in Section 2, below.

Section 2. The effective date of the termination shall be five days from and after the passage of Ordinance #### by the Kirkland City Council and publication pursuant to Section 1.08.017 of the *Kirkland Municipal Code* in the summary form attached to the original of Ordinance ####.

[Signature blocks TBD]

DRAFT