

SPONSORED BY: _____
PROPOSED BY: Executive
INTRODUCTION DATE: _____

ORDINANCE NO. _____

**GRANTING ZAYO GROUP, LLC, A NON-EXCLUSIVE FRANCHISE FOR THE PROVISION OF
TELECOMMUNICATIONS SERVICES**

WHEREAS, Zayo Group, LLC, a Delaware limited liability company, with an address of 1821 30th Street, Unit A, Boulder, CO 80301 ("Grantee") has applied to Whatcom County ("County") for a non-exclusive franchise for the right of entry, use, and occupation of those public Rights-of-Way within the County, expressly to install, construct, erect, operate, maintain, repair, relocate and remove Grantee Facilities in, on, upon, along and/or across those Rights-of-Way for purposes of offering and providing Telecommunications Services utilizing said Grantee Facilities ("Grantee Services"); and

WHEREAS, RCW 36.55.010, Whatcom County Charter Section 9.30, and Whatcom County Code Chapter 12.24 address the requirements pertaining to the granting of franchises by the County; and

WHEREAS, said application has come on regularly to be heard by the County Council on the ____ day of _____, 2021, and notice of this hearing has been duly published on the ____ day of _____, 2021, and the ____ day of _____, 2021, in the Bellingham Herald, a daily newspaper published in Whatcom County having county-wide circulation; and

WHEREAS, from information presented at such public hearing, and from facts and circumstances developed or discovered through independent study and investigation, the County Council now deems it appropriate and in the best interest of the County and its inhabitants that a franchise be granted to Grantee.

NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that a non-exclusive franchise set forth in the language herein below, Sections 1 through 24, is hereby granted to Zayo Group, LLC for a period of ten (10) years in order that it may, subject to the terms of this ordinance and other pertinent requirements of law, install, construct, erect, operate, maintain, repair, relocate and remove Grantee Facilities in, on, upon, along and/or across those Rights-of-Way for purposes of offering and providing Telecommunications Services utilizing said Grantee Facilities

Section 1. Grant of Franchise Right to Use Franchise Area.

A. Subject to the terms and conditions stated herein, County hereby grants to Grantee a franchise as set forth in this Ordinance (this "Franchise"), including permission to enter, use and occupy those Rights-of-Way within unincorporated Whatcom County as now or hereafter constituted (the "Franchise Area").

B. Grantee is authorized, subject to other applicable requirements of law, to install, remove, construct, erect, operate, maintain, relocate and repair the facilities necessary or convenient for Grantee Services and all appurtenances thereto (collectively, "Grantee Facilities") in, along, under, and across the Franchise Area.

C. This Franchise does not authorize the use of the Franchise Area for any facilities or services other than Grantee Facilities and Grantee Services as provided herein, and it extends no right or privilege relative to any facilities or services of any type, including Grantee Facilities and Grantee Services, on private property within County. This Franchise does not authorize the Grantee to provide "cable services" (as such term is defined in federal law), and if Grantee or anyone using Grantee Facilities desires to offer "cable services" in the future, a further agreement with the County will be required prior to providing such service.

D. This Franchise is non-exclusive and does not prohibit County from entering into other agreements, including other franchises, impacting the Franchise Area, unless County determines that entering into such agreements interferes with Grantee's rights set forth herein.

E. Except as explicitly set forth herein, this Franchise does not waive any rights that County has or may hereafter acquire with respect to the Franchise Area or any other County roads, Rights-of-Way, property, or any portions thereof. This Franchise shall be subject to the power of eminent domain, and in any proceeding under eminent domain, Grantee acknowledges its use of the Franchise Area shall have no value.

F. County reserves the right to change, regrade, relocate, abandon, or vacate any Right-of-Way within the Franchise Area. If, at any time during the term of this Franchise, County vacates any portion of the Franchise Area containing Grantee Facilities, County shall reserve an easement for public utilities within that vacated portion within which Grantee may continue to operate any existing Grantee Facilities under the terms of this Franchise for the remaining period set forth under Section 3.

G. Grantee agrees that its use of Franchise Area shall at all times be subordinate and subject to County's and the public's need for municipal infrastructure, travel, and access to the Franchise Area, except as may be otherwise required by law.

Section 2. Notices.

A. Written notices to the parties shall be sent by certified mail to the following addresses, unless a different address shall be designated in writing and delivered to the other party.

