

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 ABOVE NET 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,

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

139

140 Section 2. Permit Area and Authority Granted.

141

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

148

149 B. Permission Required to Enter onto Other City Property.
150 Nothing contained in this Ordinance is to be construed as granting
151 permission to Grantee to go upon any other public place other than
152 rights-of-way within the Permit Area in this Ordinance. Permission to go
153 upon any other property owned or controlled by the City must be sought
154 on a case by case basis from the City.

155

156 C. Compliance with WUTC Regulations. At all times during the
157 term of this Permit, Grantee shall fully comply with all applicable
158 regulations of the Washington Utilities and Transportation Commission.

159

160 Section 3. Construction and Maintenance.

161

162 A. Grantee's Facilities shall be located, relocated and maintained
163 within the Permit Area so as not to unreasonably interfere with the free
164 and safe passage of pedestrian and vehicular traffic and ingress or
165 egress to or from the abutting property and in accordance with the laws
166 of the State of Washington. Whenever it is necessary for Grantee, in the
167 exercise of its rights under this Permit, to make any excavation in the
168 right of way, Grantee shall obtain prior approval from the City of Kirkland
169 Public Works Department, pay the applicable permit fees, and obtain
170 any necessary permits for the excavation work. Grantee shall meet the
171 City's specifications per the Kirkland Municipal Code ("KMC") and the
172 Public Works Pre-Approved Plans and Policies.

173

174 Section 4. Location and Relocation of Facilities.

175

176 A. Grantee shall place any new Facilities underground where
177 existing telecommunications and cable facilities are located
178 underground. Any new Facilities to be located above-ground shall be
179 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,*

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

231
232 B. In the event any such claim or demand be presented to or
233 filed with the City, the City shall promptly notify Grantee thereof, and
234 Grantee shall have the right, at its election and at its sole cost and
235 expense, to settle and compromise such claim or demand, provided
236 further, that in the event any suit or action be begun against the City
237 based upon any such claim or demand, the it shall likewise promptly
238 notify Grantee thereof, and Grantee shall have the right, at its election
239 and its sole cost and expense, to settle and compromise such suit or
240 action, or defend the same at its sole cost and expense, by attorneys of
241 its own election.

242
243 Section 6. Default.

244
245 A. If Grantee shall fail to comply with any of the provisions of
246 this Permit, unless otherwise provided in this Permit, the City may, in
247 addition to the remedies provided in KMC Chapter 26.44, serve upon
248 Grantee a written order to comply within thirty (30) days from the date
249 such order is received by Grantee. If Grantee is not in compliance with
250 this Permit after expiration of the thirty (30) day period, the City may
251 act to remedy the violation and may charge the reasonable costs and
252 expenses of such action to Grantee. The City may act without the thirty
253 (30) day notice in case of an emergency. If any failure to comply with
254 this Permit by Grantee cannot be corrected with due diligence within
255 said thirty (30) day period, then the time within which Grantee may so
256 comply shall be extended for such time as may be reasonably necessary
257 and so long as Grantee works promptly and diligently to effect such
258 compliance. If Grantee is not in compliance with this Permit, and is not
259 proceeding with due diligence in accordance with this section to correct
260 such failure to comply, then the City may in addition, by ordinance and
261 following written notice to Grantee, declare an immediate forfeiture of
262 this Permit.

263
264 B. In addition to other remedies provided in KMC Chapter 26.44,
265 this Permit, or otherwise available at law, if Grantee is not in compliance
266 with requirements of the Permit, and if a good faith dispute does not
267 exist concerning such compliance, the City may withhold issuance of
268 pending Grantee right-of-way use permits until compliance is achieved.

269
270 Section 7. Nonexclusive Permit. This Permit is not and shall not
271 be deemed to be an exclusive Permit. This Permit shall not in any
272 manner prohibit the City from granting other and further Permits over,
273 upon, and along the Permit Area. This Permit shall not prohibit or
274 prevent the City from using the Permit Area or affect the jurisdiction of
275 the City over the same or any part thereof.

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Section 8. Permit Term.

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

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

Section 9. Compliance with Codes and Regulations.

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

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

Section 10. Undergrounding. New Facilities shall be installed

underground pursuant to Section 4 of this Permit. Grantee acknowledges the City's policy of undergrounding of Facilities within the Permit Area. Grantee will cooperate with the City in the undergrounding of Grantee's existing Facilities within the Permit Area. If, during the term of this Permit, the City shall direct Grantee to underground Facilities within any Permit Area, such undergrounding shall be at no cost to the City, except as may be provided in RCW Chapter 35.99. Grantee shall comply with all federal, state, and City regulations on undergrounding. If the City undertakes any street improvement which would otherwise 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.

367

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

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 15 day of March, 2022.

485
486 Signed in authentication thereof this 15 day of March,
487 2022.



Penny Sweet, Mayor

Attest:



Kathi Anderson, City Clerk

Approved as to Form:



Kevin Raymond, City Attorney

PUBLICATION SUMMARY
OF ORDINANCE NO. 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.

SECTIONS 1 - 17. Issues a non-exclusive Communications Master Use Permit to Zayo Group, LLC for wireline communications purposes and sets forth the terms and conditions of the Permit.

SECTION 18. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this Ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The Ordinance was passed by the Kirkland City Council at its meeting on the 15th day of March, 2022.

I certify that the foregoing is a summary of Ordinance O-4766 approved by the Kirkland City Council for summary publication.



Kathi Anderson, City Clerk

