

(Summary First Published in the Andale Clarion  
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THE CITY OF ANDALE, KANSAS

ORDINANCE NO. 15-5

**AN ORDINANCE ESTABLISHING A CONTRACT FRANCHISE  
AUTHORIZING ZAYO GROUP, LLC, TO CONSTRUCT,  
MAINTAIN AND OPERATE AS A COMPETITIVE  
INFRASTRUCTURE PROVIDER AND TELECOMMUNICATIONS  
SERVICES PROVIDER IN THE PUBLIC RIGHT-OF-WAY OF THE  
CITY OF ANDALE, KANSAS IN ACCORDANCE WITH K.S.A.  
12-2001 AND 17-1902 AND REPEALING ALL CONFLICTING  
ORDINANCES OR PARTS THEREOF.**

**WHEREAS**, Zayo Group, LLC (hereinafter “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 as a competitive infrastructure provider, as defined in subsection (a)(4) of Kansas Statutes Annotated (K.S.A.) 17-1902 and amendments thereto, and a telecommunications services provider, as defined in accordance with subsections (a)(2) and (a)(3) of K.S.A. 19-1902 and subsection (c)(8) of K.S.A. 12-2001 and amendments thereto, serving Zayo’s wireline customers through advanced fiber optic facilities and other wireless carrier customers through fiber-fed distributed antenna system facilities. Such facilities are located in public rights-of-way throughout the State of Kansas; and

**WHEREAS**, K.S.A. 17-1902 and K.S.A. 12-2001 provide for the enactment of contract franchise ordinances by Kansas cities with competitive infrastructure providers and telecommunications services providers; and

**WHEREAS**, Zayo desires to obtain from the City of Andale, Kansas (hereinafter “City”) and the City is willing to establish a contract franchise authorizing Zayo to construct, maintain and operate as a competitive infrastructure provider and a telecommunications services provider, in accordance with K.S.A. 17-1902 and 12-2001, in the public right-of-way of the City of Andale, Kansas.

**NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF ANDALE, KANSAS:**

**Section 1. Definitions.**

For purposes of this ordinance, the following words and phrases shall have the following meanings:

*Access line* shall mean and be limited to retail billed and collected residential lines; business lines; ISDN lines; PBX trunks and simulated exchange access lines provided by a central office based switching arrangement where all stations served by such simulated exchange access lines are used by a single customer of the provider of such arrangement. "Access line" may not be construed to include interoffice transport or other transmission media that do not terminate at an end user customer's premises, or to permit duplicate or multiple assessment of access line rates on the provision of a single service or on the multiple communications paths derived from a billed and collected access line. "Access line" shall not include the following: wireless telecommunications services, the sale or lease of unbundled loop facilities, special access services, and/or lines providing only data services without voice services processed by a telecommunications local exchange service provider or private line service arrangements.

*Access line count* means the number of access lines serving consumers within the corporate boundaries of the city on the last day of each month.

*Access line fee* means the fee determined by the city, up to a maximum as set out in K.S.A. 12-2001 and amendments thereto, to be used by Zayo in calculating the amount of access line remittance.

*Access line remittance* means the amount to be paid by Zayo to the city, the total of which is calculated by multiplying the access line fee, as determined by the city, by the number of access lines served by Zayo as a telecommunications local exchange service provider within the city for each month in that calendar quarter.

*Cable service* is defined as set forth in 47 U.S.C. Section 522(6), and amendments thereto.

*City* means the City of Andale, Kansas.

*Competitive infrastructure provider* means an entity which leases, sells or otherwise conveys facilities located in the right-of-way, or the capacity or bandwidth of such facilities for use in the provision of telecommunications services, internet services, or other intrastate or interstate traffic, but does not itself provide services directly to end users within the corporate limits of the city.

*Distributed antenna system ("DAS") facility or facilities* mean certain components of the Network consisting of distributed antenna systems which may be located on existing or new streetlights, stand-alone poles, third party utility poles, and other structures located on or within the ROW as permitted under this contract franchise ordinance, and which will be connected to underground and aboveground fiber optic cable, fiber handholes and enclosures, fiber repeaters and related equipment.

*Facility or facilities* means any portion or component of the Network located in, along,

over, upon, under, or through the public right-of-way.

*Franchise fee* means the fees established under this ordinance for each grant of access to the public rights-of-way.

*Local exchange service* means local switched telecommunications service within any local exchange service area approved by the state corporation commission, regardless of the medium by which the local telecommunications service is provided. The term local exchange service shall not include wireless communication services.

