

**CITY OF PRINEVILLE
ORDINANCE NO. 1244**

AN ORDINANCE GRANTING ZAYO GROUP, LLC THE RIGHT AND PRIVILEGE TO PROVIDE AND OPERATE A TELECOMMUNICATIONS BUSINESS WITHIN THE CITY OF PRINEVILLE, AND TO PLACE, ERECT, LAY, MAINTAIN, AND OPERATE IN, UPON, OVER, AND UNDER THE PUBLIC STREETS, ALLEYS, AVENUES, THOROUGHFARES, HIGHWAYS, PLACES, AND GROUNDS WITHIN THE CITY OF PRINEVILLE, POLES, WIRES, OPTICAL FIBER CABLE, AND OTHER APPLIANCES AND CONDUCTORS FOR ALL TELECOMMUNICATION PURPOSES; AND DECLARING AN EMERGENCY.

Whereas, Zayo Group, LLC, a Delaware limited liability company duly authorized to transact business in the state of Oregon (“Zayo”), desires to provide and operate a telecommunications business within the City of Prineville (“City”); and

Whereas, by passage of this Ordinance (“Ordinance”), City will grant Zayo the right and franchise to provide and operate a telecommunications business within City, subject to the terms and conditions contained in this Ordinance.

Now, Therefore, the people of the City of Prineville ordain as follows:

1. Grant of Franchise

1.1 Grant of Franchise. Subject to the terms and conditions contained in this Ordinance, City grants Zayo the right and privilege to provide and operate a telecommunications business within City, and to place, erect, lay, maintain, and operate the Facilities (as defined below) in, upon, over, and under the Right-of-Ways (as defined below) for all telecommunications purposes. Zayo will enter into, onto, and/or over the Right-of-Ways only for the purposes described in the immediately preceding sentence. For purposes of this Ordinance, the term “Right-of-Way(s)” means the public streets, alleys, avenues, thoroughfares, and highways located within City which are owned and/or controlled by City; “Facilities” means poles, wires, optical fiber wire, conductors, appliances, and related equipment Zayo requires for telecommunication purposes.

1.2 Franchise Non-Exclusive. The franchise granted by City under this Ordinance is and will be construed as a non-exclusive franchise. City reserves the right to grant franchises, licenses, permits, and/or other similar rights to other persons to use and/or place, erect, lay, maintain, and/or operate in, on, over, and/or under the Right-of-Ways for similar or different purposes allowed under this Ordinance.

2. Location, Relocation, and Removal

2.1 Location of Facilities. For any new construction of Facilities concerning or impacting any new construction or development within City, Zayo, with permission from City to occupy such Right-of-Way, will locate its Facilities underground; provided, however, Zayo will

not be required to locate the Facilities underground if all other utilities in the subject Right-of-Way are located aboveground. Whenever utility services are located or relocated underground within a particular Right-of-Way, Zayo will relocate its Facilities underground concurrently with the other affected utilities to minimize disruption of the Right-of-Way. Notwithstanding anything contained in this Ordinance to the contrary, (a) Zayo will not be permitted to place, erect, lay, maintain, and/or operate its Facilities in, upon, over, and/or under any City park, trail, open space, and/or similar areas, and (b) City will have the authority to prescribe which Right-of-Ways will be used by Zayo for the Facilities, and the location of the Facilities within the Right-of-Ways (whether such Facilities are newly constructed, replaced, repaired, or otherwise).

