

**ORDINANCE NO. 3298**

**A CONTRACT FRANCHISE ORDINANCE AUTHORIZING ZAYO GROUP, LLC TO CONSTRUCT, MAINTAIN AND OPERATE FACILITIES AS A TELECOMMUNICATIONS SERVICES PROVIDER AND A COMPETITIVE INFRASTRUCTURE PROVIDER IN THE PUBLIC RIGHT-OF-WAY WITHIN THE CITY OF ABILENE, KANSAS.**

**WHEREAS**, Zayo Group, LLC (“Zayo”) owns, maintains, operates and/or controls, in accordance with regulations promulgated by the Federal Communications Commission and the Kansas Corporation Commission (hereinafter “KCC”), telecommunications networks serving Zayo’s wireline customers through advanced fiber optic facilities and other wireless carrier customers through fiber-fed facilities. Such facilities are in public rights-of-way (hereinafter “ROW”), among other locations, in the State of Kansas.

**WHEREAS**, Zayo seeks to enter the City of Abilene’s (the “City”) ROW to install, maintain and operate a fiber network, so that Zayo and/or its customers (the “Customers”) may provide “telecommunications services” to the enterprises, residents and visitors of the City and others in the capacity of a “provider,” as such terms are defined under K.S.A. 17-1902, which services shall include “local exchange service,” as defined in K.S.A. 12-2001 (collectively, the “Zayo Services”).

**WHEREAS**, Zayo also seeks to enter the City’s ROW to install additional facilities and components of the fiber network, including distributed antenna system facilities, for purposes of leasing, licensing, selling, or otherwise conveying the facilities, or the capacity or bandwidth of such facilities, to one or more third-party customers (“Customers”), who are presently under contract with Zayo and will use the facilities to provide wireless telecommunications services directly to end users within the corporate limits of the City of Abilene, Kansas (“Infrastructure Services”).

**WHEREAS**, some features of the network, including the distributed antenna system facilities (collectively, the “Network”) include, without limitation, antenna nodes, poles, equipment cabinets, underground and above ground fiber optic cable, fiber handholes and enclosures, fiber repeaters and related equipment, and will include other equipment as technology evolves, in a configuration and at locations to be filed and identified through the City permit process (“Facility” or “Facilities”).

**WHEREAS**, certain systems of Zayo which are specific parts or types of the Facilities, a distributed antenna system (“DAS Facility” or “DAS Facility”) may be located on streetlights, stand-alone poles, thirty party utility poles, and other structures located on or within the ROW as permitted under this Agreement and will be connected to underground and above ground fiber optic cable, fiber handholes and enclosures, fiber repeaters, and related equipment.

**WHEREAS**, Zayo desires to obtain from City as permitted by law, and City is willing to grant Zayo as required by law, a franchise to establish the terms and conditions under which Zayo may access the City’s ROW to locate, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain the Facilities, including the DAS Facilities, for the

purposes of providing the Zayo Services and the Infrastructure Services, **SO NOW THEREFORE,**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF ABILENE, KANSAS:**

**SECTION 1  
GRANT OF FRANCHISE**

1.1 **Grant of Non-Exclusive Franchise.** Zayo is hereby granted a non-exclusive contract franchise to locate, construct, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain the Facilities in the ROW, at Zayo's sole cost and expense and subject to the terms and conditions of this ordinance (the "Agreement"), for the purposes of: (a) providing the Zayo Services within the City of Abilene, Kansas, in the capacity of a "provider" under K.S.A. 17-1902(a)(2); and (b) providing the Infrastructure Services to Zayo's Customers, in the capacity of a "competitive infrastructure provider" under K.S.A. 17-1902(a)(4). For purposes of this Agreement, the term "ROW" means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

1.2 **Compliance with Laws.** This Agreement is subject to the terms and conditions of all applicable federal, state and local Laws and the parties shall comply with any such Laws in the exercise of their rights and performance of their obligations under this Agreement. "Laws" or "Law" as used in this Agreement means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, permits, approvals or other applicable requirements of the City or other governmental entity or agency having joint or several jurisdiction over any aspect of this Agreement or the parties' activities under this Agreement, whether now existing or hereafter adopted, including but not limited to the City's right-of-way management ordinance ("ROW Ordinance") and the City's zoning and land use laws ("Zoning Regulations"), as applicable, to the extent they are not inconsistent with state and federal law regulating use of the ROW, and any related laws, rules, or regulations and amendments thereto relating to the use and occupancy of the ROW.