*Network* means the franchisee's fiber network, communications media, and distributed antenna system facilities, including the antenna nodes, poles, equipment cabinets, underground and aboveground fiber optic cable, wires, lines, fiber handholes and enclosures, fiber repeaters and related equipment and appurtenance, and similar facilities and appurtenances, designed, constructed or occupied for the purpose of producing, receiving, amplifying or distributing telecommunications service to or from locations within the city.

*Law(s)* 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 contract franchise ordinance or the parties' activities hereunder, whether now existing or hereafter adopted, including but not limited to a city right-of-way management ordinance and the city's zoning and land use laws to the extent they are not inconsistent with state and federal law regulating use of the public rights-of-way, and any related laws, rules, or regulations and amendments thereto relating to the use and occupancy of the public rights-of-way.

*Provider* means a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, or a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto, or a video service provider as defined in K.S.A. 12-2022, and amendments thereto.

*Public right(s)-of-way ("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 non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

*Telecommunications local exchange service provider* means a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, and a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto, which does, or in good faith intends to, provide local exchange

service. The term telecommunications local exchange service provider does not include an interexchange carrier that does not provide local exchange service, competitive access provider that does not provide local exchange service or any wireless telecommunications local exchange service provider.

*Telecommunications service(s)* means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Zayo means the franchisee, Zayo Group, LLC.

## **Section 2. Grants.**

(a) **Competitive Infrastructure Provider.** This contract franchise ordinance hereby grants to Zayo, the nonexclusive contract, right, privilege, and franchise to locate, construct, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain, facilities along, across, upon and under the ROW for Zayo to lease, license, sell, or otherwise convey such facilities, or the capacity or bandwidth of such facilities, to third-party carriers to provide telecommunications services, internet services, or other intrastate or interstate traffic.

(b) **Telecommunications Service Provider.** This contract franchise ordinance hereby grants to Zayo, the nonexclusive contract, right, privilege, and franchise to locate, construct, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain, and operate facilities along, across, upon and under the ROW for Zayo to provide local exchange services and other telecommunications services to its customers within the city.

(c) **Affiliate Contract Franchise.** Nothing in this contract franchise ordinance is intended to preclude the city from seeking or authorize the city to seek, a franchise from an affiliate or third party providing telecommunications services.

(d) **Conveyance of Title.** This contract franchise ordinance shall not convey title, equitable or legal, in the ROW, and gives only the right to occupy the ROW, for the purposes and for the period stated herein.

(e) **Cable Service.** This contract franchise ordinance does not provide Zayo the right to provide cable service to the city and inhabitants thereof. If, during the term of this franchise, Zayo desires to provide cable service within the corporate boundaries of the city, Zayo shall follow the requirements of K.S.A. 12-2021, et seq., as amended, in providing notice and paying a video service provider fee to the city. In the event that K.S.A. 12-2021, et seq. is repealed or amended in such a way as to provide direct franchising authority to the City, Zayo shall promptly notify the city of its intent to provide cable service and renegotiate this contract franchise ordinance in accordance with applicable law prior to providing such service. Nothing in this

contract franchise ordinance is intended to preclude the city from seeking, or authorize the city to seek, a franchise from Zayo or any subsidiary, affiliate, or third party providing cable services, to the extent any such franchise is permitted under applicable law at the time such service commences. Zayo and the city agree that nothing in this franchise is intended to authorize the city to seek from Zayo, nor to require Zayo to obtain, a franchise to offer "open video systems" as that term is used in section 653 of the Telecommunications Act of 1996 (codified at 47 U.S.C. 573). Zayo and the city further agree, however, that this ordinance does not authorize Zayo to offer "open video systems" without paying a fee on the gross revenues of the system operator for the provision of cable service in lieu of a franchise fee, pursuant to and in the manner described in 47 U.S.C. 573(c)(2)(b) and without complying with Federal Communication Commission (FCC) regulations promulgated pursuant to 47 U.S.C. 573.

- (f) This contract franchise ordinance is subject to the terms and conditions of all applicable federal, state and local laws, existing now or in the future, and the parties shall comply with any such laws in the exercise of their rights and performance of their obligations under this contract franchise ordinance. "Laws" 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 contract franchise ordinance or the parties' activities hereunder, whether now existing or hereafter adopted, including but not limited to a city ROW management ordinance and the city's zoning and land use laws 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.
- (g) The authority of Zayo to use and occupy the ROW shall always be subject and subordinate to the reasonable public health, safety, and welfare requirements and regulations of the city. The city may exercise its home rule powers in its administration and regulation related to the management of the ROW provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Zayo shall comply with all laws and lawful city regulations, in effect now or as may be adopted in the future, governing the use of ROW.

