

**ORDINANCE NO. 649  
CITY OF DAYTON, OREGON**

**AN ORDINANCE GRANTING NORTHWEST FIBER, d/b/a ZIPLY FIBER, A NONEXCLUSIVE FRANCHISE FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES WITHIN THE CITY OF DAYTON, AND DECLARING AN EMERGENCY**

**WHEREAS**, the City has jurisdiction and exercises regulatory management over all public rights of way within the City under authority of the City charter and state law and as set forth in the Dayton Municipal Code under Chapter 6.11; and

**WHEREAS**, GTE Northwest Incorporated, a Washington corporation, previously provided telecommunications services within the City of Dayton and was granted a franchise by Ordinance 517; and

**WHEREAS**, the franchise granted to GTE Northwest Incorporated by Ordinance No. 517 expired in 2015; and

**WHEREAS**, GTE Northwest Incorporated transferred its telecommunications services to Frontier Communications Corporation who sold its northwest assets to Northwest Fiber LLC d/b/a Ziplly Fiber (hereinafter "Grantee") on May 1, 2020 and Grantee wishes to continue providing telecommunication services in the City; and

**WHEREAS**, it is in the best interest of the City and its citizens to promote the offering of competitive telecommunications services, subject to the City's lawful authority to regulate the use of its rights of way; and

**WHEREAS**, because the current franchise expired and this Ordinance is needed to maintain consistent and seamless franchise authority for Grantee's operation within the City's rights of way, an emergency exists and this ordinance should take effect on June 15, 2020.


**NOW, THEREFORE, THE CITY OF DAYTON ORDAINS AS FOLLOWS:**

**Section 1.** The Franchise with Northwest Fiber LLC, d/b/a Ziplly Fiber, and as set forth in the attached Exhibit A, is adopted.

**Section 2.** Ordinance No. 517 is repealed in its entirety.

**Section 3.** An emergency is declared and this ordinance is effective after its adoption.

Ordinance adopted by the City Council of the City of Dayton this 15<sup>th</sup> day of June 2020.

  
\_\_\_\_\_  
Mayor, City of Dayton  
Elizabeth Wytoski

ATTEST

  
City Recorder, City of Dayton  
Patty Ringnalda

ATTACHED: Exhibit A

## EXHIBIT A

### FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT (“Agreement”) is made and entered into by and between the City of Dayton, an Oregon municipal corporation, (“City”) and Northwest Fiber LLC d/b/a Ziply Fiber (“Franchisee”):

#### RECITALS

1. Pursuant to Federal law, State statutes, and City Charter and local ordinances, the City is authorized to grant non-exclusive franchises to occupy “public rights-of-way” as defined by Dayton Municipal Code (“DMC”) Chapter 6.11, in order to construct, operate, and maintain telecommunication systems within the municipal boundaries of the City.
2. Franchisee has been operating within the right of way under Ordinance 517 which expired in 2015 and would like to continue to provide telecommunications services within the City.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

#### AGREEMENT

##### 1. DEFINITIONS

Unless otherwise defined in this Agreement, the terms, phrases and words used in this Agreement shall have the meanings provided in DMC Chapter 6.11.

##### 2. GRANT OF AUTHORITY

The City grants Franchisee the non-exclusive right and franchise to occupy City rights-of-way and appropriate utility easements for the purpose of construction, use, operation, and maintenance of a telecommunication system to provide telecommunications services for a period of five (5) years from and after the Effective Date of this Agreement (the “Term”), except as set forth below. This Agreement does not authorize placement or installation of cell towers, antennas, or wireless facilities in the rights-of-way. Unless otherwise authorized in writing by the City, Franchisee may not install any new poles in the rights-of-way.

##### 3. AUTHORITY NOT EXCLUSIVE

This Agreement and the grant of authority conferred herein are not exclusive. The City reserves the right to grant rights to others to use the rights-of-way in the City during the Term. The City may also do any work the City finds desirable on, over or under any street, alley, utility easement or other right-of-way. The Franchisee shall respect the rights and property of the City and other authorized users of easements and rights-of-way. This Agreement does not confer on Franchisee any right, title or interest in any public right-of-way beyond that expressly conferred herein or confer any right or privilege to use or occupy any other property of the City or any other

{00721501; 1 }

entity. This grant of authority shall not be construed as a limitation on the City in constructing, installing, maintaining or operating facilities for the provision of telecommunications services.