1.3 **Permits and Approvals.** As a condition of this Agreement, Zayo is required to obtain and is responsible for any necessary permit, license, certification, grant, registration, and any other authorization or approval required by the City (collectively, the "Permits and Approvals") relating to the installation, maintenance, and repair of the Facilities or Network and for the use and occupancy of the ROW, including but not limited to all Permits and Approvals required under the City's ROW Ordinance and Zoning Regulations, as applicable. The City shall process each valid and administratively complete application for requested Permits and Approvals in accordance with the time requirements of applicable state and federal Laws, and shall not unreasonably or unlawfully withhold or delay any Permits and Approvals. Any

conditions or requirements attached to Permits and Approvals shall be in accordance with federal, state, and local Laws.

## **SECTION 2 INSTALLATION OF THE NETWORK**

**2.1 Installation Specifications.** The installation of the Facilities shall be made in accordance with plans and specifications as may be approved by the City and after obtaining all necessary Permits and Approvals. Without limiting the foregoing, for each installation of Facilities, Zayo shall provide to the City plans, specifications, a construction work breakdown, and anticipated construction timeframes for the installation of Facilities no later than ninety (90) days prior to the planned start of the installation. Zayo shall, at the written request of the City, attend a planning session regarding an installation proposed by Zayo. The location, depth of the fiber underground, and any other requirements shall be approved in writing by the City prior to construction of the Facilities at that specific location, approval of which shall not be unreasonably withheld, conditioned or delayed. Approval of plans and specifications and the issuance of any Permits and Approvals by the City shall not release Zayo from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in the plans, specifications and/or Permits and Approvals. Zayo shall be responsible for notifying the City and all other relevant parties immediately upon discovery of such omissions and/or errors and with obtaining any amendments for corrected City-approved permits, as may be necessary. Zayo shall be responsible for all costs associated with the permitting process, including, but not limited to, repairs and replacement of City ROW. Zayo shall undertake and perform any work authorized by this Agreement in a skillful and workmanlike manner.

**2.2 Temporary Construction.** The installation of the Facilities shall be performed in accordance with traffic control plans for temporary construction work that are approved by the City, which approval shall not unreasonably be withheld, conditioned or delayed.

**2.3 Construction Schedule.** If requested by the City, at least ten (10) days prior to the installation of the Facilities, Zayo shall deliver to the City a schedule for the proposed work related to the construction of the Facilities, as well as a list of the names of all agents and contractors of Zayo's authorized by Zayo to access the City ROW on Zayo's behalf.

**2.4 Coordination of Work.** Zayo shall be responsible for coordination of work to avoid any interference with existing utilities, substructures, facilities and/or operations within the City's ROW. Zayo shall be the City's point of contact and all communications shall be through Zayo. Zayo shall be solely responsible for communicating with Kansas One-Call.

**2.5 Other Utility Providers.** When necessary, Zayo shall coordinate with other utility providers for other needed utility services. Zayo and the City will reasonably cooperate with the other utilities providers regarding the location of any meter, pole, and other apparatuses required for each Site.

**2.6 Existing Utility Poles.** Zayo may attach its Facilities to an existing utility pole pursuant to a properly executed agreement with the pole owner, provided, however, that any

necessary replacement of the pole in order to accommodate the attachment shall be subject to the proper exercise of the City's police powers, in addition to any required Permits and Approvals.

**2.7 Compliance with Permits.** All work within the City's ROW shall be performed in strict compliance with all applicable Permits and Approvals and all applicable regulatory requirements.

**2.8 Placement of Zayo Facilities.** Zayo shall coordinate the placement of its Facilities in the ROW in a manner that minimizes adverse impact on public improvements, as reasonably determined by the Public Works Director, or his or her designee.

**2.9 New Streetlight Poles and Existing Streetlight Poles.** It is understood that in connection with DAS Facilities, Zayo may build new stand-alone poles approximating the size of the standard street light or utility poles, including ancillary equipment for connection of antennae located on new stand-alone poles to utilities and fiber optic cable, other such facilities required for the installation of the Facilities which would comply with all encroachment and building permits, applicable City, state and federal specifications, and Laws ("New Poles"), provided however, that such new pole will not be erected on a City existing sidewalk or cause damage to a City sidewalk. The parties agree that in areas where there are existing poles, Zayo will work with the owner of that existing pole to collocate the DAS Facility, and Zayo will only pursue the installation of a new pole when the existing pole owner is unwilling to reasonably allow such attachment or where such attachment is unfeasible from a safety, technical, and engineering (structural and radio frequency coverage) perspective.