County: County Executive
Whatcom County Courthouse
311 Grand Ave., Suite 108
Bellingham, WA 98225

Grantee: Zayo Group, LLC
Attn: General Counsel – West Region
1821 30th Street, Suite A
Boulder, CO 80301

With a Copy to: Zayo Group, LLC
Attn: Director, Underlying Rights – West Region
1821 30th St., Unit A
Boulder, CO 80301

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

B. Any changes to the Grantee’s information shall be sent to County’s Public Works Director referencing the title of this agreement.

C. The Grantee’s voice number, (888) 404 9296 (Operations Center), shall be staffed at least during normal business hours, at least from 8:00 a.m. to 5:00 p.m., Pacific Time Zone.

In all cases, “normal business hours” must also include some evening hours at least one night per week and/or some weekend hours.

Section 3. Term of Franchise.

A. This Franchise shall run for a period of ten (10) years from the date of execution specified in Section 5.

B. If the parties fail to formally renew this Franchise prior to the expiration of its term or any extension thereof, the obligations and privileges of this Franchise shall nonetheless

continue in full force and effect until renewed or otherwise terminated by either party through written notice to that effect.

Section 4. Definitions.

For the purpose of this Franchise:

“Affiliate” means, with respect to any Person, any other Person controlling, controlled by or under common control with such Person. For purposes of this definition, the term “control” (including the correlative meanings of the terms “controlled by” and “under common control with”), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

“Emergency” means a condition of imminent danger to the health, safety and welfare of persons or property located within County including, without limitation, damage to persons or property from natural consequences, such as storms, earthquakes, riots, acts of terrorism or wars.

“Grantee Facilities” means such poles, antenna, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments, and other related wireline and wireless property or equipment as may be necessary or appurtenant to Grantee’s telecommunications system.

“Franchise Area” means those public Rights-of-Way located within the unincorporated area of the County.

“Grantee Services” means Telecommunications Services and services ancillary thereto provided by Grantee to its customers.

“Gross Revenues” means all revenues received by Grantee from the operation of the Grantee Facilities within the Rights-of-Way, including, but not limited to all rents, payments, fees and other amounts actually collected from any third party and received by Grantee and allocable to the period within the Term pursuant to any other agreement for telecommunications services provided with respect to Grantee Facilities, but exclusive of:

1. any payments, reimbursements or pass-throughs from the third party to Grantee:
 - a. for utility charges, taxes and other pass-through expenses, or
 - b. in connection with Maintenance work performed or equipment installed by Grantee;
2. site acquisition, construction management or supervision fees related to the installation of the Grantee Facilities; and
3. contributions of capital by any third party to reimburse Grantee in whole or in part for the installation of the Grantee Facilities.

“Maintenance” or “Maintain” means examining, testing, inspecting, repairing, maintaining and replacing the existing Grantee Facilities or any part thereof, including as required and necessary for safe operation.

“Person” means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Washington, and includes any natural person.

“Relocation” means permanent movement of Grantee Facilities required by County, and not temporary or incidental movement of such facilities, or other revisions Grantee would accomplish and charge to third parties without regard to municipal request.

“Right-of-Way” (pluralized as “Rights-of-Way”) means the surface and the space above and below streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, easements, rights-of-way and similar public properties and in the Franchise Area.

“State” means the State of Washington.

“Telecommunications Service” has the same meaning as “Telecommunications service” as defined under 47 U.S.C. § 153 (2012).

Section 5. Acceptance of Franchise.

A. This Franchise, and any rights granted hereunder, shall not become effective for any purpose unless and until Grantee files with the Whatcom County Council the Statement of Acceptance, attached hereto as Exhibit A (the “Franchise Acceptance”). The date that the Franchise Acceptance is filed with the County Council shall be the effective date of this Franchise.

B. Should Grantee fail to file the Franchise Acceptance with the County Council within 30 days after the effective date of this ordinance, then the County shall have the right to declare, by ordinance, Grantee’s forfeiture of all rights hereunder and to declare this Franchise terminated and of no further force or effect thereafter. The County shall retain this right to terminate the Franchise until such time as Grantee files the Franchise Acceptance pursuant to the terms herein.

Section 6. Construction and Maintenance.

A. Grantee shall apply for, obtain, and comply with the terms of all permits required under Whatcom County Code 12.16, 12.24, 12.27, 12.28, 12.30, 20.13 and any other pertinent provisions of law as may now or hereafter apply, for any work done on, or to install Grantee Facilities. Grantee shall comply with all applicable County, State, and federal codes, rules, regulations, and orders in undertaking such work, which shall be done in a thorough and proficient manner consistent with the standards of the telecommunications industry.