2.2 Relocation. Except in the case of an Emergency (as defined below), within thirty (30) days after City's request, Zayo will, at Zayo's cost and expense, remove, relocate, change, and/or alter the position or location of any Facilities within the Right-of-Way whenever City has determined that such removal, relocation, change, and/or alteration is necessary for any of the following reasons: (a) an Emergency; (b) the construction, repair, installation, and/or maintenance of any City or other public work or improvement; (c) the operations of City or other governmental entity in, on, and/or under the Right-of-Way requires the removal, relocation, change, and/or alteration of the Facilities; (d) the removal, relocation, change, and/or alteration is pursuant to 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, or development, the costs of such moving or relocation work will be borne by the requesting private individual, entity, developer, or development. Nothing contained in this Ordinance 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. If Zayo is required to complete any removal, relocation, change, and/or alteration work under this Section 2.2 due to an Emergency, Zayo will exercise its best efforts to complete such work promptly and without delay. City will not require Zayo to remove or relocate its Facilities or vacate any Right-of-Way incidental to any public housing or renewal project under ORS Chapters 456 or 457 without reserving Zayo's right therein or without requiring Zayo to be compensated for the costs thereof.

2.3 Moving Aerials. Notwithstanding anything contained in this Ordinance to the contrary, whenever it becomes necessary to temporarily rearrange, remove, lower, and/or raise the Facilities to permit the passage of any building, machinery, and/or other object moved over any Right-of-Way (a "Temporary Adjustment"), Zayo will perform the Temporary Adjustment within seventy-two (72) hours after Zayo's receipt of written notice from the owner or contractor-mover desiring to move such building, machinery, and/or other object (the "Move Notice"). The Move Notice will (a) bear the approval of City, (b) detail the route of movement of the building, machinery, and/or object, (c) provide that the costs incurred by Zayo in making the Temporary Adjustment will be borne by the contractor-mover, (d) provide that the contractor-mover will indemnify and hold Zayo harmless for, from, and against any and all damages, claims, or causes of action caused directly or indirectly from the Temporary Adjustment, and (e) if required by Zayo, will be accompanied by cash deposit or a good and sufficient bond to pay any and all such costs as estimated by Zayo.

3. **Construction, Installation, and Operation**

3.1 Telecommunications Facilities. Facilities will not interfere with City's water mains, sewer mains, gas mains, and/or any other municipal uses of the Right-of-Way. Facilities will be erected and located so not to unreasonably interfere with the public's use of the Right-of-Way. Zayo will maintain, at Zayo's expense, all Facilities in good and safe order and condition. If Zayo erects poles within the Right-of-Way for the purposes of providing and operating the telecommunications business, to the extent technically feasible and subject to reasonable conditions relating to safety, City may attach and maintain traffic signals, wires, control boxes, and similar items or equipment to the poles without cost or expense. City will compensate Zayo for any make ready work needed in order to accommodate City's attachments to Zayo's poles.

3.2 Construction Work. Except in the case of an Emergency, not less than fifteen (15) days prior to Zayo commencing (or causing any person to commence) any Construction Work (as defined below) within City, Zayo will (a) obtain all necessary construction permits concerning the proposed Construction Work, if any, (b) file with City maps, materials, documentation, a copy of the proposed work order, any necessary construction permits, and any other information or documentation requested by City concerning the proposed Construction Work (including, without limitation, a description of the location of any Facilities), and (c) obtain City's prior written consent to the proposed Construction Work. If Zayo is required to perform any Construction Work due to the occurrence of an Emergency, Zayo will be required to comply with Section 3.2(a), (b), and (c) as soon as practicable (but in no event later than five days after the occurrence of the Emergency). Zayo will conduct its operations and will perform all Construction Work, including, without limitation, any excavation and/or restoration work, in accordance with the following: (a) all Construction Work will be completed in a safe manner, taking into account all applicable traffic control rules and procedures; (b) all Construction Work will be completed so as to minimize disruption and interference of the Right-of-Way; (c) all Construction Work will be completed in accordance with this Ordinance and all applicable Legal Regulations (as defined below); and (d) all Construction Work will be completed in a good workmanlike manner. City will be permitted to inspect any and all Construction Work and demand correction of any incomplete or improper Construction Work. For purposes of this Ordinance, the term "Construction Work" means any construction activity in, on, over, and/or under any Right-of-Way, including, without limitation, any excavation, maintenance, improvement, repair, extension, and/or relocation work; the term "Emergency" means a human created or natural event or circumstance that causes or threatens loss of life, injury to person or property, human suffering, or significant financial loss.