**2.10 City Use of New Poles.** The parties understand and agree that the city may use any New Poles for City purposes, including but not limited to streetlights and other lighting so long as such use does not interfere with Zayo's use of its Network or Facilities. Zayo shall reasonably cooperate with the City when using the New Poles.

**2.11 City-Owned Lights.** Except for the installation of the lights and ancillary equipment on or in the New Poles and/or as set forth in Section 2.12 below, Zayo shall not be responsible for maintenance, repair, or replacement of City-owned lights, light bulbs and equipment or equipment owned by third parties authorized by the City on the New Poles.

**2.12 Damage to New Poles.** If a new Pole falls or is damaged such that there is an imminent threat of harm to persons or property, then the City may cause the New Pole to be removed to the side of the street or a location that City believes reasonably eliminates the right of such imminent threat or harm to persons or property. Zayo shall, after written notice from the City that any New Pole has been damaged or removed, cause the New Pole to be repaired or replaced within thirty (30) days after the City's written notice. In the case of emergency or service effecting upon written notice Zayo will repair or replace within two (2) days. The cost to repair and/or replace any New Pole, including the replacement City streetlight, bulb and ancillary equipment shall be paid by Zayo; provided, however, that if the new Pole is damaged or destroyed by the City or a third party user that the City has given the right to use the New Pole, then the City and/or its third party user shall pay the cost to repair and/or replace the New Pole. To the extent that Zayo seeks reimbursement for a third party either directly or through

applicable insurance, the City shall assign Zayo any rights the City may have against such third party for such claims.

### **SECTION 3 COMPENSATION AND FEES**

**3.1 Franchise and Permit Fees.** Zayo is solely responsible for the payment of all lawful franchise and permit fees in connection with Zayo's performance under this Agreement.

**3.1.1 5% Franchise Fee for all Gross Revenues.** In consideration of this Franchise Agreement, Zayo agrees to remit to the City a franchise fee of five percent (5%) of Gross Revenues ("Franchise Fee"). "Gross revenues" means and includes:

(1) All revenues derived from the Infrastructure Services, including but not limited to RF telecommunications service revenue and any other operating revenue derived from leasing, licensing, or otherwise selling or conveying the right to use Zayo dark fiber or other Facilities, and indefeasible rights of use ("IRU") fees; and

(2) With respect to the Zayo Services, only those revenues derived from services provided within the corporate boundaries of the City which include: (A) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (B) recurring local exchange access line services for pay phone lines provided by a telecommunications local exchange service provider to all pay phone service providers; (C) local directory assistance revenue; (D) line status verification/busy interrupt revenue; (E) local operator assistance revenue; and (F) nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills. All other revenues, including, but not limited to, revenues from extended area service, the sale or lease of unbundled network elements, nonregulated services, carrier and end user access, long distance, wireless telecommunications services, lines providing only data service without voice services processed by a telecommunications local exchange service provider, private line service arrangements, internet, broadband and all other services not wholly local in nature are excluded from gross revenues. Gross revenues shall be reduced by bad debt expenses that are attributable to Sections (A) through (F) as referenced within this Section 3.1.1(2). Uncollectible and late charges shall not be included within gross revenues.

**3.1.2 Timing of Franchise Fee Payment.** Zayo shall pay its Franchise Fee on the 15<sup>th</sup> day of the second month following the month in which the Gross Revenue is received.

**3.1.3 Fees.** Zayo shall pay to City all required fees and/or deposits to recover the City's costs associated with the review and approval of all Permits and Approvals and managing the ROW, and such other fees allowed by Law associated therewith, provided that such fees and/or deposits reimburse the City for its reasonable, actual and verifiable costs of managing the ROW, including but not limited to reviewing and approving the application(s) for Permits and Approvals. These fees must be competitively neutral and may not be unreasonable or discriminatory.

3.2 **Accounting Matters.** Zayo shall keep accurate books of account at its principal office in Wichita, Kansas, or such other location of its choosing for the purpose of determining the amounts due to the City under Section 3 above. No more than once per year, the City may inspect Zayo's books of account relative to the application of the franchise fees required under this Section 3 any time during regular business hours on thirty (30) days' prior written notice and may audit the books from time to time at the City's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due under Section 3 above. The City agrees to hold in confidence any non-public information it learns from Zayo to the fullest extent permitted by Law.