Modifications shall not be subject to additional approval hereunder (except such permitting as is required by applicable law) to the extent that: (i) such modification to Grantee Facilities involves only substitution of internal components, and does not result in any change to the external appearance, dimensions, or weight of Grantee Facilities, as approved by County; or (ii) such modification involves replacement of Grantee Facility with a facility that is the same, or smaller in weight and dimensions as the approved Facility. Grantee will notify County of any such modification within fifteen (15) days after modification is made.

B. Grantee agrees to use commercially reasonable efforts to coordinate its activities with County and all other affected utilities located within the Franchise Area.

C. County expressly reserves the right to prescribe in a reasonable manner how and where Grantee Facilities shall be installed within the Franchise Area and may from time to time, pursuant to the applicable sections of this Franchise, direct in writing the removal, Relocation and/or replacement thereof as required by the public interest and safety at the expense of Grantee. Such public interest shall not extend to the accommodation of private development. Grantee shall have no less than 60 days following receipt of such written direction to complete the removal, Relocation, and/or replacement of Grantee Facilities, provided that Grantee shall have such extended period of 30 days as may be required beyond the initial 60 days if Grantee commences removal, Relocation, and/or replacement of Grantee Facilities within the initial 60 day period and thereafter continuously and diligently pursues such required performance to completion.

D. Upon prior written approval of County and in accordance with County ordinances, Grantee shall have the authority, but not the obligation, to reasonably trim trees upon and overhanging streets, Rights-of-Way and places in the Franchise Area so as to prevent the branches of such trees from coming in physical contact with Grantee Facilities. Grantee shall be responsible for debris removal from such activities. If such debris is not removed within twenty-four (24) hours of completion of the trimming, County may, at its sole discretion, remove such debris and charge Grantee for the cost thereof. This section does not in any instance grant automatic authority to clear vegetation for purposes of providing a clear path for radio signals. Any such general vegetation clearing will require a land clearing permit.

E. Consistent with Sections 12.16, 12.24, 12.27, 12.28, and 12.30 of the Whatcom County Code, in case of any disturbance of any road, pavement, sidewalk, driveway or other surfacing, the Grantee shall, at its own cost and expense and in a manner approved by the County, replace and restore all paving, sidewalk, driveway, landscaping or surface, promptly and in as good condition as before said work was commenced and in accordance with standards for such work set by the County and the County Code. If Grantee fails, neglects or refuses to make restorations as required under this Section, then the County may do such work or cause it to be done, and the cost thereof to the County shall be paid by Grantee.

F. Grantee shall maintain all above-ground improvements that it places on County Rights-of-Way pursuant to this franchise. In order to avoid interference with the County's

ability to maintain its roads and associated Rights-of-Way, Grantee shall provide a clear zone of five feet on all sides of such improvements. For these purposes, "clear zone" means an area that is mowed or otherwise maintained so that the Grantee Facilities are readily visible to County maintenance operations. The foregoing obligations shall not apply to above-ground, pole-mounted antenna but shall apply to any poles or other structures at ground level erected or managed by Grantee hereunder. If Grantee fails to comply with this provision, and by its failure property is damaged, then Grantee shall be responsible for all damages caused thereby.

G. Grantee shall maintain a minimum underground horizontal separation of five (5) feet from County water facilities and ten (10) feet from above-ground County water facilities; provided, that for development of new areas, County, together with Grantee and other utility purveyors or authorized users of Rights-of-Way, will develop and follow the Public Works Director's determination of a consensus for guidelines and procedures for determining specific utility locations, subject additionally to this Franchise.

H. Before any work is performed under this Franchise which may affect any existing monuments or markers of any nature relating to subdivisions, plats, roads and all other surveys, the Grantee shall reference all such monuments and markers. The reference points shall be so located that they will not be disturbed during the Grantee's operations under this Franchise. The method of referencing these monuments or other points to be referenced shall be approved by the County Engineer. The replacement of all such monuments or other points to be referenced shall be approved by the County Engineer. The replacement of all such monuments or markers disturbed during construction shall be made as expeditiously as conditions permit, and as directed by the County Engineer. The cost of monuments or other markers lost, destroyed or disturbed, and the expense of replacement by approved monuments shall be borne by the Grantee. A complete set of reference notes for monuments and other ties shall be filed with the County Engineer's Office.

