

**Ordinance No. 186051**

Grant a franchise to Zayo Group, LLC for telecommunications services for a period of 10 years.  
(Ordinance)

The City of Portland ordains:

**Section 1. NATURE AND TERM OF GRANT.**

1.1 Background.

(A) On November 12, 1998, the City of Portland approved Ordinance No. 172864 granting a franchise to 360networks (USA) inc. fka Pacific Fiber Link, LLC (360networks) for a period of ten years and establishing terms and conditions regarding 360network's use of the City streets. Ordinance No. 185747 amended Ordinance No. 172864 and extended the term of the franchise until December 31, 2014.

(B) On December 13, 2000, the City of Portland approved Ordinance No. 175162 granting a franchise to Metromedia Fiber Network Services Inc. dba Abovenet Inc. (Abovenet) for a period of ten years and establishing terms and conditions regarding Abovenet's use of the City streets. Ordinance No. 185750 amended Ordinance No. 175162 and extended the term of the franchise until December 31, 2014.

(C) Zayo Group, LLC, (Zayo) is a competitive telecommunications provider and acquired 360networks on December 1, 2011, and Abovenet on July 2, 2012. Zayo owns and operates the telecommunications systems within the City constructed by both 360networks and Abovenet. Zayo is assuming all the covenants, duties, obligations and liabilities for 360networks and Abovenet's telecommunications systems and desires to combine its franchise responsibilities and authorities to use the City streets under one agreement. Zayo will be solely responsible for performance and compliance with the terms and conditions of this Franchise.

1.2 Grant of Franchise.

(A) The City of Portland, Oregon does hereby grant to Zayo Group, LLC., a Delaware limited liability company qualified to do business in Oregon, and to its successors and assigns as approved by the City under Section 16, a franchise to construct, operate, repair and maintain a Telecommunications System, with all necessary Facilities, located within the Streets.

(B) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City" and Zayo Group, LLC. shall be referred to as the "Grantee."

(C) Grantee may construct, operate, repair and maintain Grantee's Telecommunications System within the Streets in the manner and under the conditions set forth in this Franchise.

(D) This Franchise does not authorize Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C. §522.

1.3 Duration of Franchise. The term of this Franchise, and all the rights and obligations pertaining thereto, shall be ten (10) years from the effective date of this Franchise, unless terminated sooner as provided herein.

1.4 Effective Date. The effective date of this Franchise shall be sixty (60) days after passage of the Franchise by the City Council, unless Grantee fails to file an unconditional written acceptance of this Franchise in accordance with Section 20.10, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

1.5 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant franchises, licenses, permits or other similar rights to other Persons, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee under this Franchise.

1.6 Charter and General Ordinances to Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), as the same now exist or hereafter are amended by the people of the City, are hereby incorporated by reference and made a part of this Franchise. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

## **Section 2. DEFINITIONS.**

2.1 Captions. Throughout this Franchise, captions are intended solely to facilitate reading and reference provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

2.2 Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

(A) "Attachment" means any wire, optical fiber, or other cable, or any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

(B) "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

(C) "City Council" means the Council of the City of Portland.

(D) "Conduit" means any structure, or section thereof, containing two or more Ducts in use or planned for use in connection with Grantee's Telecommunications System.

(E) "Duct" means any single enclosed raceway for power or communication lines, conductors, optical fiber, wire or other Facilities for use in connection with Grantee's Telecommunications System.

(F) "Facility" means any tangible component of Grantee's Telecommunications System.

(G) "Franchise" means this ordinance, as approved by the City Council and accepted by Grantee pursuant to Section 20.10.

(H) "Gross Revenues" means after adjustment for the net write-off of uncollectible accounts, any and all revenues derived by Grantee within the City from Grantee's Telecommunications System, including but not limited to: revenues from the sale of and use of Telecommunications Services originating or terminating in Portland, Oregon; revenues charged to or attributable to a circuit location in Portland, Oregon, regardless of where the circuit is billed or paid; revenues from the use, rental, or lease of Grantee's operating Facilities within Portland; revenues from the provision of any and all products, services, or charges; revenues from dedicated private networks; and revenues from any leases or indefeasible right of use interests (IRUs) of any portion of Grantee's Telecommunications System within Portland, Oregon. "IRU" or "Indefeasible Right of Use" means any form of acquired capital interest in Grantee's Telecommunications System in which the holder possesses a right to use the Telecommunications System but not the right to control, maintain, construct or revise the Telecommunications System.