3.3 Restoration of Property. If Zayo disturbs and/or causes another to disturb any Right-of-Way, Zayo will, at Zayo's cost and expense, replace or restore the Right-of-Way to the same condition to which the Right-of-Way existed prior to the disruption as soon as practicable and without unreasonable delay. If Zayo fails to timely replace or restore any Right-of-Way to the same condition to which the Right-of-Way existed prior to the disruption, City may cause the replacement or restoration to be made at the expense of Zayo. Zayo will pay City any and all costs and expenses incurred by City to replace or restore the Right-of-Way immediately on City's demand.

4. **Franchise Fees**

4.1(a) Payment of Franchise Fees. In consideration of the rights, privileges, and franchise granted by City to Zayo under this Ordinance, Zayo will pay City a franchise fee equal to seven percent (7%) of Zayo's Gross Revenues (as defined below). Zayo will pay the Franchise Fee in quarterly installments, which quarterly installments will be due on or before the last day of the month immediately following the end of each calendar year quarter. The first quarterly payment of the Franchise Fee is due on or before. Contemporaneously with each quarterly payment, Zayo will file with City a sworn statement describing the total Gross Revenues Zayo received during the immediately preceding quarter (the "Accounting Statement"). City's acceptance of any payments under this Section 4.1 will not constitute a waiver by City of any breach under this Ordinance. For purposes of this Section 4.1, the term "Gross Revenues" means any and all revenues Zayo receives directly or indirectly from Zayo's operations and/or delivery of services within City, less net uncollectibles, including, without limitation, revenues from the use, rental, and/or lease of the Facilities.

4.1(b) In the event Zayo does not generate any Gross Revenue within the City's jurisdiction, Zayo shall instead remit to the City on an annual basis, payable one (1) year in advance, \$2.50 per linear foot for those portions of Zayo's cable that occupies City's public rights of way. This fee shall be payable to the City until such time that Zayo begins to generate revenue within City at which time Zayo shall then begin to remit franchise fees to the City in accordance with Section 4.1(a), with any amounts paid in advance pursuant with this Section prorated accordingly and applied to amounts subsequently owed under Section 4.1(a).

4.2 Inspection of Books and Records. On ten (10) days' advance written notice to Zayo, City may review such Zayo books, records, documentation, and/or information City reasonably determines necessary or appropriate to audit an Accounting Statement and/or ascertain Zayo's compliance with this Ordinance. Zayo will cooperate with City in conducting any inspection and/or audit and will correct any discrepancies affecting City's interest in a prompt and efficient manner. City will bear the cost of any audit provided no irregularities are found (if City discovers any irregularities, Zayo will bear the cost of City's audit). Zayo will keep all its books, records, documentation, and/or information at its Boulder, Colorado corporate headquarters. If Zayo provides any books, records, and/or information to 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 City, City will take reasonable steps to protect the confidentiality of such books, records, and/or information subject to City's obligations under Oregon's Public Records Law, ORS 192.410-192.505. City will not be required to incur any costs to protect any confidential or proprietary books, records, and/or information, other than City's routine internal procedures for complying with Oregon's Public Records Law.