### **Section 3. Term/Renegotiation.**

- (a) This contract franchise ordinance shall be effective for a term of five (5) year(s) from the effective date of this contract franchise ordinance. Thereafter, this contract franchise ordinance shall automatically renew for three (3) additional five-year terms, unless a party notifies the other party of its intent to terminate the contract franchise ordinance prior to 180 days before the termination of the current term. The additional terms are a continuation of this franchise and not a new franchise or amendment. But, in no event, shall the city curtail Zayo's ability to obtain a contract franchise ordinance from the City to construct, maintain and operate Facilities as a competitive

infrastructure provider and a telecommunications services provider in the public right-of-way of the City of Andale, Kansas, pursuant to K.S.A. 17-1902 and 12-2001, unless Zayo abandons all of the Network, or unless the terms of the Agreement are breached and/or local, state, or federal law permit.

- (b) Upon written request of either the City or Zayo, this contract franchise ordinance shall be renegotiated at any time in accordance with the requirements of K.S.A. 12-2001 and K.S.A. 17-1902, as amended, upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or Zayo, including but not limited to the scope of the contract franchise ordinance granted to Zayo or the compensation to be received by the City.
- (c) Amendments under this section, if any, shall be made by contract franchise ordinance as prescribed by statute. The contract franchise ordinance shall remain in effect according to its terms pending completion of any review or renegotiation provided by this section.

#### **Section 4. Compensation.**

- (a) **Competitive Infrastructure Provider Franchise Fee.** In consideration of this contract franchise ordinance, Zayo agrees to pay the city the franchise fee of five percent (5%) of Zayo's gross revenue derived from its grant as a competitive infrastructure provider within the corporate boundaries of the city, 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's facilities, and indefeasible rights of use ("IRU") fees. Zayo shall pay its franchise fee within the month in which the gross revenue is received.
- (b) **Provider Franchise Fee.** In consideration of this contract franchise ordinance, Zayo agrees to pay the city the franchise fee of five percent (5%) of Zayo's gross revenue derived from its grant as a telecommunications services provider for services provided within the corporate boundaries of the city, which include but are not limited to: (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. Uncollectible and late charges shall not be included within gross revenues. Zayo shall pay its franchise fee within the month in which the gross revenue is received.

- (c) **Additional Fees.** In addition to the gross revenue fees allowed by law and pursuant to this contract franchise ordinance, and in exchange for other valuable consideration including expedited review of its permits, Zayo shall pay a one-time permit and license fee of \$1000.00 for each DAS Facility and/or other Facility installed within the ROW. This fee shall be in addition to all other city site plan review, right of way permit and/or building permit fees relating to the installation of the DAS Facility that are in existence as of the date the DAS Facility is applied for. Zayo shall pay the above-stated fees upon submission of a complete application for the installation of a DAS Facility per this ordinance. After the date of Zayo's submission of a complete application, the city will not retroactively apply any new permit or licensing fees to said DAS Facility except for the Competitive Infrastructure Provider Franchise Fee set forth in subsection (a) above, the Provider Franchise Fee set forth in subsection (b) above and/or other applicable franchise fees.
- (d) Zayo shall reimburse the city for the publication costs related to the adoption or amendment of this contract franchise ordinance.
- (e) If any franchise fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest shall accrue from the due date until received, at an annual rate of ten percent (10%), or if lower, the highest percentage allowed by law.
- (f) Zayo shall keep accurate books of account at its principal office at Zayo Group, LLC, 1805 29<sup>th</sup> Street, Boulder, CO 80301 or such other location of its choosing, for the purpose of determining the amounts due to the city pursuant to this subsection. The city shall have access to, and the right to examine, at all reasonable times, all books, receipts, files, records and documents of Zayo necessary to verify the correctness of compensation paid to the city, and to correct the same, if found to be erroneous. The city may only exercise its right to examine the books, receipts, files, records, and documents one time per year at a mutually agreeable time. If the statement of fees paid by Zayo is incorrect, Zayo shall promptly make payment upon such corrected statement. The city agrees to hold in confidence any non-public information it learns from Zayo to the fullest extent permitted by law.

## **Section 5. Installation of the Facilities.**

- (a) Pursuant to the grants provided herein, Zayo shall have the right to construct, maintain, and operate the Facilities along, across, upon, and under the ROW.