#### **SECTION 4 ACCESS TO FACILITIES**

4.1 **Zayo Access to Facilities for Repair.** Zayo will be given reasonable access to each of the Facilities in the City ROW for the purposes of routine installation, repair, maintenance or removal of Facilities. If any such maintenance activities have the potential to result in an interruption of the City's use of the New Poles, Zayo shall provide the City with a minimum of three (3) days prior written notice of such maintenance activities. Such maintenance activities shall, to the extent feasible, be done with minimal impairment, interruption, or interference to the City's use of the New Poles.

4.2 **City Observation and Inspection.** The City shall have reasonable access to observe and inspect the Facilities, or any work conducted by Zayo during the installation, maintenance and/or repairs of the Facilities.

#### **SECTION 5 TERM AND TERMINATION**

5.1 **Term.** This Franchise Agreement shall be effective for an initial term of ten (10) years from the effective date of this Agreement. Thereafter, this Agreement will automatically renew for additional one (1) year terms, unless either party notifies the other party of its intent to terminate the franchise at least ninety (90) days prior to the termination of the then current term. The additional (term(s)) shall be deemed a continuation of this franchise ordinance and not as a new franchise ordinance or amendment. Under no circumstances shall this Agreement exceed twenty (20) years from the effective date hereof.

5.2 **Termination of Use.** Notwithstanding Section 5.1 above, Zayo may terminate its use of any or all of the Network by providing the City with ninety (90) days prior written notice. In the event of any such termination, Zayo payment obligations to the City shall terminate simultaneously with the termination of use; provided Zayo removes its equipment and restores the Facilities, as set forth in Section 6 and in accordance with applicable Laws, prior to the termination date.

## SECTION 6 REMOVAL AND RELOCATION

**6.1 Removal due to Public Project.** Upon receipt of a written demand from the City pursuant to this Section 6, Zayo, at its sole cost and expense, shall remove and relocate any part of the Network, constructed, installed, used and/or maintained by Zayo under this Agreement, whenever the City reasonably determines that the removal and/or relocation of any part of the Network is needed for any of the following purposes: (a) due to any work proposed to be done by or on behalf of the City or any other governmental agency, including, but not limited to, any change of grade, alignment or width of any street, sidewalk or other public facility, installation of curbs, gutters or landscaping and installation, construction, maintenance or operation of any underground or aboveground facilities used as sewers, water mains, drains, storm drains, pipes, gas mains, poles, power lines, telephone lines, cable television lines and tracks; (b) because any part of the Network is interfering with or adversely affecting the proper operation of City-owned light poles, traffic signals, or other City facilities or operations; (c) the City is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the ROW; or (d) to protect or preserve the public health and safety. The City shall cooperate with Zayo in relocating any portion of the Network removed pursuant to this Section 6.1 in a manner that allows Zayo to continue providing service to its customers, including, but not limited to, expediting approval of any necessary Permits and Approvals required for the relocation of that portion of the Network relocated under this Section 6.1. No permitting or other fees may be charged by the City for a removal occurring under this Section.

**6.2 Removal Due to Termination.** No later than ninety (90) days after termination of this Agreement pursuant to the provisions of this Agreement, Zayo shall, at its sole cost and expense, remove the Network or the terminated portion thereof and, if such removal disturbs the locations or adjacent property (including City ROW or City real property), Zayo will restore the affected area or property to its original conditions, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment or other aesthetic improvements made by Zayo to the Facility or adjacent property, or as otherwise required by the City. For New Poles, Zayo shall install a new streetlight or facility as directed by City's Public Works Director, or his or her designee. Alternatively, the City may allow Zayo, in the City's sole and absolute discretion, to abandon the Network, or any part thereof, in place and convey it to the City.

**6.3 Abandonment.** In the event Zayo ceases to operate and abandons the Network, or any part thereof, for a period of ninety (90) days or more, Zayo shall, at its sole cost and expense and within the time period specified in Section 6.2, vacate and remove the Network or the abandoned part thereof. If such removal disturbs the Facility or adjacent property (including City ROW or City real property), Zayo shall also, at its sole cost and expense, restore the Facility or adjacent property to its original conditions, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment or other aesthetic improvements made by Zayo to the Facility or adjacent property. Alternatively, the City may allow Zayo, in the City's sole and absolute discretion, to abandon the Network, or any part thereof, in place and convey it to the City.