5. **Insurance; Indemnification**

5.1 Insurance. Zayo, at its cost and expense, will obtain and keep in full force and effect during the term of this Ordinance the following insurance coverage and their respective minimum limits: (a) workers' compensation insurance within statutory limits; (b) employer's

liability insurance with limits of not less than \$1,000,000 per occurrence, \$2,000,000 in the aggregate; (c) comprehensive general liability insurance with limits of not less than \$2,000,000 for bodily injury or death to each person, \$2,000,000 for property damage resulting from any one accident, and \$2,000,000 for all other types of liability; and (d) automobile liability insurance for all owned, non-owned, and hired vehicles that are or may be used by Zayo and its employees with limits of \$1,000,000 for each person, \$2,000,000 for each accident. Each liability insurance policy Zayo is required to obtain and maintain under this Section 5.1 will name City and its officers, employees, and agents as additional insureds. No cancellation, expiration, modification, or reduction in amount or scope of insurance coverage is permitted without providing City thirty (30) days' prior written notice. All insurance Zayo is required to obtain and maintain under this Section 5.1 will be issued only by insurance companies licensed in Oregon. Prior to City's execution and acceptance of this Ordinance, and at any other time thereafter within ten (10) days after City's written request, Zayo will provide City with certificates of insurance and endorsements evidencing Zayo's compliance with this Section 5.1.

5.2 Zayo Indemnification. Zayo will defend, indemnify, and hold City, and each employee, officer, agent, contractor, and representative of City, harmless for, from, and against any and all 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 directors, officers, shareholders, members, managers, employees, agents, representatives, contractors, and/or affiliates, whether such acts or omissions are authorized, allowed, or prohibited by this Ordinance; (b) damage, injury, or death to person or property caused directly or indirectly by Zayo and/or its directors, officers, shareholders, members, managers, employees, agents, representatives, contractors, and/or affiliates; and/or (c) Zayo's breach and/or failure to perform any Zayo representation, warranty, covenant, and/or obligation under this Ordinance. Zayo's indemnification obligations provided in this Section 5.2 will survive the termination of this Ordinance.

6. **Term of Franchise**

6.1 Term of Franchise. Unless sooner terminated or extended as provided in this Ordinance, this Ordinance (and the Franchise granted hereunder) will be in full force and effect for a period of five (5) years, commencing on September 1, 2018, and ending August 30, 2023. Upon expiration of this Ordinance, Zayo shall have the option to renew the Franchise granted pursuant to this Ordinance for one additional term of five (5) years. To exercise this option, Zayo must make written application to City on or before March 31, 2023, and be in compliance with the terms of this Ordinance. The provisions of the Franchise renewal will be negotiated in good faith by City and Zayo. Any renewal of the Franchise will be governed by and comply with the provisions of Section 626 of the Cable Act, as amended (11 U.S.C. § 546). This Ordinance may be terminated at any time by the mutual written agreement of City and Zayo.

6.2 Termination for Cause. Notwithstanding anything contained in this Ordinance to the contrary, City may terminate this Ordinance (and the franchise granted hereunder) by notice to Zayo on the occurrence of any of the following events (each an "Event of Default"): (a) Zayo fails to comply with any applicable Legal Regulation; and/or (b) Zayo breaches and/or otherwise fails to perform any Zayo representation, warranty, covenant, and/or obligation contained in this Ordinance.

Prior to City's termination of this Ordinance under this Section 6.2, City will provide Zayo thirty (30) days' prior written notice (the "Zayo Default Notice") specifying with reasonable particularity the Event of Default(s) City believes exist. Commencing from Zayo's receipt of the Zayo Default Notice, Zayo will have thirty (30) days to cure or remedy the Event of Default(s) (the "Zayo Cure Period"); provided, however, if the nature of the default is such that it cannot be completely remedied or cured within the Zayo Cure Period, there will not be a default by Zayo under this Ordinance if Zayo begins correction of the default within the Zayo Cure Period and thereafter proceeds with reasonable diligence to effect the remedy as soon as practicable. Subject to the immediately preceding sentence, if Zayo fails to cure or remedy the Event of Default(s) within the Zayo Cure Period, City may terminate this Ordinance based on such Event of Default(s) and may pursue any and all rights and remedies available to City under this Ordinance and/or applicable law. Termination of this Ordinance by City will not constitute a waiver or termination of any rights, claims, and/or causes of action City may have against Zayo.