#### 4. PERFORMANCE; CONSIDERATION

4.1 During the term of this Agreement, the Franchisee agrees to comply with all lawful terms and conditions of DMC Chapter 16.11, as amended from time to time, the provisions of which are incorporated herein as though fully set forth. Franchisee agrees to comply with any other generally applicable ordinances, codes, rules and regulations of the City and applicable provisions of state and federal law.

4.2 As consideration for the use of City's public rights-of-way, Franchisee shall remit to City an annual fee equal to seven percent (7%) of the Franchisee's gross revenues (excluding all municipal, state or federal fees or taxes imposed by law or regulation directly on Franchisee's customers and which Franchisee is required to pass through to the entity imposing the fee or tax and unrecoverable bad debt) derived from the operation of Franchisee's telecommunications facilities in the City.

4.3 The franchise fee shall be payable quarterly on or before forty-five (45) days after the end of the preceding quarter, continuing through the term of this Franchise. Payments not received by the 45<sup>th</sup> day of each quarter will be assessed interest at the rate of one and one-half percent (1-1/2%) per month until paid. City shall have the right to conduct or cause to be conducted, an audit of gross revenues as defined herein for the purpose of ascertaining whether Franchisee's franchise fee payments have met the requirements of this franchise. Any difference of payment due to the City following audit shall be payable within thirty (30) days after written notice to the affected party.

#### 5. CHANGE OF LAW; AMENDMENT OF FRANCHISE AGREEMENT

5.1 It is the intent of the parties that this Agreement may be amended from time to time to conform to any changes in the controlling federal or state law or other changes material to this agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This Agreement may be amended or terminated by the mutual consent of the parties and their successors-in-interest.

5.2 To the extent any lawful City rule, ordinance or regulation, including any amendment to the provisions of DMC Chapter 6.11, is adopted on a jurisdiction-wide basis and is generally imposed on similarly situated persons or entities, the rule, ordinance or regulation shall apply without need for amendment of this Agreement. City shall provide Franchisee notice of any such change in law prior to its adoption.

#### 6. TREE TRIMMING

6.1 Upon the express written permission of the City including via email, Franchisee may trim trees or other vegetation owned by the City or encroaching upon the public right-of-way to prevent branches or leaves from touching or otherwise interfering with Franchisee's telecommunications

{00721501; 1 }

facilities. All trimming or pruning shall be at the sole cost of Franchisee and under the supervision of the City.

6.2. The Franchisee may contract for said trimming or pruning services with any person approved by the City and such approval not to be unreasonably withheld.

## 7. REPORTS

7.1 Within thirty (30) days of receipt, Franchisee shall submit to City copies of all decisions, orders, and judgments by any federal, state and local court, regulatory agency and other government body in which Franchisee is a party, substantially and materially affecting Franchisee's obligations under this Franchise.

7.2 Franchisee shall make available to City, upon reasonable advance written notice, such information or reports pertinent to enforcing the terms of the Franchise in such form and at such times as the City may request. Subject to the Oregon Public Records law, any information that is provided to the City which is marked proprietary and confidential shall not be disclosed or used for any purpose, other than verifying compliance with the terms of this Franchise, and shall be returned to Franchisee.

7.3 Concurrently with the remittance of franchise fees as required by this Franchise and DMC 6.11, Franchisee shall submit a report of gross receipts utilized to compute such franchise fees.

## 8. TAXES

Nothing contained in this Agreement shall be construed to exempt the Franchisee from any license, occupation, franchise or excise tax or assessment which is or may be hereafter lawfully imposed on all entities engaged in the same business as the Franchisee.

## 9. INSURANCE

Franchisee attaches and incorporates the following exhibits:

9.1. Performance Bond consistent with the requirements of DMC 6.11.8(J).

9.2. Certificate of insurance that names the City as an additional insured and is otherwise consistent with the requirements of DMC 6.11.8(H).