6.4 **No Relocation Compensation.** The parties understand and agree that neither the City nor Zayo are entitled to compensation for any relocation of its Network that may be required under Section 6.1. Zayo is not entitled to relocation assistance or any other compensation or benefits under the Uniform Relocation Assistance Act or any other applicable provision of law upon termination of this Agreement.

## **SECTION 7 MAINTENANCE AND REPAIR**

7.1 **Electricity Use.** Zayo shall pay for the electricity and other utilities services it consumes in its operations at the rate charged by the servicing utility company.

7.2 **Maintenance and Repair.** Zayo shall, at Zayo's sole cost and expense, perform all maintenance and repairs reasonable needed to maintain the Network in good condition and neat and orderly appearance, and in compliance with all applicable Laws. In the event any part of the Network requires replacement because such part cannot be repaired, Zayo shall, at Zayo's sole cost and expense, replace the irreparable part of the Network. Zayo shall not cause rubbish, garbage or debris on or around its Network or the Facilities and shall not permit rubbish, garage or debris to accumulate on or around in any enclosed areas around the Facilities. If the City gives Zayo written notice of a failure by Zayo to maintain the Facilities, Zayo shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice.

7.3 **Appearance.** Zayo shall cooperate with the City on all issues of aesthetics and appearance. Zayo shall follow all legally binding City policies, state and local ordinances with respect to aesthetics. This includes, but is not limited to, historic site and/or locations of significant importance. All locations of DAS systems must be aesthetically approved by the Community Development Department, in a manner consistent with other Permits and Approvals under this Agreement.

7.4 **Repair of ROW.** Zayo shall be responsible for any damage, ordinary wear and tear excepted, to street pavement, existing facilities and utilities, curbs, gutters, sidewalks, landscaping, and all other public or private facilities, to the extent caused by Zayo's construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of the Network in the City's ROW. Zayo shall promptly repair such damage and return the City's ROW and any affected adjacent property to a safe and satisfactory condition to the City and in accordance with the City's applicable street restoration standards, or to the property owner if not the City. Zayo's obligations under this Section shall survive for one (1) year past the completion of such reparation and restoration work and return of the affected part of the City's ROW by Zayo to the City.

7.5 **Bond.** As a material condition of this Agreement, and prior to the commencement of any work in the ROW, Zayo shall provide a bond in the amount of \$100,000, payable to the City to ensure the appropriate and timely performance of Zayo's obligations under this Agreement, including Zayo's obligations under Sections 6 and 7. The required bond must be with a good and sufficient surety, authorized to transact business in the State of Kansas, and satisfactory to the City in form and substance.



## **SECTION 8 TAXES**

8.1 **Taxes.** Zayo agrees that it will be solely responsible for the payment of any and all taxes, fees and assessments levied on its ownership, use and maintenance of the Network and this Agreement. Pursuant to Section 79-5a01 *et seq.* of the Kansas Revenue and Taxation Code, the City hereby advises, and Zayo recognizes and understands, that Zayo's use of the City's ROW and/or the New Poles may create a possessory interest subject to real property taxation and that Zayo may be subject to, and responsible for, the payment of real property taxes levied on such interest. Zayo will cooperate with the Dickinson County Appraiser in providing any information necessary for the Appraiser to make a property tax determination. Zayo reserves the right to challenge any such assessment, and the City agrees to cooperate with Zayo in connection with any such challenge.

## **SECTION 9 INDEMNIFICATION**

9.1 **Indemnity.** Zayo shall indemnify, defend, and hold harmless the City, its City commissioners, officers and employees, agents, and contractors, from and against liability, claims, demands, losses, damages, fines, charges, penalties administrative and judicial proceedings and orders, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense to the extent resulting from activities undertaken by Zayo pursuant to this Agreement, except to the extent arising from or caused by the negligence or willful misconduct of the City, its commissioners, officers, employees, agents or contractors. The City shall promptly notify Zayo of any claim, action or proceeding covered by this Section 9.1.

9.2 **Waiver of Claims.** Zayo waives all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network resulting from any event or occurrence except for any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network resulting from the gross negligence or willful misconduct of the City.