Section 7. Repair and Emergency Work.

In the event of an Emergency, Grantee may commence such repair and Emergency response work as required under the circumstances, provided that Grantee shall notify the County Public Works Director in writing as promptly as possible, before such repair or Emergency work commences, or as soon thereafter as possible, if advance notice is not practical. County may act, at any time, without prior written notice in the case of Emergency, but shall notify Grantee in writing as promptly as possible under the circumstances.

Section 8. Damages to County and Third-Party Property.

Grantee agrees that should any of its actions under this Franchise materially impair or damage any County property, survey monument, or property owned by a third-party, Grantee will restore, at its own cost and expense, said property to a safe condition. Such repair work shall be performed and completed to the reasonable satisfaction of the County Engineer.

Section 9. Location Preference.

Any structure, equipment, appurtenance or tangible property of a utility, other than Grantee's, which was installed, constructed, completed or in place prior in time to Grantee's application for a permit to construct Grantee Facilities under this Franchise shall have preference as to positioning and location with respect to Grantee Facilities. However, to the extent that Grantee Facilities are completed and installed prior to another utility's submittal of a permit for new or additional structures, equipment, appurtenances or tangible property, then Grantee Facilities shall have priority. These rules governing preference shall continue in the event of the necessity of relocating or changing the grade of any County road or Right-of-Way. A relocating utility shall not necessitate the relocation of another utility that otherwise would not require Relocation. This Section shall not apply to any County facilities or utilities that may in the future require the Relocation of Grantee Facilities. Such Relocations shall be governed by Section 11.

Section 10. Grantee Information.

A. Grantee agrees to supply, at no cost to County, any information reasonably requested by the Director of Public Works to coordinate municipal functions with Grantee's activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum, as-built drawings of Grantee Facilities, installation inventory, and maps and plans showing the location of existing or planned facilities within County. Said information may be requested either in hard copy and/or electronic format, if reasonably possible in a format compatible with County's database system, as now or hereinafter existing, including County's Geographic Information Service (GIS) data base. Grantee shall use commercially reasonable efforts to keep the Public Works Director informed of its long-range plans for coordination with County's long-range plans.

B. The parties understand that Washington law limits the ability of County to shield from public disclosure any information given to County. Accordingly, the County will endeavor in good faith to provide Grantee reasonable notice of any request for public disclosure of information of Grantee to allow Grantee to take such actions as Grantee may determine and at Grantee's sole cost and expense to prevent or limit such disclosure. Grantee shall indemnify and hold harmless County for any loss or liability for costs and for attorneys' fees because of non-disclosures requested by Grantee under Washington's open public records law, provided reasonable notice and opportunity to defend was given to Grantee or Grantee is made aware of a pending request or claim.

Section 11. Relocation of Grantee Facilities.

A. Except as otherwise so required by law, Grantee agrees to Relocate, remove, or reroute Grantee Facilities as reasonably ordered by the County Engineer at no expense or liability to County, the time frame for which shall be reasonably determined by the County Engineer and which shall in no event be less than sixty (60) days following the date of written

notice of such order, provided that Grantee shall have such extended period of 30 days as may be required beyond the initial 60 days if Grantee commences removal, Relocation, and/or replacement of Grantee Facilities within the initial 60 day period and thereafter continuously and diligently pursues such required performance to completion. Any determination to require the Relocation of Grantee Facilities shall be made in a reasonable, competitively neutral, uniform and non-discriminatory manner. Any County funds used to reimburse costs incurred by any Person in connection with any relocation shall be allocated in a reasonable, uniform and non-discriminatory manner. Pursuant to the provisions of Section 14, Grantee agrees to protect and save harmless County from any customer or third-party claims for service interruption or other losses in connection with any such change, Relocation, abandonment, or vacation of public property.

If Grantee fails, neglects or refuses to remove or relocate Grantee Facilities as directed by the County; or in emergencies or where public health and safety or property is endangered, the County may do such work or cause it to be done, and the cost thereof to the County shall be paid by Grantee. If Grantee fails, neglects or refuses to remove or relocate Grantee Facilities as directed by another franchisee or utility with authority to so direct Grantee, that franchisee or utility may do such work or cause it to be done, and if Grantee would have been liable for the cost of performing such work, the cost thereof to the party performing the work or having the work performed shall be paid by Grantee.