Nothing in this contract franchise ordinance shall be interpreted as granting Zayo the authority to construct, maintain or operate any facility or related appurtenance on property owned by the city outside of the ROW.

- (b) Zayo shall construct and maintain the facilities in a skillful and workmanlike manner that does not obstruct or hinder the usual travel or public safety on such ROW, and that does not obstruct or interfere with the legal use of the ROW by other utilities. Zayo shall be solely responsible for communicating with Kansas One-Call, or for taking other necessary measures to determine the location of public improvements or other facilities located in the ROW. Zayo shall install facilities 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. 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 city engineer.
- (c) Zayo shall be the city's point of contact and all communications shall be through Zayo. Zayo shall at all times maintain with the city a local point of contact who shall be available at all times to act on behalf of Zayo in the event of an emergency. Zayo shall provide the city with the local contact's name, address, telephone number, fax number and e-mail address.
- (d) Notwithstanding any other ordinance or resolution adopted by the city, Zayo shall follow the following process:
  - (1) Zayo shall submit to the city its plans and specifications for the installation of the facilities. Approval of plans and specifications and the issuance of any permits or 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, or city permits or approvals. Zayo shall immediately notify the city and other relevant parties if Zayo discovers errors, omissions, or mistakes, and Zayo shall obtain any correct city approval, if necessary.
  - (2) The city shall approve plans and specifications that comply with the requirements of this ordinance. The city must respond to the submission of such plans and specifications within thirty (30) calendar days from the date of submission of a complete application with the DAS Facility permit and license fee. The location, aesthetic requirements, depth of the fiber underground, and any other requirements shall be approved by the city in writing prior to the installation of any facilities at a specific location, and such approval shall not be unreasonably withheld, conditioned or delayed. The city shall have the authority to prohibit the use or occupation of a specific portion of the ROW by Zayo due to a reasonable public interest necessitated by public health, safety and welfare, so long as the authority is exercised in a competitively neutral

manner and is not unreasonable or discriminatory. A reasonable public interest shall include the following:

- a. The prohibition is based upon a recommendation by the city engineer, is related to public health, safety, and welfare and is nondiscriminatory among providers, including incumbent providers;
  - b. Zayo has rejected a reasonable, competitively neutral and nondiscriminatory justification offered by the city for requiring an alternate method or alternate route that will result in neither unreasonable additional installation expense nor a diminution of service quality;
  - c. The city reasonably determines, after affording Zayo reasonable notice and an opportunity to be heard, that a denial is necessary to protect the public health and safety and is imposed on a competitively neutral and nondiscriminatory basis; or
  - d. The specific portion of the ROW for which Zayo seeks use and occupancy is environmentally sensitive as defined by state or federal law or lies within a previously designated (as of the date of submission of the DAS Facility permit application) historic district as defined by local, state or federal law.
- (e) Zayo shall cooperate with the city and follow all legally binding city policies and state and local ordinances with respect to aesthetics.
- (f) In addition to the approvals required by this section, Zayo must 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 a city ROW ordinance or zoning regulation and that are not inconsistent with state and federal laws regarding the regulation of the public ROW. The city shall process each valid and administratively complete application for requested permits and approvals in accordance with the time requirements of applicable laws, and shall not unreasonably or unlawfully withhold or delay any permits and approvals. Zayo shall comply with any condition or requirement set forth in any permit and approval, if they comply with all applicable laws.
- (g) Except as may otherwise be provided by this ordinance, where reasonable and appropriate and where adequate public ROW exists, Zayo shall place all facilities underground, and/or replace all above-ground facilities with underground facilities, in conjunction with city capital improvement projects and/or at specific locations requested by the city. Above-ground pedestals, vaults, or other above-ground facilities, may be installed only if approved by the city where alternative underground facilities are not technically or financially feasible or where underground requirements are otherwise waived pursuant to this section, and shall generally be located behind the sidewalk where feasible and shall be screened from public view.

The underground requirements of this subsection shall not apply to the maintenance and repair of existing facilities, as determined by the city engineer.