9.3 **Limitation of City's Liability.** The City will be liable, if at all, only for the cost of repair to damaged portions of the Facilities arising from the gross negligence or willful misconduct of City, its employees, agents, or contractors. The City, its agents, officers, employees, or contractors, shall not be liable for any damage from any cause whatsoever to the Facilities, specifically including, without limitation, damage, if any, resulting from the City's maintenance operations adjacent to the Facilities or from vandalism or unauthorized use of the Facilities, except to the extent such damage is caused by the gross negligence or willful misconduct of City, its agents, officers, employees or contractors. The City will in no event be liable for indirect or consequential damages.

9.4 **Limitation of Zayo's Liability.** Except for Zayo's indemnification obligations under Section 9.1, Zayo shall not be liable for indirect or consequential damages in connection with or arising from this Agreement, or its use of the Network, New Poles, and ROW.

## **SECTION 10 INSURANCE**

10.1 **Minimum Insurance Requirements.** Zayo shall obtain and maintain at its sole cost and expense for the duration of this Agreement insurance pursuant to the terms and conditions described in this Section.

(a) **Minimum Insurance.** Zayo shall at all times during the term of this Agreement, carry, maintain, and keep in full force and effect, insurance as follows:

(i) **General Liability:** A policy or policies of Comprehensive General Liability Insurance, with minimum limits of \$2,000,000 combined single-limit per-occurrence for bodily injury, personal injury, death, loss and property damage resulting from wrongful or negligent acts by Zayo. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

(ii) **Automobile Liability:** A policy or policies of Comprehensive Vehicle Liability Insurance covering personal injury and property damage, with minimum limits of \$1,000,000 combine single-limit per accident for bodily injury and property damage covering any vehicle utilized by Zayo in performing the work covered by this Agreement.

(iii) **Workers' compensation and Employer's Liability:** Workers' compensation limits as required by the Labor Code, and Employer's Liability limits of \$1,000,000 per accident.

(b) **Deductible and Self-Insured Retentions.** Any deductibles or self-insured retentions shall not exceed \$25,000; provided, however, if Zayo's insurance policy expressly provides (i) that the insurer is required to pay covered claims with no deduction for all or any part of the Zayo's deductible, and (ii) insurer's obligation to pay covered claims is triggered irrespective of whether or not the insured pays the deductible, the Zayo's deductible shall not exceed \$100,000 for Comprehensive General Liability Insurance, \$100,000 Comprehensive Vehicle Liability Insurance and \$250,000 for Workers' Compensation and Employer's Liability coverage.

(c) **Other Insurance Provisions.** The policies shall contain, or be endorsed to contain, the following provisions:

(i) **General Liability and Automobile Liability Coverage.**

(1) The City, and its agents, representatives, officers, officials, and employees (the "Insureds") shall be named as additional insureds on all required

insurance policies, except for Workers' Compensation and Employer's Liability policies.

(2) Zayo's insurance coverage shall be primary insurance as respects the Insureds with respect to the matters covered by this Agreement. Any insurance or self-insurance maintained by the Insureds shall be in excess of Zayo's insurance and shall not contribute with it.

(3) Any failure of Zayo to comply with reporting provisions of the policies shall not affect coverage provided to the Insureds.

(4) Zayo's insurance shall apply separately to each of the Insureds against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. Each of the Insureds is subject to all policy terms and conditions and has an obligation, as an Insured, to report claims made against them to the insurance carrier.

(ii) **Workers' Compensation and Employer's Liability Coverage.** The insurer shall agree to waive all rights of subrogation against the Insureds for losses arising from work performed by Zayo in the City's ROW.

(iii) **All Coverages.** Except for non-payment of premium, each insurance policy required by this clause shall be endorsed to state that coverage shall not be cancelled or reduced in coverage or limits by the insurer except after thirty (30) days' prior written notice has been given to the City. If for any reason insurance coverage is canceled or reduced in coverage or in limits, Zayo shall within two (2) business days of notice from the Insurer, notify the City by phone or fax of the changes to or cancellation of the policy and shall confirm such notice via certified mail, return receipt requested.

(d) **Acceptance of Insurers.** Insurance shall be placed with insurers with an A.M. Best rating of no less than A-: VII.

(e) **Verification of Coverage.** Zayo shall furnish the City with certificates of insurance required by this Section 10. The certificates for each insurance policy are to be signed by a person, either manually or electronically, authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City before work commences.

(f) **Secondary Parties.** In the event Zayo hires any subcontractors, independent contractors or agents ("Secondary Parties") to locate, place, attach, install, operate, use, control, replace, repair or maintain the Network, Zayo shall require the Secondary Parties to obtain and maintain insurance commensurate to the work such Secondary Parties perform.