B. If a readjustment or Relocation of Grantee Facilities is necessitated by a request to Grantee from a Person other than County, that party shall agree to reimburse Grantee's costs prior to Grantee having any obligation to readjust or relocate Grantee Facilities and agree to pay Grantee the actual costs thereof.

C. Grantee and the County acknowledge and commit to fully comply with their respective obligations, as the same may arise from time to time, under Chapter 19.122 RCW (Underground Utilities Locator Statute) or any other law applicable to determining the location of utility facilities. Thus, before commencing any work within the Franchise Area, Grantee shall comply with the One Number Locator provisions of RCW Chapter 19.122 to identify existing utility infrastructure.

D. Design locate marks will be placed in the same three (3) day time frame as construction locate marks.

Section 12. Abandonment and or Removal of Grantee Facilities.

A. Within one hundred and eighty (180) days of Grantee's permanent cessation of use of Grantee Facilities, or any portion thereof, Grantee shall, at County's discretion, either abandon in place or remove the affected facilities.

B. The parties expressly agree that this Section shall survive the expiration, revocation or termination of this Franchise.

Section 13. Undergrounding.

A. The parties agree that this Franchise does not limit County's authority under federal law, State law, or local ordinance, to require the undergrounding of utilities.

B. Whenever County requires the undergrounding of aerial utilities in the Franchise Area, Grantee shall underground Grantee Facilities in the manner specified by the County Engineer to the extent practical and recognizing that wireless antenna cannot be undergrounded, with payment therefor consistent with the provisions of RCW 36.88.410 et ff. Where other utilities are present and involved in the undergrounding project, Grantee shall be required to pay only its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Grantee Facilities. Common costs shall include necessary costs for common trenching and utility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded.

Section 14. Indemnification and Hold Harmless.

A. Grantee shall defend, indemnify and hold the County and its officers, officials, agents, employees, and volunteers harmless from any and all claims, demands, suits, actions, costs and expenses, including but not limited to attorney's fees, made against it by any third party on account of injury or damage to the person or property of another, but only to the extent such injury or damage is caused by the negligence or breach of Grantee, its agents, servants or employees of this Franchise; provided, however, that in the event any such claim or demand be presented to or filed with the County, the County 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 is begun against the County based upon any such claim or demand, the County 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. Notwithstanding the foregoing, if damages to another or others result from concurrent negligence of Grantee and the County, Grantee and the County shall each be responsible for and this indemnification provision shall be operative so that each party bears the proportionate share attributable to its own negligence. In case judgment which is not appealed shall be rendered against the County in such suit or action, County shall fully satisfy said judgment within ninety (90) days after said suit or action shall have finally been determined. Upon County's failure to satisfy said judgment within ninety (90) days, the Grantee may elect to terminate this Franchise pursuant to the terms of Section 19 herein. The provision for reimbursement of the County shall survive the termination of this Franchise.

B. County shall defend, indemnify and hold Grantee harmless from any liability arising out of or in connection with any damage or loss to Grantee Facilities caused by the

willful misconduct or gross negligence of County, except to the extent any such damage or loss is directly caused by the negligence of Grantee, or its agents.

C. Grantee acknowledges that neither County nor any other public agency with responsibility for firefighting, Emergency rescue, public safety or similar duties within County has the capability to provide trench, close trench or confined space rescue. Grantee, and its agents, assigns, successors, or contractors, shall make such arrangements as Grantee deems fit for the provision of such services. Grantee shall hold County harmless from any liability arising out of or in connection with any damage or loss to Grantee for County's failure or inability to provide such services, and, pursuant to the terms of Section 14(A), Grantee shall indemnify County against any and all third-party costs, claims, injuries, damages, losses, suits, or liabilities based on County's failure or inability to provide such services.

D. Acceptance by County of any work performed by Grantee shall not be grounds for avoidance of this section.

E. EXCEPT FOR A PARTY'S INDEMNIFICATION OBLIGATIONS SET FORTH HEREIN AND EXCEPT FOR CLAIMS ARISING FROM A PARTY'S INTENTIONAL MISCONDUCT (INCLUDING EMPLOYEE CONDUCT), IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES WHATSOEVER, ARISING OUT OF, OR IN CONNECTION WITH, THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, LOST PROFITS, LOST REVENUE, LOSS OF GOODWILL, LOSS OF ANTICIPATED SAVINGS, LOSS OF DATA, INCURRED OR SUFFERED BY EITHER PARTY.

