

**A NON-EXCLUSIVE LICENSE AGREEMENT BETWEEN THE CITY OF SAN ANTONIO
AND ZAYO GROUP, LLC, A DELAWARE LIMITED LIABILITY COMPANY
FOR USE OF PUBLIC RIGHTS-OF-WAY**

This License Agreement (“Agreement”) is made by and between the CITY OF SAN ANTONIO, TEXAS (hereafter referred to as “City” or “Licensor”), a Texas Municipal Corporation and Home-Rule Municipality, acting by and through its City Manager, or designee, pursuant to Ordinance No. _____, passed and approved by the City Council on _____, 2017; and Zayo Group, LLC, a Delaware Limited Liability Company (hereafter referred to as “Zayo” or “Licensee”). The City and the Zayo may hereinafter be referred to individually as “Party” and collectively as the “Parties”.

RECITALS

WHEREAS, Licensee owns, maintains, operates and controls a telecommunications Network to provide Service to Licensee’s customers; and

WHEREAS, Licensee holds Service Provider Certificate of Operating Authority No. 60834, issued by the Public Utility Commission on May 26, 2009; and

WHEREAS, for purposes of operating its telecommunications network, Licensee wishes to install, operate, and maintain certain of its communications Equipment in the City’s public right-of-way, as more fully described herein; and

WHEREAS, the installation, maintenance, and repair of the Network including fiber optic cable, conduit, and related Equipment in the City’s public right-of-way will be done in a manner consistent with all City of San Antonio regulations, including the City’s Rights-of-Way Management Ordinance and Utility Excavation Criteria Manual; and

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the following terms and conditions:

1. **Definitions.** The following definitions shall apply to the provisions of this Agreement.
 - (a) **“Chief Technology Officer”** means an assistant director of the Information Technology Services Department designated as chief technology officer.
 - (b) **“Equipment.”** means any and all Licensee’s ducts spaces, manholes, poles, conduits, fiber optic cables, repeaters, electronics equipment, transmission equipment, power sources, underground and overhead passageways, and other equipment, structures, plant, and appurtenances located within the public right-of-way.
 - (c) **“Excavation Manual.”** means the Utility Excavation Criteria Manual, adopted in accordance with Section 29-141 of the City Code.
 - (d) **“Gross revenues” (A)** means all consideration of any kind or nature including without limitation cash, credits, property, and in-kind contributions (services or goods) derived by the Licensee from the operation of the Licensee’s telecommunications network to provide Service within the City where compensation is not already provided through Local Government Code Chapters 283 and 284. Gross revenue shall include all consideration paid to the Licensee and its affiliates (to the extent either is acting as a provider of a service as authorized by this Agreement), which shall

include but not be limited to the following: (i) all fees charged to customers for any and all Service provided by the Licensee; (ii) any fee imposed on the Licensee by this Agreement that is passed through and paid by customers (including without limitation the gross revenue fee set forth in this Agreement); and (iii) compensation received by the Licensee or its affiliates that is derived from the operation of the Licensee's telecommunications network to provide Service with respect to commissions that are paid to the Licensee as compensation for promotion or exhibition of any products or services on the Licensee's telecommunications network. Gross revenue includes a pro rata portion of all revenue derived by the Licensee or its affiliates pursuant to compensation arrangements for advertising derived from the operation of the Licensee's telecommunications network to provide service within the City, subject to Paragraph (B)(iii). Advertising commissions paid to third parties shall not be netted against advertising revenue included in gross revenue. Revenue of an affiliate derived from the affiliate's provision of Service shall be gross revenue to the extent the treatment of such revenue as revenue of the affiliate and not of Licensee has the effect (whether intentional or unintentional) of evading the payment of fees which would otherwise be paid to the City. In no event shall revenue of an affiliate be gross revenue to the Licensee if such revenue is otherwise subject to fees to be paid to the City.

(B) For purposes of this section, "gross revenues" does not include:

- (i) any revenue not actually received, even if billed, such as bad debt;
- (ii) non-services revenues received by any affiliate or any other person in exchange for supplying goods or services used by the Licensee to provide Service;
- (iii) refunds, rebates, or discounts made to customers, leased access providers, advertisers, or the City;
- (iv) the sale of services for resale in which the purchaser is required to collect the fees set out in the Agreement from the purchaser's customer;
- (v) the provision of Services to customers at no charge if required by state law;
- (vi) any tax of general applicability imposed upon the Licensee or upon customers by the City, state, federal, or any other governmental entity and required to be collected by the Licensee and remitted to the taxing entity (including, but not limited to, sales and use tax, gross receipts tax, excise tax, utility users tax, public service tax, communication taxes, and fees not imposed by this Agreement);
- (vii) any forgone revenue from the Licensee's provision of free or reduced cost Services to any person including without limitation employees of the Licensee; provided, however, that any forgone revenue which the Licensee chooses not to receive in exchange for trades, barter, services, or other items of value shall be included in gross revenue; and
- (viii) sales of capital assets or sales of surplus equipment that is not used by the purchaser to receive services from the Licensee.