## **SECTION 11 DEFAULT**

### **11.1 Default.**

11.1.1 **Defined.** A "Default" shall be deemed to have occurred under this Agreement if a party fails to cure the breach of any term, condition, or covenant of this Agreement within thirty (30) days after written notice specifying such breach, provided that if the breach is of a nature that it cannot be cured within thirty (30) days, a default shall not have occurred so long as the breaching party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.

11.1.2 **Remedies.** Upon the failure of a party to timely cure any breach after notice thereof from the other party and expiration of the above cure periods, then the non-defaulting party may, subject to the terms of Section 9 (Limitation of Liability), terminate this Agreement and pursue all remedies provided for in this Agreement and/or any remedies it may have under applicable law or principles of equity relating to such breach.

11.2 **No waiver.** A waiver by either party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any breach of covenant or other matters subsequently occurring.

11.3 **Interest.** If Zayo fails to make any payment under this Agreement when due, such amounts shall accrue interest from the date such payment is due until paid, including accrued interest, at an annual rate of ten percent (10%) or, if lower, the highest percentage allowed by law.

## **SECTION 12 INTERFERENCE**

12.1 **Non-Interference with Non-Public Safety Communications Systems.** Zayo shall operate the Network in a manner that will not cause interference with City non-public safety communications systems and to the services and facilities of other licensees or lessees of City property located at or near the Facilities that were in operation prior to the installation of the Network or that are in operation prior to any modifications Zayo may make to the Network.

12.2 **Non-Interference with Public Safety Communications Systems.** Zayo's Network and Facilities shall not cause interference with public safety communications systems operated by City or any other public agency, regardless of the date such systems or any components thereof have been placed in service. Nor shall Zayo's Network and Facilities cause interference with the City's use of the New Poles for their intended purpose as streetlights, traffic lights, and/or stand-alone light poles, as applicable.

12.3 **Correction of Interference.** If such interference with the Facilities described in Sections 12.1 or 12.2 occurs, Zayo shall, upon receipt of written notice thereof from City, immediately commence commercially reasonable, diligent efforts to correct or eliminate such

interference. If such interference cannot be corrected by Zayo to the reasonable satisfaction of City within the cure period set forth for in the City's notice, which notice shall not be less than thirty (30) days, such interference shall be deemed a material breach under this Agreement and City may terminate this Agreement. Interference caused by actions of Zayo's Customer(s) remains the responsibility of Zayo. If the interference is an emergency or a danger to public health and safety, the City shall be entitled to require correction in a time period necessary to avoid the emergency or public health and safety issue.

### **SECTION 13 MISCELLANEOUS PROVISIONS**

13.1 **Nonexclusive Use.** Zayo acknowledges that this Agreement does not provide Zayo with exclusive use of the City's ROW and that City retains the right to permit other providers, persons, or entities to install equipment or devices in the City's ROW. The parties hereto specifically agree that all franchises issued to telecommunications providers shall be competitively neutral and not unreasonable or discriminatory in nature in compliance with applicable federal, state and local regulations.

13.2 **Notices.** All notices which shall or may be given pursuant to this Agreement shall be in writing and served by (1) electronic mail; and (2) personally served or transmitted through first class United States mail, or by express mail providing for overnight delivery, postage prepaid, to the following address or such other address of which a party may give written notice:

City:                      City of Abilene  
                                 419 N. Broadway Street  
                                 P.O. Box 519  
                                 Abilene, KS 67410  
                                 Attention: City Manager

Zayo:                      Zayo Group, LLC  
                                 1805 29<sup>th</sup> Street  
                                 Boulder, CO 80301  
                                 Attn: General Counsel, ZPI

Such notice shall be deemed made when personally delivered; of mailed via first class U.S. Mail, such notice shall be deemed made three (3) calendar days after the date of deposit in the U.S. Mail, if mailed via express/overnight mail, such notice shall be deemed made two (2) calendar days after the date of deposit in a designated overnight delivery mailbox or other like facility. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

13.3 **Assignment.** This contract franchise shall be assignable only to a telecommunications local exchange service provider which holds a current and valid certificate of convenience and authority from the Kansas Corporation Commission, and any such assignment shall be preconditioned upon the City receiving written notice of the assignment

(including notice of the name and address of the assignee and contact information) and a copy of the assignee's current certificate of convenience and authority no later than seven (7) days prior to the effective date of the assignment. Any attempted assignment of this contract franchise without satisfying the requirements of this section shall be void.