Section 15. Insurance.

A. Grantee shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by Grantee, its agents, representatives, or employees in the amounts and types set forth below:

1. Automobile Liability insurance covering all owned, non-owned, hired, and leased vehicles with a minimum combined single limit for bodily injury and property damage of \$2,000,000 per accident.

2. Commercial General Liability insurance with limits no less than \$2,000,000 each occurrence, \$3,000,000 general aggregate and a \$2,000,000 products-completed operations aggregate limit. Coverage shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, and personal injury and advertising injury and liability assumed under an insured contract. County shall be named as an additional insured under Grantee's Commercial General Liability insurance policy with respect to the work performed under this Franchise.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

B. Grantee's insurance coverage shall be primary and non-contributory insurance as respects County. Any insurance, self-insurance, or insurance pool coverage maintained by County shall be in excess of Grantee's insurance and shall not contribute to or with it to satisfying any claim or judgment covered hereunder. Grantee's insurance shall also waive any rights of subrogation against the County and its agents as it pertains to the scope of this agreement.

C. Grantee shall furnish County with certificates of the foregoing insurance coverage with a copy of amendatory endorsements, including but not necessarily limited to the additional insured endorsement.

D. Grantee shall have the right to self-insure any or all of the above-required insurance. Any such self-insurance is subject to approval by County, and in the event such approval is not obtained, Grantee shall carry such coverage as is herein provided.

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

Section 16. Performance Security.

Grantee shall provide County with a surety bond in the amount of Fifty Thousand Dollars (\$50,000) running or renewable for the term of this Franchise, in a form and substance reasonably acceptable to County. In the event Grantee shall fail to substantially comply with any one or more of the provisions of this Franchise following notice and a reasonable opportunity to cure, then there shall be recovered jointly and severally from the principal and any surety of such surety bond any damages suffered by County as a result thereof, including but not limited to staff time, material and equipment costs, compensation or indemnification of third parties, and the cost of removal or abandonment of facilities hereinabove described. Grantee specifically agrees that its failure to comply with the terms of Section 19 shall constitute damage to County in the monetary amount set forth therein. Such a financial guarantee shall not be construed to limit Grantee's liability to the guarantee amount, or otherwise limit County's recourse to any remedy to which County is otherwise entitled at law or in equity.

Section 17. Successors and Assignees.

A. All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors, assigns of, and independent contractors of Grantee, and all rights and privileges, as well as all obligations and liabilities of Grantee shall inure to its

successors, assignees and contractors equally as if they were specifically mentioned herein wherever Grantee is mentioned.

B. This Franchise shall not be leased, assigned or otherwise alienated, except to an Affiliate of Grantee, without the express consent of County by ordinance, which approval shall not be unreasonably withheld, conditioned, or delayed. Approval shall not be required for mortgaging purposes or if a transfer of interest is from Grantee to (i) another person or entity controlling, controlled by, or under common control with Grantee or (ii) another person or entity purchasing all or substantially all of the assets or stock of Grantee. Within 30 days of the lease, assignment, or other alienation of this Franchise for which prior County approval is not hereunder required, Grantee shall provide reasonable notice to County, including all information with respect to the assignee or transferee that is reasonably required by County of an applicant for a Franchise.

C. To the extent County's approval is required under Section 17(B), Grantee and any proposed assignee or transferee shall provide and certify the following to County not less than sixty (60) days prior to the proposed date of transfer: (a) complete information setting forth the nature, term and conditions of the proposed assignment or transfer; (b) all information reasonably required by County of an applicant for a Franchise with respect to the proposed assignee or transferee; and, (c) an application fee which shall be reasonably set by County, plus any other costs actually and reasonably incurred by County in processing and investigating the proposed assignment or transfer.

D. Prior to County's consideration of a request by Grantee to consent to a Franchise assignment or transfer pursuant to subpart C hereto, the proposed assignee or transferee shall file with County a written promise to unconditionally accept all terms of this Franchise, effective upon such transfer or assignment of this Franchise. County is under no obligation to undertake any investigation of the transferor's state of compliance and failure of County to insist on full compliance prior to transfer does not waive any right to insist on full compliance thereafter.

E. Notwithstanding the forgoing or anything to the contrary in this Ordinance, Grantee may provide capacity across Grantee Facilities to a third party without the consent required under this Section, so long as Grantee retains control over and remains solely responsible for, such communications facilities. The use of Grantee Facilities by third parties (including, but not limited to, leases of dark fiber) that involves no additional attachment and no expanded occupation of the right-of-way is not considered a sublicense to a third party subject to the provisions of this Section.