- (h) When Zayo is allowed to place DAS Facilities above ground under this section, Zayo may attach its DAS facilities to an existing utility pole pursuant to a properly executed agreement with the pole owner provided. If Zayo locates on an existing utility pole owned by the city, Zayo shall be responsible for all costs to install and maintain a separate utility meter, and shall pay the electric costs related to its Facilities on the city pole. Zayo agrees that in areas where there are existing poles, Zayo will work with the owner of that existing pole to collocate DAS facilities, but only when the pole owner is willing to allow such attachment and where such attachment is feasible from a safety, technical, and engineering (structural and radio frequency coverage) perspective. Any necessary replacement of any pole to accommodate the attachment shall be subject to the proper exercise of the city's police powers, and in no instance shall Zayo erect a new pole within an existing aerial pole line absent the city's prior authorization. Installation of any new poles or other similar facilities shall be subject to the requirements of the City of Andale ordinance No. 1871 and the express prior authorization of the City and any new poles or other similar facilities required for the installation of the facilities allowed shall comply with all encroachment and building permits, applicable city, state and federal laws, regulations, specifications, and this ordinance. Zayo hereby grants the city the right to 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 facilities. Zayo shall reasonably cooperate with the city in the city's use of the new poles. The city shall not be required to pay a fee to use Zayo's poles for a city purpose, except that Zayo may require the city to separately meter and pay for any city electrical use on Zayo's pole. Except for the installation of the lights and ancillary equipment on or in the New Poles and/or as set forth in subsection (j) 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.
  
- (i) If Zayo's pole falls or is damaged such that there is an imminent threat of harm to persons or property, then the city may cause the pole to be removed to the side of the street or a location that city believes reasonably eliminates the risk of such imminent threat of harm to persons or property. Zayo shall, after written notice from the city that its pole has been damaged or removed, cause its pole to be removed, repaired or replaced within thirty (30) days after the city's written notice. The cost to remove, repair or replace Zayo's pole, including the replacement city streetlight, bulb and ancillary equipment, shall be paid by Zayo; provided, however, that if Zayo's pole is damaged or destroyed by the city or a third party user that the city has given the right to use the pole, then the city and/or its third party user shall pay the cost to repair and/or replace the pole. To the extent that Zayo seeks reimbursement from a third party either directly or through applicable insurance, the city shall assign to Zayo any rights the city may have against such third party for such claim.

- (j) If there is an emergency necessitating response work or repair, Zayo may begin that repair or emergency response work or take any action required under the circumstances, provided that Zayo notifies the city promptly after beginning the work and timely thereafter meets any permit or other requirement had there not been such an emergency.
- (k) In granting this contract franchise ordinance, the city makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of facilities on any particular segment of the ROW. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon Zayo.
- (l) Zayo shall take all reasonable measures necessary to maintain accurate as completed records in electronic format, of all facilities constructed, reconstructed, or relocated in the ROW. Zayo shall cooperate promptly and fully with the city and take all reasonable measures necessary to provide accurate and complete information regarding the nature and horizontal and vertical location of its facilities located within the ROW when requested by the city or its authorized agents for a public project. Such location and identification shall be at the sole expense of Zayo without expense to the city, its employees, agents, or authorized contractors.
- (m) Zayo may trim trees overhanging the ROW that may come into contact with Zayo facilities with the prior written approval of the city.

**Section 6. Removal of facilities due to public project and other causes.**

Upon receipt of a written demand from the city, 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 contract franchise ordinance, within the reasonable time frame set forth by the city, whenever the city reasonably determines that the removal and/or relocation of any Zayo facility 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 such as sewers, water mains, drains, storm drains, pipes, gas mains, poles, power lines, telephone lines, cable television lines and tracks; or,
- (b) Because any part of the network or facility is interfering with or adversely affecting the proper operation of city-owned light poles, traffic signals, or other city facilities; or,
- (c) Because 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, safety and welfare.

The city shall cooperate with Zayo in relocating any portion of the network removed pursuant to this section 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 relocated network. The city may not charge permitting or other fees for a removal occurring under this section. Any damages suffered by the city or its contractors as a result of Zayo's failure to timely relocate or adjust its facilities shall be borne by Zayo. The parties understand and agree that neither the city nor Zayo is entitled to compensation for any relocation of the Zayo network that may be required by this section. Zayo acknowledges that it 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 contract franchise ordinance.

**Section 7. Zayo and City access to the facilities.**

- (a) Zayo will be given reasonable access to each of the facilities in the ROW for the purposes of routine installation, repair, maintenance or removal of facilities. If any such activities have the potential to result in an interruption of the city's use of Zayo's network facilities, Zayo shall provide the city with a minimum of three (3) days prior written notice of such activities. Such activities shall, to the extent feasible, be done with minimal impairment, interruption, or interference to city's use of Zayo's network facilities.
- (b) The city shall have commercially reasonable access to observe and inspect the facilities, and any work conducted by Zayo during the installation, maintenance and/or repairs of the facilities.