**13.4 Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successor, assigns and transferees.

**13.5 Entire Agreement; Modification; Waiver.** This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties, oral or written, relating to the subject matter hereof are merged into and superseded by this Agreement. Any modification or amendment to this Agreement shall be of no force and effect unless it is in writing and signed by the parties. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any provisions, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the party making the waiver.

**13.6 Severability.** If any one or more of the provisions of this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision or provisions shall be deemed separable from the remaining provisions of this Agreement and shall in no way affect the validity of the remaining portions of this Agreement.

**13.7 Governing Law.** This Agreement shall be interpreted and enforced according to, and the parties' rights and obligations governed by, the domestic law of the State of Kansas or applicable federal law, without regard to laws regarding choice of applicable law. Any proceeding or action to enforce this Agreement, or otherwise directly related to this Agreement shall occur in the state courts located in Dickinson County, Kansas.

**13.8 Survival of Terms.** All of the terms and conditions in this Agreement related to payment, removal due to termination or abandonment, indemnification, limits of City's liability, attorneys' fees and waiver shall survive termination of this agreement.

**13.9 Captions and Paragraph Headings.** Captions and paragraph headings used herein are for convenience only. They are not a part of this Agreement and shall not be used in construing this Agreement.

**13.10 Drafting.** The parties agree that this Agreement is the project of joint draftsmanship and that should any of the terms be determined by a court, or in any type of quasi-judicial or other proceeding, to be vague, ambiguous and/or unintelligible, that the same sentences, phrases, clauses or other wording or language of any kind shall not be construed against the drafting party.

**13.11 Execution in Counterparts.** This Agreement may be executed in one or more identical counterparts and all such counterparts together shall constitute a single instrument for the purpose of the effectiveness of this Agreement.

**13.12 Authority to Execute This Agreement.** Each person or persons executing this Agreement on behalf of a party, warrants and represents that he or she has the full right, power, legal capacity and authority to execute this Agreement on behalf of such party and has the authority to bind such party to the performance of its obligations under this Agreement without the approval or consent of any other person or entity.

**13.13 No Warranty by the City.** The City makes no representations or warranties regarding the suitability, condition or fitness of the locations for the installation, maintenance or use of the New Poles or the Facilities.

**13.14 Agreement Applicable Only to the Facilities.** This This Agreement shall not be construed to permit construction, installation, maintenance or use of any facilities in the ROW or on any property other than the Facilities and Network as defined and authorized herein.

**13.15 No Abrogation of Legal Responsibilities.** The City's execution of this Agreement shall not abrogate, in any way, Zayo's responsibility to comply with all permitting requirements or to comply with all Laws with respect to its performance of the activities permitted or obligations required under this Agreement.

**13.16 Contractual Interpretation.** In the interpretation and application of its rights under this Franchise Agreement, the City will act in a reasonable, non-discriminatory, and competitively neutral manner in compliance with all applicable federal, state, and local laws and regulations.

## **SECTION 14 ZAYO'S ACCEPTANCE; EFFECTIVE DATE**

**14.1 Acceptance of Terms.** Zayo shall have thirty (30) days after the final passage and approval of this ordinance to file with the City Clerk its acceptance, in writing, of the provisions, terms and conditions of this ordinance, which acceptance shall be duly acknowledged before an officer authorized by law to administer oaths; and when so accepted, this ordinance and acceptance shall constitute a contract between the City and Zayo subject to the provisions of the laws of the state of Kansas, and such contract shall be deemed effective on the date of publication pursuant to Section 14.3 below.

**14.2 Summary of Ordinance for Publication.** Upon receipt of Zayo's written acceptance of this ordinance, the City Clerk is directed to publish a summary of this ordinance in the official city newspaper.

**14.3 Effective Date of Ordinance.** This ordinance shall take effect and be in full force from and after its passage by the governing body, receipt of Zayo's written acceptance of terms, and publication of a summary thereof in the official newspaper of the City.

**PASSED AND APPROVED** by the governing body of the City of Abilene, Kansas, on May 9th, 2016.

**CITY OF ABILENE, KANSAS**

By: *S. Dee Marshall*  
S. Dee Marshall, Mayor



[SEAL]  
ATTEST:

*Penny L. Soukup, CMC*  
Penny L. Soukup, CMC, City Clerk

APPROVED AS TO FORM:

*A. O. Martin*  
Aaron O. Martin, City Attorney