Section 18. Dispute Resolution.

A. In the event of a dispute between County and Grantee arising by reason of this Franchise, the dispute shall first be referred to the operational officers or representatives designated by Grantor and Grantee to have oversight over the administration of this Franchise.

The officers or representatives shall meet within thirty (30) calendar days of either party's request for a meeting, whichever request is first, and the parties shall make a good faith effort to achieve a resolution of the dispute.

B. If the parties fail to achieve a resolution of the dispute in this manner, either party may then pursue any available judicial remedies. This Franchise shall be governed by and construed in accordance with the laws of the State of Washington. In the event any suit, arbitration, or other proceeding is instituted to enforce any term of this Franchise, the parties specifically understand and agree that venue shall be exclusively in Whatcom County, Washington.

Section 19. Enforcement and Remedies.

A. If Grantee shall materially violate or fail to comply with any of the provisions of this Franchise, or should it fail to heed or comply with any notice given to Grantee under the provisions of this Franchise, County shall provide Grantee with written notice specifying with reasonable particularity of the nature of any such material breach and Grantee shall undertake all commercially reasonable efforts to cure such material breach within thirty (30) days of receipt of notification. If County reasonably determines the material breach cannot be cured within (30) thirty days, County shall specify a longer cure period, and condition the extension of time on Grantee's submittal of a plan to cure the breach within the specified period, commencement of work within the original thirty (30) day cure period, and diligent prosecution of the work to completion. If the material breach is not cured within the specified time, or Grantee does not comply with the specified conditions, County may, at its discretion, either (1) revoke this Franchise with no further notification, or (2) claim damages of One Thousand Dollars (\$1,000.00), or actual damages if demonstrably greater, against the financial guarantee set forth in Section 16.

B. Should County reasonably determine that Grantee is acting beyond the scope of permission granted herein for Grantee Facilities and Grantee Services, then, following the expiration of the cure period specified in subpart A of this Section, County reserves the right to cancel this Franchise and require Grantee to apply for, obtain, and comply with all applicable County permits, franchises, or other County permissions for such actions, and if Grantee's actions are not allowed under applicable federal and state or County laws, to compel Grantee to cease such actions.

Section 20. Compliance with Laws and Regulations.

A. This Franchise is subject to, and Grantee shall comply with all applicable Federal and State or County laws, regulations and policies, including all applicable elements of County's comprehensive plan, in conformance with federal laws and regulations, affecting performance under this Franchise. Furthermore, notwithstanding any other terms hereof to the contrary, Grantee shall be subject to the police power of County to adopt and enforce general ordinances

necessary to protect the safety and welfare of the general public in relation to the rights granted in the Franchise Area.

Section 21. Amendments.

A. The parties shall amend this Franchise as reasonably required to accommodate, ensure compliance with, and/or conform to any existing or hereafter enacted, amended, or adopted federal, state, or local statute, ordinance, or regulation, or County ordinance enacted pursuant thereto, or any binding judicial or governmental agency interpretations thereof (including, but not limited to, actions by the Federal Communications Commission or its successor agency) that govern any aspect of the rights or obligations of the parties under this Franchise. In the event that a party seeks such amendment, that party may provide the other party with written notice identifying and setting forth the full text of the desired amendment, and the reason(s) for it. A representative of Grantee and a representative of County, each who have authority to bind their respective parties, shall meet, in person or telephonically if travel is impractical for either party, no later than thirty (30) days following such written notice. During such meeting, the parties shall in good faith negotiate and execute an amendment to the Franchise to provide for the necessary change, and shall do so within 90 calendar days following such written notice. If the parties do not reach agreement as to the terms of the amendment within 90 days of commencing negotiations, the parties promptly shall mutually agree upon a third-party, neutral arbiter, who shall determine the terms of any such amendment after each party presents to the arbiter their proposed amendment language.

B. Any other amendments to this Franchise must be in writing and executed by authorized representatives of the County and the Grantee.

Section 22. Consideration.

A. As consideration for this Franchise, Grantee commits to pay a County franchise fee of five percent (5%) on Gross Revenues.