- (e) "**Network**" means the telecommunication systems operated by the Licensee to provide Service its customers in the City.
- (f) "**Right-of-way or public right-of-way**" means the surface of, and the space above and below, any street, road, highway, freeway, lane, path, drainage way, channel, fee interest, public way or place, sidewalk, alley, boulevard, parkway, drive, or other easement now or hereafter held by the City or over which the City exercises any rights of management or control and shall include but not be limited to all easements now held, or hereafter held, by the City but shall specifically exclude private property; as definition may be amended from time to time by the San Antonio City Council.

(g) “**Rights-of-Way Management Ordinance**” means the San Antonio Right-of-Way Management Ordinance passed by the San Antonio City Council on January 25, 2001 as Ordinance No. 93319, codified in Chapter 29 of the City’s Municipal Code, as amended from time to time by the San Antonio City Council.

(h) “**Service**” means ‘wireline communication’ or ‘communication by wire’, as defined in 47 USC § 153(59), including telecommunications service and information service.

2. **Term.** (a) This Agreement shall be effective as of the Effective Date and shall continue for a term of twenty (20) years (the “Initial Term”), unless it is earlier terminated in accordance with the provisions herein. Thereafter, this Agreement may be renewed for two (2) successive five (5) year terms (each, a “Renewal Term”) unless one party provides at least six (6) months prior written notice to the other Party of its intent not to renew.

(b) At least six (6) months prior to the expiration of the then-current term of the Agreement, Zayo shall inform the Chief Technology Officer in writing of its intent to seek renewal of the Agreement. During this time period, the City may reappraise the gross revenue fee, and the Parties may re-negotiate the gross revenue fee and other terms of this Agreement.

(c) Upon determination by the City Council that Zayo’s performance is satisfactory, a renewal, subject to an agreed re-negotiation of compensation and other terms may be granted for a period of five (5) years.

(d) The “Effective Date” of this Agreement means the latest date on which this Agreement is signed by both Parties following approval of the Agreement by an ordinance of the San Antonio City Council.

3. **Scope of Agreement.** The City hereby grants Zayo, a non-exclusive license to use and occupy the right-of-way to erect, install, construct, replace, and maintain all necessary Equipment to provide Services to its Customers. Zayo’s use of the right-of-way shall be subject to the laws of the State of Texas and the City’s charter and laws as they exist now or may be amended from time to time, and subject to the conditions outlined in this Agreement. Zayo shall install its Equipment consistent with the City’s Rights-of-Way Management Ordinance and Excavation Manual. Nothing in this Agreement shall be deemed to grant convey, create, or vest in Zayo a real property interest in land, including any fee, leasehold interest, or easement.

4. **License Fee.** (a) The Licensee shall pay the City a license fee of three (3) percent of gross revenues as set forth in this Agreement. That same license fee structure shall apply to any unincorporated areas that are annexed by the City after the effective date of this Agreement.

(b) The license fee payable under this section is to be paid quarterly, within 45 days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the fee. The City may review the business records of the Licensee to the extent necessary to ensure compensation in accordance with Subsection (a), provided that the City may only review records that relate to the 48-month period preceding the date of the last license fee payment. The licensee’s business records will be made available to the City for review electronically in a format acceptable to the City. If the City determines that Licensee is in violation of the above revenue requirements, the City shall have the right to hire auditors of its choosing to conduct the required audit and to have the Licensee pay for such audit. If after the audit is conducted it is determined that Licensee is in compliance with the Agreement then the cost of the audit shall be borne by the City. Licensee may recommend the hiring of alternate auditors, but the final decision on the selection of auditors shall rest with the City.

(c) The City may audit the business records of the Licensee every four (4) years; however, if the City discovers a discrepancy in an audit of the business records of the Licensee, the City may conduct annual audits until the discrepancy is resolved. Once the discrepancy is resolved, the City may audit the business records of the Licensee every four (4) years. The City may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.

(d) The Licensee may recover from the Licensee's customers any fee imposed by this License Agreement, to the extent allowed by law.

5. Administration of License and Notices. (a) The City Manager or her designee is the principal City officer responsible for the administration of this License Agreement.