**Section 8. Maintenance and repair.**

- (a) Zayo shall pay for the electricity and other utilities services it consumes in its operations at the rates charged by the servicing utility companies.
- (b) Zayo shall, at Zayo's sole cost and expense, perform all maintenance and repairs reasonably needed to maintain its facilities in good condition and neat and orderly appearance, and in compliance with all applicable laws. In the event any facility requires replacement because such part cannot be repaired, Zayo shall, at Zayo's sole cost and expense, replace the irreparable facility. Zayo shall not cause rubbish, garbage or debris on or around the facilities and shall not permit any rubbish, garbage or debris to accumulate on or around 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.

- (c) 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 facilities in the ROW. Zayo shall promptly repair such damage and restore the ROW and any affected adjacent property to a safe and satisfactory condition to the city in accordance with the city's applicable street or ROW restoration standards, or to the property owner if not the city. If Zayo fails to make the repairs required by the city, the city may effect those repairs and charge Zayo the cost of those repairs. If the city incurs damages as a result of a violation of this subsection, then the city shall have a cause of action against Zayo for violation of this section, and may recover its damages, including reasonable attorney fees, if Zayo is found liable by a court of competent jurisdiction. 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 ROW by Zayo to the city, or such longer period as may be established by the city's ROW ordinance, rules or regulations or other applicable laws.

**Section 9. Non-interference.**

- (a) Zayo shall operate its 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.
- (b) 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 Zayo network facilities for the city's intended city purpose.
- (c) If such interference with the facilities described in subsections (a) or (b) occurs, Zayo shall, upon receipt of written notice from the 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 the city within the cure period set forth in the city's notice, which notice shall not be less than 30 days, absent an emergency or danger to public health and safety requiring shorter notice, such interference shall be deemed a material breach under this contract franchise ordinance and the city may terminate this contract franchise ordinance. Interference caused by actions of Zayo's customer(s) remains the responsibility of Zayo.

**Section 10. Indemnity and hold harmless.**

- (a) It shall be the responsibility of Zayo to take adequate measures to protect and defend its facilities in the ROW from harm or damage. If Zayo fails to accurately or timely locate facilities when requested, it has no claim for costs or damages against the city and its authorized contractors unless such party is responsible for the harm or damage by its negligence or intentional conduct. The city and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near Zayo's facilities.
- (b) Zayo shall indemnify, defend, and hold harmless the city, its agents, representatives, officers, officials, employees 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 contract franchise ordinance, except to the extent arising from or caused by the gross negligence or willful misconduct of the city, its agents, representatives, officers, officials, employees or contractors.
- (c) 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.
- (d) 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 the 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.
- (e) In no event shall Zayo be liable for indirect or consequential damages in connection with or arising from this contract franchise ordinance, or its use of the network or ROW.
- (f) Zayo or the city shall promptly advise the other in writing of any known claim or demand against Zayo or the city related to or arising out of the Zayo's activities in a

ROW.

**Section 11. Insurance requirement and performance bond.**

- (a) During the term of this franchise, Zayo shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers with an A.M. Best rating of no less than A:VII. Zayo shall provide not less than the following insurance:
- (1) Workers' compensation as provided for under any workers' compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.
  - (2) Commercial general liability with limits of insurance not less than \$2,000,000.00 each occurrence, \$2,000,000.00 annual aggregate, \$2,000,000 completed Operations/Product Aggregate covering claims for bodily injury, property damage, personal and advertising injury, completed operation/product liability and contractual liability arising out of the activities and operations of the franchisee and independent contractors operating on their behalf. The city shall be included as an additional insured. The insurance for the additional insured shall be as broad as the insurance for the named insured and apply on a primary/non-contributory basis and include protection for completed operations/products claims. Coverage for the additional insured shall include defense expense. If in order to accomplish the required limits of insurance, the franchisee must purchase an excess liability/umbrella policy, such policy shall be written on a follow form basis and be as broad as the underlying insurance. The city shall be included as additional insured to this policy.
  - (3) Business Auto Liability Insurance with limits of insurance not less than \$1,000,000.00 Combined Single Limit for bodily injury and property damage covering ownership or use of all owned, hired and non-owned autos used in connection with the Franchisee operations and activities. The city shall be included as additional insured to this policy.
- (b) Zayo shall, as a material condition of this franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the city a certificate of insurance, satisfactory in form and content to the city, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the city 30 days prior written notice. Zayo shall make available to the city on request the policy declarations page and a certified copy of the policy in effect, so that limitations and exclusions can be evaluated for appropriateness of overall coverage.
- (c) Zayo shall, as a material condition of this franchise, prior to the commencement of any work and prior to any renewal of this franchise, deliver to the city a performance and maintenance bond in an amount equal to the cost of initial facility construction, payable