B. Grantee's franchise fee payments to the County shall be computed quarterly for the preceding calendar quarter, with quarters ending March 31, June 30, September 30 and December 31. Each quarterly payment shall be due and payable no later than forty-five (45) days after said dates. Payments shall be made to the Whatcom County Treasurer, Whatcom County Courthouse, Suite 104, 311 Grand Avenue, Bellingham, WA 98225, unless otherwise specified by the County in writing.

C. No acceptance of any payment shall be construed as an accord by the County that the amount paid is in fact the correct amount, nor shall any acceptance of payments be construed as a release of any claim the County may have for further or additional sums payable or for the performance of any other obligation of Grantee.

D. Each payment shall be accompanied by a written report to the County verified by an authorized representative of Grantee, containing an accurate statement in summarized

form, as well as in reasonable detail, of Grantee's Gross Revenues and the computation of the payment amount. Grantee shall, no later than sixty (60) days after the end of each calendar year, furnish to the County a statement of gross revenues and all payments, deductions and computations for the year just ended. Such statement shall be reviewed and approved by an authorized representative of Grantee prior to submission to the County.

E. During the term of this Agreement, and for a period of one (1) year thereafter, the County may retain (on a non-contingent fee basis) an independent auditor to conduct a reasonable review and audit of Grantee's relevant records to confirm the performance of payment obligations under this Agreement upon thirty (30) days prior written notice. Each party shall provide a list of two (2) auditors, one (of the four) of whom thereafter must be mutually agreed to by the parties. Such audit shall: (a) be subject to Grantee's reasonable security and confidentiality requirements; (b) occur no more than once per year and not during the first or last three (3) weeks of a calendar quarter; and (c) transpire during Grantee's normal business hours. If the audit shows an underpayment to the County for any period of time, then Grantee shall, within thirty (30) days after completion of such audit, pay such underpaid amounts to the County. If the audit shows an overpayment to the County for any period of time, then the County shall, within thirty (30) days after completion of such audit or by deduction from the next scheduled quarterly payment owed by Grantee, pay such overpaid amounts to Grantee. Any underpayment will also include interest at the maximum allowed rate provided under State law, calculated from the date of the underpayment or overpayment. All expenses associated with such audit shall be paid by the County unless the audit reveals an underpayment of more than ten percent (10%) in payments required hereunder in which case Grantee shall reimburse the County for the reasonable costs of such audit, not to exceed Five Thousand Dollars (\$5,000).

F. Any claim arising as a result of such an audit against Grantee must be made in writing within sixty (60) days of the County's completion of the audit. All information reviewed by the County or its auditor pursuant to any audit shall be deemed to be "Confidential Information" subject to the terms of Section 10 herein and shall be treated as such by the County in accordance with applicable law.

G. No more than once per year, Grantee agrees to meet with a representative of the County upon written request to review Grantee's methodology of record-keeping, financial reporting, the computing of franchise fee obligations and other procedures, the understanding of which the County reasonably deems necessary for reviewing reports and records that are relevant to the enforcement of this Agreement.

H. In the event any payment is not received within forty-five (45) days from the end of the calendar quarter, Grantee shall pay, in addition to the payment or sum due, interest on the amount due at the maximum allowed rate as provided under State law from the date the payment was due until the date the County receives the payment.

I. If this Agreement terminates for any reason, the Grantee shall file with the County, within sixty (60) calendar days of the date of the termination, a financial statement showing the gross revenues received by the Grantee since the end of the previous fiscal year. Within thirty (30) days of the filing of the certified statement with the County, Grantee shall pay any unpaid amounts as indicated. If the Grantee fails to satisfy its remaining financial obligations as required in this Agreement, the County may do so by utilizing the funds available in any security provided by the Grantee.

Section 23. Consequential Damages Limitation.

Notwithstanding any other provision of this Franchise, in no event shall either party be liable for any special, incidental, indirect, punitive, reliance, consequential or similar damages.

Section 24. Severability.

If any portion of this Franchise is deemed invalid, the remainder portions shall remain in effect.

Section 25. Titles.

The section titles used herein are for reference only and should not be used for the purpose of interpreting this Franchise.

ADOPTED this _____ day of _____ 2021.

ATTEST

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

Dana Brown Davis, Clerk of the Council

Barry Buchanan, Council Chair

APPROVED AS TO FORM:

WHATCOM COUNTY EXECUTIVE
WHATCOM COUNTY, WASHINGTON

Christopher Quinn
Civil Deputy Prosecutor
(approved electronically 11/19/2021)

Satpal Singh Sidhu, County Executive

() Approved () Denied

Date Signed: _____