(I) "Hazardous Substances" has the meaning given by ORS 465.200(16) (2011).

(J) "Licensee" means any Person franchised, licensed or otherwise permitted by the City to use the Streets including, if appropriate, the City itself. For the purposes of Section 12.2, Grantee shall not be construed to be a "Licensee" within this definition.

(K) "Minimum Annual Franchise Fee" means \$14,000 in the first year of this Franchise, and shall increase by \$1,000 annually, until reaching a minimum of \$23,000 in year ten (10) of this Franchise.

(L) "Person" means any natural person, and any individual, sole proprietorship, partnership, association, corporation, cooperative, municipal corporation or other form of organization authorized to do business in the State of Oregon.

(M) "Streets" means the surface of and the space above and below any public street, road, alley or highway within the City, used or intended to be used by the general public, to the extent the City has the right to allow Grantee to use them.

(N) "Surplus Ducts or Conduits" means Ducts or Conduit other than those: (i) occupied by Grantee or any prior Licensee, (ii) unoccupied Ducts or Conduit held by Grantee as an

emergency use spare, and (iii) unoccupied Ducts or Conduit that Grantee reasonably expects to use within the next eighteen (18) months.

(O) "Telecommunications Services" means

(1) All services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

(2) All services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video, or data transmission;

(3) All services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carrier, or telephone company providing local exchange services, for the purpose of voice video, or data transmission;

(4) All services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission; and

(5) This Franchise does not authorize Grantee to operate as a telecommunications services provider. Prior to providing such services, Grantee shall apply for and obtain such authority as is necessary from the Oregon Public Utility Commission and/or Federal Communications Commission. Grantee shall provide the City with documentation of such authority, upon written request.

(6) Nothing herein shall preclude Grantee from entering into a contract for the use of any portion of its Telecommunications System with any Person or other entity for any services, whether or not specified in this Franchise, provided that said Person or entity is another Licensee and has assumed responsibility for obtaining any required authority from the City.

(P) "Telecommunications System" means all wires, cables, Ducts, Conduits, vaults, poles, anchors, cabinets, fixtures, transformers, and other necessary Facilities owned or used by Grantee for the purpose of providing Telecommunications Services and located in, above or below the Streets excluding Ducts, Conduits and vaults leased from any other Licensee.

(Q) "Year," "Annual," or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

### **Section 3. COMPENSATION.**

3.1 Amount of Compensation. As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets, Grantee shall pay an annual fee to the City, through the duration of this Franchise, which must be the greater of either: (a) the Minimum Annual Franchise Fee; or (b) an amount equal to five percent (5%) of Grantee's Gross Revenues.

### 3.2 Payment of Compensation.

(A) Grantee's first Minimum Annual Franchise Fee payable under Section 3.1 shall be paid to the City forty-five (45) days after the effective date of this franchise, as defined in Section 1.3. Such payment will be prorated for the remaining calendar year beginning from the franchise effective date (rounded to the nearest month) through December 31. Thereafter, Grantee shall pay each Minimum Annual Franchise Fee on or before April 15, and Grantee's Minimum Annual Franchise Fee payment will apply to the current calendar year (January 1 through December 31). Any Minimum Annual Franchise Fee paid to the City will be credited towards Grantee's Gross Revenue based Franchise Fee for that calendar year.

(B) Gross Revenue based Franchise fee payments to the City under Section 3.1 shall be computed based on Grantee's Gross Revenues from each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) and paid on or before the forty-fifth (45<sup>th</sup>) day following each calendar quarter period during the term of this Franchise.

(C) Payment not received by the City by the due date shall be assessed interest equal to one percent (1%) per month. Interest shall be compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

(D) Grantee shall set up electronic fund transfer within sixty (60) days of the Franchise effective date to submit payments to the City by Automated Clearing House (ACH) payment receipts. The City may approve any written requests from Grantee for waivers from the ACH requirement.

3.3 Reports. Prior to making each payment to the City under Section 3.1, Grantee shall file with the City a written report containing an accurate statement in summarized form, as well as in detail, of its calculation of the amount of the payment, verified by an officer or other authorized representative of Grantee, setting forth its Gross Revenues according to their accounting subdivisions, and any deductions claimed for the period upon which the payment is computed. Such reports shall be in form satisfactory to the City.

3.4 Cost of Pre-franchising and Publication. Grantee shall pay the pre-franchising costs associated with this Franchise, including publication of this Franchise, as such publication is required by the City Charter.

3.5 Acceptance of Payment and Recomputation. No acceptance of any payment pursuant to this Section 3 shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under this Section 3 shall be subject to audit by the City, provided that only payments which occurred during a period of sixty (60) months prior to the date the City notifies Grantee of its intent to perform an audit shall be subject to such audit. Grantee agrees to pay the City for:

(A) Interest on any underpayment of an amount due under Section 3 that is disclosed as the result of an audit, such interest to be calculated at the interest rate pursuant to Section 3.2(C).

(B) A penalty of five percent (5%) of the underpayment shall be assessed and due within thirty (30) days of written notice from the City, if the City's audit discloses that Grantee has paid ninety-five percent (95%) or less of the principal amount owing for the period under audit. If such payment is not received within thirty (30) days of written notice from the City, then interest shall be compounded daily from the date on which the payment was due until the date on which the City receives the payment, such interest to be calculated at the interest rate pursuant to Section 3.2(C).

3.6 Escrow. If Grantee disputes the City's determination of any underpayment under Section 3, Grantee shall place the disputed amount in an escrow account at a financial institution acceptable to the City with instructions agreed to by the City until final resolution.

3.7 Authority to Audit. The City and its agents and representatives shall have authority to arrange for and conduct audits or reviews of the relevant financial obligations payable under Section 3. The City may determine the scope of audit or review in each instance. All amounts paid by Grantee shall be subject to audit or review by the City, provided that such audit or review be completed within five (5) years from the date payment was due. City requests for audits or reviews shall be in writing. If Grantee has not provided copies of all information reasonably within the scope of the audit or review to the City within 30 days from the date of the written request, Grantee shall provide access within the Portland metropolitan region, during normal business hours, upon 48 hours prior written notice. If the City requests in writing that Grantee provide, or cause to be provided, copies of any information reasonably within the scope of the audit or review, and Grantee fails within 30 days of receipt of the request to provide, or cause to be provided, such information, then the five (5) year period shall be extended by one day for each day or part thereof beyond 30 days that Grantee fails to provide, or fails to cause to be provided, such requested information.

3.8 No Credit Against Other City Charges. Payment of the compensation owed pursuant to Section 3 shall not exempt Grantee from the payment of any license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or other taxing authority, except as may otherwise be provided in the ordinance or ordinances imposing such other license fee, tax or charge.

#### **Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS.**

##### **4.1 Insurance.**

(A) At all times during which Grantee's Facilities are in the Streets as described in Section 1 of this Agreement, Grantee shall comply with the requirements for insurance and other applicable forms of financial guaranty for right-of-way permits, as established by applicable Portland City Code and implementing regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement. Until the

time when such administrative regulations are effective, Grantee shall maintain insurance with the requirements as set forth in Exhibit A.

(B) Grantee shall maintain on file with the City a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause for revocation of this Franchise by the City.

(C) In the alternative to providing a certificate of insurance to the City certifying liability insurance coverage as required in Section 4.1(A), Grantee may provide the City with an Annual statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for Grantee and the City, its officers, agents and employees, as otherwise required under Section 4.1(A). The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon Grantee's election to provide self-insurance coverage under Section 4.1(C), any failure by Grantee to maintain adequate self-insurance shall be cause for the City to declare a revocation of this Franchise under and subject to Section 17.

#### 4.2 Faithful Performance Bond.

(A) Upon the effective date of this Franchise, Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of not less than \$100,000, conditioned that Grantee shall well and truly observe, fulfill, and perform each term and condition of the Franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of the Franchise, including, if necessary, the time required for removal of all of Grantee's Telecommunications System installed in the Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice first being given to the City. The bond is subject to review and approval by the City Attorney as to whether the certificate and the insurance certified is consistent with the requirements of this Section 4.2.

(B) During the term of the Franchise, Grantee shall file with the City a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under Section 4.2 if a bona fide, good faith dispute exists between the City and Grantee.

4.3 Construction Bond. At all times during which Grantee is constructing, repairing, replacing or maintaining its Facilities in the Streets, Grantee shall comply with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement, for providing construction bonds or other forms of financial guaranty satisfactory to the City.

### **Section 5. GENERAL INDEMNIFICATION.**

5.1. Indemnification – General. Grantee shall indemnify, defend and hold harmless the City, its officers, agents, boards and employees, from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to Person or property, including, without limitation: damages arising out of or by reason of any construction, excavation, operation, maintenance, reconstruction or any other act done under this Franchise, by or for Grantee, its agents, or its employees; or by reason of any neglect or omission of Grantee to keep its Telecommunications System with all necessary Facilities in a safe condition. Grantee's indemnification obligation shall not extend to liability directly arising out of any negligence or willful misconduct by the City or its officers, agents, boards or employees. The City shall provide Grantee prompt notice of any such claim which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done without the prior written approval of the City which approval shall not be unreasonable withheld. Grantee shall consult and cooperate with the City while conducting its defense of the City and the City shall fully cooperate with Grantee.

5.2. Indemnification – Relocation. Grantee also hereby agrees to indemnify the City, its officers, agents and employees, for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Telecommunications System with all related Facilities in the Streets in a timely manner in accordance with Section 6.3, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

5.3. Indemnification – Hazardous Substances. Grantee agrees to forever indemnify the City, its officers, agents and employees, from and against any claims, costs and expenses of any kind, whether direct or indirect, or pursuant to any state or federal law statute, regulation or order, for the removal or remediation of any leaks, spills, contamination or residues of Hazardous Substances, associated with, arising from or due to Grantee's Facilities in the Streets.

## **Section 6. CONSTRUCTION AND RELOCATION.**

### 6.1 Permits.

(A) Subject to applicable regulations of the City, Grantee may perform all construction necessary for the operation and maintenance of its Telecommunications System. All construction and maintenance of any and all Telecommunications System within the Streets shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Telecommunications System within the Streets. Grantee shall pay all applicable fees due for City construction permits.

### (B) Maps:

(1) Prior to beginning any new construction in the Streets, Grantee shall provide the City Engineer through the permitting process with an initial construction schedule for work in the Streets and the estimated total cost of such work together with its permit application. When Grantee's construction in the Streets is completed, Grantee shall provide the City with electronic



maps showing the location of its installed Telecommunications System in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) One (1) year after the effective date of this Franchise, and annually thereafter in the event of any alterations, Grantee shall provide an electronic map to the City Engineer and the City's Office for Community Technology, or its successor, showing the location of Grantee's Facilities in the Streets on a scale of three thousand five hundred feet (3,500') per inch or whatever scale the City and Grantee agree upon.

6.2 Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law, ORS Chapter 757 (2011), and the related rules and administrative regulations thereunder in OAR Chapter 952.

6.3 Relocation. Grantee shall relocate its Telecommunications System or any Facilities within the Streets when public convenience requires such change, in compliance with the requirements of applicable Portland City Code and implementing regulations, and the expense thereof shall be paid by Grantee.

6.4 Additional Facilities Subject to Franchise. Within thirty (30) days of Grantee's acquisition of any telecommunications system in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such facilities in the Streets, Grantee shall submit to the City a written statement describing all facilities involved, whether authorized by franchise, license, permit or any other similar form of right granted by the City, and specifying the location of all such facilities. At the City's sole option, as expressed by ordinance adopted by the City Council, such acquired facilities shall be subject to the terms of this Franchise, with a reasonable period of time provided to Grantee to bring such acquired facilities into compliance with this Franchise, including payment of appropriate franchise fees as determined by the City in accordance with Section 3.

## **Section 7. RESTORATION OF STREETS.**

Grantee shall, after construction, maintenance or repair of Facilities, leave the Streets in as good or better condition in all respects as it was before the commencement of such construction, maintenance or repairs, excepting normal wear and tear in strict compliance with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations, and the expense thereof shall be paid by Grantee.

## **Section 8. RESERVATION OF CITY STREET RIGHTS.**

Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street; laying down, repairing or removing water mains; or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to injure or prevent the unrestricted use and operation of Grantee's Telecommunications System under this Franchise. However, if any portion of Grantee's Telecommunications System interferes with the construction or repair of

any Street or public improvement, including construction, repair or removal of a sewer or water main, the City may direct Grantee to relocate as provided in applicable regulations of the City.

## **Section 9. USE OF GRANTEE'S FACILITIES BY CITY.**

### 9.1 New Construction.

(A) Grantee shall provide twenty (20) business days prior written notice to the City of any planned Duct or Conduit construction. Such notice shall include a description of any planned Duct or Conduit construction and a map showing the planned route in a form acceptable to the City Engineer. If the City desires any Ducts or Conduits along Grantee's planned route, then within ten (10) business days of receiving the written notice, the City shall provide a written request to Grantee, and Grantee shall provide such Ducts or Conduits to the City pursuant to the process set forth in this Section 9.1.

(B) For new Grantee Duct or Conduit installation, Grantee will provide additional duct(s) or conduit(s) as needed by the City:

(1) Grantee will confer with City prior to finalizing plans and specifications for any proposed new build, to establish City requirements for ducts, conduits, or and access vaults;

(2) If the City determines a need for duct, conduits, or and access vaults, City will pay Grantee the direct incremental costs for this work, consisting of material, labor, and design and engineering costs associated with modifications to the plans and specifications for the segments defined and necessary facilities;

(2) Grantee will provide suitable documentation of ownership and include location in map submitted per Section 6.1(B). City will then maintain ownership of and maintenance responsibilities for the additional Ducts, Conduits, or access vaults.

(C) Grantee will provide separate access vaults for the City at City's cost, at locations to be determined by the City during the process noted in Section 9.1 above.

9.2 City Use of Surplus Ducts or Conduits. As needed and as specified by the City, City will be allowed to access and use Grantee's Surplus Ducts or Conduits without use fees, subject to the same process and other terms applicable to Licensees under Section 12 and subject to a separate written agreement between the City and Grantee specifying the terms of such access and usage by the City.

## **Section 10. STREET VACATION.**

Upon receipt of any request for vacation of any Street or portion thereof used by Grantee, the City shall provide Grantee with the standard notice provided for street vacations. If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street area or Grantee secures such right from the third party that will have title to the

area in which Grantee has its Facilities, Grantee shall, without expense to the City, remove its Facilities from such Street, restore, repair or reconstruct the Street area where such removal has occurred, and place the Street area in such condition as may be required by the Council, which shall be no worse than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty (30) days notice by City Council, to repair, improve or maintain such Street portions, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City shall make reasonable efforts to assist Grantee in identifying potential available alternative locations within the Streets, or, if requested by Grantee, will cooperate with Grantee's efforts to secure an alternate location in the vacated Street area from the third party that shall have ownership after vacation.

#### **Section 11. FACILITY MAINTENANCE.**

Grantee shall provide and put in use all Facilities and equipment necessary for the operation of its Telecommunications System in a manner that will not cause injury to the City's property or to any property within the City belonging to any Person. Notwithstanding the foregoing, it shall not be a breach of Section 11 if such injury is not reasonably foreseeable by Grantee. Grantee, at no expense to the City, shall repair, renew, change and improve said Facilities and equipment from time to time as may be necessary to meet the requirement of Section 11. Grantee shall not require any customer (except the City) or any entity franchised or licensed by the City to install lines or cables in, under or over the Streets in order for such customer or entity to connect with or receive service from Grantee's Telecommunications System. The Telecommunications System constructed, owned or controlled by Grantee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

#### **Section 12. COMMON USERS.**

12.1 Use of Surplus Facilities by Third-parties. Grantee acknowledges that the Streets have a finite capacity for containing conduits, ducts and other facilities. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to permit construction of an underground duct or conduit system by any other Person which may at the time have authority from the City to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such Person the right as a Licensee to use Grantee's Surplus Ducts or Conduits in common with Grantee, unless safety or engineering concerns cannot reasonably be mitigated or eliminated. This right of use shall be subject to Section 12.2, to the terms and conditions of an agreement for use of Surplus Ducts or Conduits entered into by Grantee and the Licensee, and to the safety and reliability of Grantee's Telecommunications System and maintenance requirements. Any agreement governing the terms and conditions of use of Surplus Ducts or Conduits may, at Grantee's discretion, require use of Grantee's employees or contractors in any work occurring in Grantee's vaults. If Grantee and the Licensee are unable to mutually agree upon the terms and conditions of the use of Surplus Ducts or Conduits, Grantee shall seek resolution of the dispute in accordance with procedures established by the Oregon Public Utility Commission.