to the city to ensure the appropriate and timely performance in the construction and maintenance of facilities located in the ROW as set forth in this ordinance; to ensure Zayo's removal and/or relocation of any part of the network as set forth in section 6; to ensure Zayo's repair and restoration of its damage to its facilities or the ROW as set forth in section 8; and to ensure Zayo's removal of its facilities, as set forth in section 15. The required performance and maintenance bond must be with good and sufficient sureties, issued by a surety company authorized to transact business in the State of Kansas, and satisfactory to the city attorney in form and substance.

**Section 12. Taxes.**

Zayo agrees that it will be solely responsible for the payment of any and all applicable taxes, fees and assessments levied on its ownership, use and maintenance of the network and this contract franchise ordinance. Pursuant to Section 79-5a01 *et seq.* of the Kansas Revenue and Taxation Code, as amended, the city hereby informs, and Zayo recognizes and understands, that Zayo's use of the ROW and/or Zayo facilities 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 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 reasonably cooperate with Zayo in connection with any such challenge.

**Section 13. Nondiscrimination.**

Zayo will not, on the grounds of race, sex, military status, disability, religion, age, color, national origin or ancestry, discriminate or permit discrimination against any person in the use of the ROW or in activities under this franchise.

**Section 14. Transfer and assignment.**

This franchise shall be assignable, subject to all terms and conditions of this contract franchise ordinance, in accordance with the laws of the State of Kansas. Zayo shall provide the city written notice of any transfer or assignment within thirty (30) days, including notice of the name and address of the assignee and contact information.

**Section 15. Default; abandonment; expiration or termination of contract franchise.**

- (a) A "default" shall be deemed to have occurred if a party fails to cure a breach, 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.

- (b) Upon a party's failure to timely cure a breach after city notice, and upon expiration of the above cure periods, then the other party may terminate this contract franchise and pursue all remedies provided for in this contract franchise and/or any remedies it may have under applicable law or principles of equity relating to such breach.
- (c) In addition to the remedies set forth herein, the city shall have the right to terminate this contract franchise if (i) 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 (ii) if Zayo's applicable licenses are terminated, revoked, expired, or otherwise abandoned. Such termination rights under subsection (i) shall be subject to Zayo's rights to just compensation, if any, from the federal, state or local government requiring such removal for any taking of a protected property right.
- (d) In the event Zayo ceases to operate and abandons the network, any facility, or parts thereof, for a period of ninety (90) days or more, Zayo shall, at its sole cost and expense and within ninety (90) days from the date of abandonment, vacate and remove the network or the abandoned part thereof. If such removal disturbs the facility or adjacent property (including ROW or city real property), Zayo shall also, at its sole cost and expense, restore or repair the ROW, each facility, and any adjacent property to its original condition, 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.
- (e) Upon expiration or termination of this contract franchise for any reason, Zayo shall have the right to remove any and all of its Facilities within sixty (60) days after such termination or expiration, or to transfer any and all of its Facilities to another entity authorized to place facilities in the ROW. Zayo has the duty, immediately upon any such removal, to restore the ROW from which the facilities are removed to as good a condition as the same were before removal was performed. If Zayo fails to remove or transfer its Facilities within sixty (60) days, the city may, at its option, remove any or all of the Facilities at Zayo's expense, or take ownership of any or all of Facilities for the city's use and/or disposal.

**Section 16. Notices.**

Except in emergencies, all notices by one party to the other shall be made by personal delivery, by depositing such notice in the U.S. mail, certified mail, return receipt requested, or by facsimile. Any notice served by certified mail, return receipt requested, shall be deemed delivered five (5) calendar days after the date of such deposit in the U.S. mail unless otherwise provided. Any notice given by facsimile is deemed received by the next business day. "Business day" for purposes of this section shall mean Monday through Friday, city and Zayo-observed holidays excepted. Emergency notices

shall be provided by telephone, with written notice immediately following by facsimile.