## 10. SEVERABILITY CLAUSE

If any clause, sentence, or any other portion of this Agreement becomes illegal, null or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law. If any material portion of the Agreement becomes illegal, null or void so that the intent of the Agreement is frustrated, the parties agree to negotiate replacement provisions to fulfill the intent of the Agreement consistent with applicable law.

## 11. REMEDIES

11.1. Subject to the reservation of rights in DMC 6.11, if Franchisee fails to comply with any material provision of this Agreement, or if grounds for revocation of this Agreement exist under DMC 6.11.7(N), Franchisee will forfeit all rights and privileges granted by this Agreement. That forfeiture and revocation of the franchise will not occur until the City complies with the requirements for revocation of the franchise set out in DMC 6.11.7.

11.2. Notwithstanding the above, failure or default or violation by Franchisee shall not constitute grounds for the forfeiture of this franchise if due materially, substantially and reasonably to an act of God, fire, flood, storm or other element or casualty, theft, war, disaster, strike, lock-out, boycott, prevailing war or war preparation, or bona fide legal proceedings, beyond the control of Franchisee, or matter unrelated to the Franchisee's use of the public right-of-way.

11.3. All remedies under this Agreement, including revocation of the Franchise, are cumulative and not exclusive, and the recovery or enforcement by one available remedy is not a bar to recovery or enforcement by any other such remedy. The City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon Franchisee by or pursuant to this Agreement. A specific waiver of a particular breach of any term, condition or obligation imposed upon Franchisee by or pursuant to this Agreement shall not be a waiver of any other, or subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

11.4. The right is hereby preserved to the City to adopt, in addition to the reservations contained herein and existing applicable ordinances, such additional regulations as it shall find necessary for the regulation of the public right-of-way, provided that such regulations, by ordinance or otherwise, shall be reasonable and not in conflict with the rights herein granted. Franchisee shall, at all times during the life of this Agreement, be subject to all lawful exercise of the police power by the City, and to such reasonable regulations as the City may hereafter by resolution or ordinance provide. The City hereby reserves the right to exercise, with regard to this franchise, all authority now or hereafter granted to the City by State statute or City charter, except where such authority may be modified or superseded by the Constitution of the State of Oregon or the Constitution of the United States.

11.5. In the event of a suit, action, arbitration, or other proceeding of any nature whatsoever is instituted to enforce any provision of this Agreement, each Party is responsible for its own costs for attorneys, paralegals, accountants, and other experts fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as allowed by Oregon law and as determined by the judge or arbitrator at trial or arbitration, as the case may be, or on any appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorneys' fees related to or with respect to proceedings in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law.

12. ASSIGNMENT

All rights and privileges granted and duties imposed by this Agreement upon Franchisee shall extend to and be binding upon Franchisee's successors, legal representatives and assigns, in accordance with the procedures in Chapter 6.11 of the DMC. Franchisee shall notify the City of any sale or transfer of its telecommunications facilities or majority control of its plant or system, at least sixty (60) days before any such sale or transfer occurs. No assignment shall be recognized for purposes of this Agreement until the assignee has obtained and filed with the City the performance bond and insurance certificate required by Paragraph 9 of this Agreement, and has agreed to the terms and conditions of this Agreement.

13. NOTICE

Unless specifically provided otherwise herein, all notices shall be mailed, postage prepaid, to the following addresses or to such other addresses as Franchisee or the City may designate in writing:

If to Franchisee:

If to City: City of Dayton  
Attention: City Manager  
416 Ferry Street  
Dayton, OR 97114

14. GOVERNING LAW

The law of the State of Oregon governs the validity of this Agreement, and its interpretation, performance and enforcement. Any action or suit to enforce or construe any provision of this Agreement by any party shall be brought in the Circuit Court of the State of Oregon for Yamhill County, or the United States District Court for the District of Oregon.

15. EFFECTIVE DATE

The effective date of this franchise is the 15 day of June, 2020.

CITY OF DAYTON

FRANCHISEE

By: [Signature]  
Mayor

By: \_\_\_\_\_  
Title: President

Attest: [Signature]

{00721501; 1 }

City Recorder

{00721501; 1 }

Page 6 – Franchise Agreement