6.3 City Default. No City act or omission will be considered a default under this Ordinance unless and until City has received thirty (30) days' prior written notice from Zayo specifying with reasonable particularity the nature of the default Zayo believes exist (the "City Default Notice"). Commencing from City's receipt of the City Default Notice, City will have thirty (30) days to cure or remedy the alleged default (the "City Cure Period") before City will be deemed in default of this Ordinance; provided, however, if the nature of the default is such that it cannot be completely remedied or cured within the City Cure Period, there will not be a default by City under this Ordinance if City begins correction of the default within the City Cure Period and thereafter proceeds with reasonable diligence to effect the remedy as soon as practicable.

6.4 Remedies. If a party breaches or otherwise fails to perform any of its terms, covenants, conditions, and/or obligations under this Ordinance, the non-defaulting party may, in addition to any other remedy provided to the non-defaulting party under this Ordinance, pursue any and all remedies available to the non-defaulting party at law or in equity. All available remedies are cumulative and may be exercised singularly or concurrently.

7. **Miscellaneous**

7.1 Assignment or Transfer of Franchise. Zayo will not assign or transfer in any manner whatsoever any interest in or to the franchise created by this Ordinance unless and until the following conditions are met: (a) the grantee, assignee, or transferee agrees in writing (in form and substance reasonably satisfactory to City) to assume and abide by the terms and conditions contained in this Ordinance; and (b) Zayo provides City ninety (90) days' prior written notice of the proposed assignment or transfer and City provides prior written consent of the proposed assignment or transfer, which consent City will not unreasonably withhold, condition, or delay, except that Zayo may assign its interest in or to the franchise created by this Ordinance, to another entity that Zayo owns or controls or to another person, as defined in Section 7.8, that Zayo is owned or controlled by, by given written notice to the City of such assignment and confirms that the affiliate assignee agrees that it shall abide by the terms and conditions contained in this Ordinance. Subject to the terms and conditions contained in this Section 7.1, this Ordinance will be binding on the parties and their respective heirs, executors, administrators, successors, and assigns and will inure to their benefit. Any pledge or

hypothecation of corporate assets for the purposes of fulfilling corporate financing transactions in the ordinary course of business shall not be considered an assignment for the purposes of this section of the Ordinance.

7.2 Severability. Each provision contained in this Ordinance will be treated as a separate and independent provision. The unenforceability of any one provision will in no way impair the enforceability of any other provision contained herein. Any reading of a provision causing unenforceability will yield to a construction permitting enforcement to the maximum extent permitted by applicable law.

7.3 Attorney Fees. With respect to any dispute relating to this Ordinance, or if a suit, action, arbitration, or other proceeding of any nature whatsoever is instituted to interpret or enforce the provisions of this Ordinance, including, without limitation, any proceeding under the U.S. Bankruptcy Code and involving issues peculiar to federal bankruptcy law or any action, suit, arbitration, or proceeding seeking a declaration of rights or rescission, the prevailing party will be entitled to recover from the losing party its reasonable attorney fees, paralegal fees, expert fees, and all other fees, costs, and expenses incurred in connection therewith, as determined by the judge or arbitrator at trial, arbitration, or other proceeding, or on any appeal or review, in addition to all other amounts provided by law.

7.4 Governing Law; Venue. This Ordinance is subject to any and all applicable federal, state, and local laws, rules, regulations, codes, and ordinances, including, without limitation, any City ordinances, standards, and regulations, all as now in force and/or which may hereafter be amended, modified, enacted, or promulgated (individually and collectively, the “Legal Regulation(s)”). Any action or proceeding arising out of or concerning this Ordinance will be litigated in courts located in Crook County, Oregon, or the United States District Court for the District of Oregon. Each party consents and submits to the jurisdiction of any local, state, or federal court located in Crook County, Oregon, or the United States District Court for the District of Oregon.