(b) All notices shall be in writing and shall be delivered by certified mail return receipt requested or by overnight delivery that is capable of providing proof of delivery. Any such notice shall be deemed effective on the date of mailing. All notices shall be addressed to the Parties as specified below, or such other address as a Party may update in writing to the other Party from time to time. Until any such change is made, notices to the City shall be delivered as follows:

If to City: Director of Information Technology
 Services Department
 City of San Antonio
 P.O. Box 839966
 San Antonio, Texas 78283-3966
 (210) 207-6909

And

 City Clerk's Office
 City of San Antonio
 P.O. Box 839966
 San Antonio, Texas 78283-3966
 (210) 207-7253

Until any such change is made, notices to Zayo shall be delivered as follows:

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

6. Waiver of Compliance. None of the provisions of this Agreement may be waived or modified except in writing signed by Zayo and City, and authorized by the San Antonio City Council by passage of an ordinance. Failure of a party to enforce or insist upon compliance with any term or condition of this Agreement or any breach thereof shall not constitute a waiver or relinquishment of such terms, conditions or legal rights.

7. Assignment. This Agreement shall not be assigned, transferred, sold or disposed of, in whole or in part, by voluntary sale, merger, consolidation, or otherwise by force or involuntary sale, without the expressed written consent of the City, approved by passage of an ordinance. For the purposes of this Section, assignment, transfer, sale, disposal, merger, or consolidation shall exclude an assignment or

transfer to entities that control, are controlled by, or are under common control with Zayo. Any such consent by the City shall not be unreasonably withheld.

8. **Severability.** In the event any term or provision of this Agreement is declared illegal, invalid or unenforceable, then that provision shall be deemed to be deleted from this Agreement and have no force or effect and this Agreement shall thereafter continue in full force and effect, as so modified.

9. **Joint Work Product.** This Agreement is the joint work product of both Parties hereto, accordingly, in the event of ambiguity no presumption shall be imposed against any Party by reason of document preparation.

10. **Change in Law.** Notwithstanding anything contained in this Agreement to the contrary, in the event that this Agreement, in whole or in part, is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unlawful, or otherwise inapplicable, Zayo and the City shall meet and negotiate an amended Agreement that is in compliance with the authority's decision or enactment and, unless explicitly prohibited, the amended Agreement shall provide the City with a level of compensation comparable to that set forth in this Agreement.

11. **Governing Law.** (a) VENUE OF ANY COURT ACTION BROUGHT DIRECTLY OR INDIRECTLY BY REASON OF THIS AGREEMENT SHALL BE IN BEXAR COUNTY, TEXAS. THE PROVISIONS OF THE AGREEMENT SHALL BE CONSTRUED UNDER, AND IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER SHALL BE PERFORMED IN BEXAR COUNTY, TEXAS.(b) This License Agreement shall be construed in accordance with the CITY Charter and Municipal Code(s) in effect on the date of passage of this License Agreement, and as may be subsequently amended, to the extent that such Charter and Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

12. **Amendment.** Either Party shall have the right to request an amendment of this Agreement on the fifth (5th) anniversary of the Effective Date and each five (5) year period of the Term thereafter, provided notice to amend is sent to the other Party no later than one hundred twenty (120) days from the end of such five (5) year period. In the event City or Licensee requests amendments to the license fee, such license fee may be increased or decreased based on comparable licensing fees paid by Licensee in other Texas cities or by other parties to the City. The Parties may agree to amend other substantive provisions of this Agreement. The City may determine, in its sole discretion, whether any contractual amendments need to be approved by an ordinance of the City Council. If the Parties have not reached agreement on contractual amendments by the end of the then five (5) year period, the Parties may agree in writing to a temporary extension of the Agreement as appropriate and necessary to complete negotiations on proposed contractual amendments. If following negotiations, the Parties cannot reach agreement on contractual amendments, the either Party shall have the right to terminate this Agreement at the end of the agreed upon temporary extension period by providing written notice thereof to the other Party.

13. **Non-Waiver of Rights** – By entering this License Agreement, neither Licensor nor Licensee has waived any rights either Party may have under applicable state and federal law pertaining to municipal fees paid for use of the public right-of-way, or Licensor's management of the Licensee's activities in the right-of-way.

14. **Entire Agreement.** This Agreement contains the entire agreement between the Parties and supersedes all prior and contemporaneous communications, understandings and agreements with respect

to the subject matter hereof, whether written or oral, expressed or implied. No other agreement, statement, promise or practice between the Parties relating to the Agreement shall be binding upon the Parties.

15. **Counterparts.** This Agreement may be executed in counterparts, each of which when executed and delivered shall be an original, but all of which shall constitute one and the same instrument. Electronic signatures shall be treated as originals.

16. **Captions.** The captions contained in this Agreement are for convenience of reference only and in no way limit or enlarge the terms and conditions of this Agreement.
Executed and Agreed to as of the dates indicated below.

THE CITY OF SAN ANTONIO

ZAYO GROUP, LLC

By: _____

By:  _____

Printed Name: _____

Printed Name: CHRISTOPHER P. YOST

Title: _____

Title: GENERAL COUNSEL

Dated: _____

Dated: FEBRUARY 22, 2018

APPROVED AS TO FORM:

Andrew Segovia, City Attorney