Notices shall be addressed to the city as follows:

City of Andale  
Attn: City Clerk  
326 N. Main  
P.O. Box 338  
Andale, Kansas 67001

With an additional copy forwarded to:

City of Andale  
Attn: City Attorney  
326 N. Main  
P.O. Box 338  
Andale, Kansas 67001

Notice to Zayo shall be addressed to the company as follows:

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

Notice shall be given as required by the terms of this contract franchise ordinance. Notice shall be provided to the above-named addressees unless directed otherwise in writing by the city or Zayo. Both Zayo and the city shall provide to the other contact information with telephone and facsimile numbers for use in emergencies.

**Section 17. Acceptance.**

Prior to the effective date of this franchise, Zayo shall file with the city's 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. When so accepted, the ordinance and acceptance shall constitute a contract between the city and Zayo subject to the provisions of the laws of the state of Kansas.

**Section 18. Reservation of rights.**

(a) The city specifically reserves its right and authority as a customer of the company and as a public entity with responsibilities towards its citizens, to participate to the full extent allowed by law in proceedings concerning the company's rates and services to ensure the rendering of efficient telecommunications service at reasonable rates, and the maintenance of the company's property in good repair.

(b) In granting its consent hereunder, the city does not in any manner waive its

regulatory or other rights and powers under and/or by virtue of the laws of the State of Kansas, as the same may be amended, its home rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the city, including but not limited to Ordinance # 1871 providing for the management of the public right-of-way in the City of Andale, Sedgwick County, Kansas, adopted by the City Council on the 12<sup>th</sup> day of December, 2006, as currently or hereafter amended and/or replaced.

- (c) In granting its consent hereunder, Zayo does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas, as the same may be amended, or under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the city. This contract franchise ordinance is in all respects subject to the provisions of the Kansas Cash Basis Law (K.S.A. 10-1112 and 10-1113), the Budget Law (K.S.A. 79-2935), and other laws of the State of Kansas, and shall be construed and interpreted so as to ensure that the City is at all times in compliance with such laws. The City reserves the right to unilaterally modify or terminate this contract franchise ordinance at any time if, in the opinion of its legal counsel, this ordinance may be deemed to violate the terms of such laws.

**Section 19. Entire Agreement; Modification; Waiver.**

This contract franchise ordinance 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 contract franchise ordinance. 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. Any modification or amendment to this contract franchise ordinance shall be of no force and effect unless it is in writing, signed by the parties, and adopted pursuant to the requirements of state law. No waiver of any of the provisions of this contract franchise ordinance shall be deemed, or shall constitute, a waiver of any other provision, 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.

**Section 20. Severability.**

If any clause, sentence, or section of this contract franchise ordinance, or any portion thereof, shall be declared by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared to be invalid; provided, however, the city or Zayo may elect

to declare that the entire agreement is invalidated if the portion declared invalid is, in the judgment of the city or Zayo, an essential part of this contract franchise ordinance.

**Section 21. Survival of Terms.**

All of the terms and conditions in this contract franchise ordinance related to payment, removal due to termination or abandonment, indemnification, limits of city's liability, attorneys' fees and waiver shall survive termination of this contract franchise.

**Section 22. Governing law and venue.**

(a) As a condition of this contract franchise ordinance, Zayo is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the city, the FCC or the Kansas Corporation Commission (KCC), subject to Zayo's right to challenge in good faith such requirements as established by the FCC, KCC or other city regulations. Zayo shall also comply with all applicable laws, statutes and/or city regulations, subject to Zayo's right to challenge in good faith such laws, statutes, and/or city regulations.

(b) The obligations and undertakings of both parties hereto shall be performed in Andale, Sedgwick County, Kansas. In the event that any legal proceeding is brought to enforce the terms of this franchise, the same shall be brought in state or federal courts, as appropriate, having jurisdiction for Sedgwick County, Kansas.

**Section 23. Effective date of franchise.**

The effective date of this franchise shall be effective upon its publication of this ordinance, or a summary thereof, in the official city newspaper.

**Section 24. Repeal.**

All ordinances or parts of ordinances in conflict herewith are repealed. However, any section of an existing ordinance not in conflict herewith is not repealed and remains in full force and effect.

**Section 25. Publication.**

This ordinance shall take effect and be in force from and after its publication, or publication of a summary of this ordinance, in the official city newspaper.

Adopted by the City Council this 19th day of May, 2015.

Approved by the Mayor this 19th day of May, 2015.

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MAYOR, JEREMY CAWOOD

SEAL

ATTEST:

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CITY CLERK, VIRGINIA SWANSON