7.5 Action by the Parties. In any action mandated or permitted by City or Zayo under this Ordinance, such party will act in a reasonable, expeditious, and timely manner. Whenever the approval or consent of either City or Zayo is required under this Ordinance, such consent will not be unreasonably withheld, conditioned, or delayed.

7.6 Compliance with Laws. Zayo will comply with any and all applicable Legal Regulations, both generally and in connection with Zayo’s performance of its obligations arising out of or under this Ordinance. The rights and privileges granted by City to Zayo under this Ordinance extend only to the extent of City’s right or authority to grant a franchise to occupy and use the Right-of-Ways for the Facilities.

7.7 Notices. All notices or other communications required or permitted by this Ordinance must be in writing, must be delivered to the parties at the addresses set forth below, or any other address that a party may designate by notice to the other party, and are considered delivered upon actual receipt if delivered personally, by fax, or by a nationally recognized overnight delivery service, or at the end of the third business day after the date of deposit if

deposited in the United States mail, postage pre-paid, certified, return receipt requested.

To City:
City of Prineville
Attn: City Manager
387 NE Third Street
Prineville, Oregon 97754

To Zayo:
Zayo Group, LLC
Attn: General Counsel
1805 29th Street
Boulder, CO 80301

with a copy to:
Jered Reid
Law Office of Jered Reid, LLC
545 NE Seventh Street
Prineville, OR 97754
Fax: 541.475.1113

with a copy to:
Zayo Group, LLC, Attn. Randy Whitehead
Underlying Rights Dept.
805 29th Street, Suite 2050
Boulder, CO 80301

7.8 Person and Interpretation. For purposes of this Ordinance, the term “person” means any natural person, corporation, limited liability company, partnership, joint venture, firm, association, trust, unincorporated organization, government or governmental agency or political subdivision, or any other entity. All pronouns contained herein and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular includes the plural and the plural includes the singular. The words “include,” “includes,” and “including” are not limiting. The word “or” is not exclusive. Reference to “days” means calendar days, with any deadline falling on a day other than a business day being extended to the next business day.

7.9 Expenses. Notwithstanding anything contained in this Ordinance to the contrary, Zayo will bear any and all fees, costs, and expenses incurred or arising out of Zayo’s performance of its obligations under this Ordinance.

7.10 Entire Agreement. This Ordinance contains the entire agreement and understanding between the parties with respect to the subject matter of this Ordinance and contains all of the terms and conditions of the parties’ agreement and supersedes any other oral or written negotiations, discussions, representations, or agreements. Zayo has not relied on any promises, statements, representations, or warranties except as set forth expressly in this Ordinance.

7.11 Zayo Acceptance. Within thirty (30) days after City’s passage of this Ordinance, Zayo will file with City the written acceptance attached hereto as Exhibit A (the “Acceptance”). If Zayo fails to timely file the Acceptance with City, this franchise (and the rights granted to Zayo herein) will be deemed null, void, and repealed by City in all respects without further act by City.

7.12 Corrections. This Ordinance may be corrected by order of City’s City Council to cure editorial and clerical errors.

7.13 Emergency Declaration. Passage of this Ordinance is deemed to be necessary for the immediate preservation of the peace, health, and safety of City’s citizens. Consequently, an emergency is hereby declared to exist. This Ordinance will be in full force and effect upon its

passage by the City Council and approval of the Mayor.

Presented for the first time at a regular meeting of the City Council held on August _____, 2018, and the City Council finally enacted the foregoing ordinance this 28th day of August, 2018.


Betty J. Roppe
Mayor

ATTEST:


Lisa Morgan, City Recorder

Exhibit A
Acceptance

The forgoing Ordinance No., adopted by the City of Prineville on, consisting of 10 pages, including this Exhibit A, is approved, accepted, and agreed upon by Zayo.

Dated: _____, 2018

Zayo Group, LLC.
an Delaware limited liability company

By:

Its: