

## CONDUIT USE AGREEMENT

THIS AGREEMENT, made as of this\_\_ day of \_\_\_\_\_ 2015 by and between the City of Mesa hereinafter called "the Owner," or "the City," and Zayo Group, LLC hereinafter called "the Licensee,"

WHEREAS, the Licensee represents that it is the holder of all necessary governmental permits to erect and maintain cables, wires and associated equipment (the "Facilities") in the streets, alleys and other public places of the City for the purpose of transmitting communications; and

WHEREAS, the Licensee desires to locate such Facilities in the empty two inch conduit of the Owner (hereinafter collectively called "City System") comprised of approximately four thousand five hundred (4500) linear feet of two-inch schedule 40 PVC conduit ("conduit") located along Main Street between Lindsay Road and Val Vista Drive in Mesa, AZ ("Main Street Area"), in order to avoid expensive and unnecessary duplication of facilities; and

WHEREAS, in connection with its use of the Main Street Area, Licensee may repair, replace or alter the conduit, where permitted by the City; and

WHEREAS, the parties, in 2012, entered into an Amendment to a License Agreement (the "Telecommunications License") with Licensee's predecessor in interest, for the installation, placement, operation and maintenance of an underground optical fiber based, communications network in the City's rights-of-way and easements; and

WHEREAS, the Owner is willing to permit, to the extent it may lawfully do so, the use of Licensee's facilities in the Main Street Area for the above-stated purposes, upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of their respective undertakings herein, the parties agree as follows:

### ARTICLE I AVAILABILITY OF CONDUIT FOR LICENSEE'S FACILITIES

To the extent permitted by law, by the provisions of presently existing joint-use contracts, and by the terms of all necessary permits, licenses, easements, franchises or consents from property owners and governmental authorities having jurisdiction, the conduit (the "Mesa Conduit") located within the portion of Owner's City System depicted and described on **Exhibit A** hereto (the Main Street Area) shall be available to the Licensee for its Facilities constituting a portion of the Licensee's system in accordance with the terms of this Agreement, if and to the extent that such use, in the Owner's judgment, will not interfere with the Owner's service requirements, including, but not by way of limitation, considerations of safety and economy.

Nothing herein shall create or vest in the Licensee any ownership or property rights in the City System, and the Licensee's rights in said City System shall be and remain a mere license.

## **ARTICLE II SPECIFICATIONS AND OWNERSHIP OF FACILITIES**

All of Licensee's Facilities shall be installed and maintained in accordance with the requirements and specifications of the Mesa City Code, The City of Mesa Engineering Standards, , and other authorities having jurisdiction, and such other specifications, not less restrictive than the foregoing, as the parties may agree upon from time to time.

All work within the City System shall be performed by licensed contractors and in accordance with all applicable Federal, State and local laws. The Owner shall be given the opportunity to be present during any installation or similar procedures. The Licensee shall give the Owner at least five (5) days written notice of the commencement of installation. The Owner reserves the right to shut down any installation work that in its sole judgment, reasonably exercised, does not conform to any of the aforementioned codes, laws, rules or specifications.

Installations in the City System will be limited to space available in Owner's existing facilities as it in its sole discretion determines. The more detailed specifications for the installation of Licensee's Facilities are as follows: Licensee shall install within the Mesa Conduit: (a) two (2) microducts along with separate pull boxes and manhole/handholes (the "Microducts"); and (b) a single forty-eight (48) count fiber optic cable along with separate pull boxes and manhole/handholes (the "FOC"). Ownership of the Microducts shall vest in the Owner upon installation; provided that Owner's use of the Microducts shall be limited to Owner's use with no right of resale; and provided further that during the first three (3) years of the Term hereof, Owner's use shall be additionally limited to Owner's exclusive government, non-commercial use. Ownership of the FOC shall remain vested in Licensee; provided that Licensee's use of the FOC shall be limited to telecommunications uses. Upon termination of this License, Licensee shall remove the FOC within one hundred and eighty (180) days; provided that if Licensee fails to do so, ownership of the FOC shall vest in Owner.

## **ARTICLE III APPLICATION AND PERMIT PROCEDURE**

Whenever the Licensee desires to make installations in the Main Street Area, the Licensee shall prepare and submit to the Owner an application (accompanied by the required application fee) on an Application and Permit form, a copy of which may be attached hereto as **Exhibit B**, including any sketch and other information necessary to clearly show the location of said installations. As soon as reasonably possible after a properly prepared and submitted Application

and Permit is furnished to the Owner, the Owner shall either deny or grant permission for such attachment as follows:

- (1) If, in the Owner's judgment, such City System is unavailable for installation, such Application and Permit shall be ineffective and the Owner shall notify the licensee in writing of such unavailability.
- (2) If, in the Owner's judgment, such City System is available for installation, the Owner shall complete, execute and furnish to the Licensee one (1) copy of such Application and Permit, which shall thereupon be effective as a Permit.

The Licensee shall make no installation in any City System as to which there does not exist an effective Permit, and as to which all necessary permits, licenses, easements, franchises and consents have not been secured by the Licensee as required by or pursuant to this Agreement.

If any cable, wire or equipment of Licensee shall be found in the City System for which no license is outstanding, the Owner, without prejudice to its other rights or remedies under this Agreement or otherwise, may (1) impose a reasonable charge, or (2) require Licensee to remove such cable, wire or equipment forthwith or the Owner may remove them without liability 30 days after having given written notice to the Licensee of their unauthorized installation and the expense of removal shall be borne by Licensee. In the latter event, the Licensee shall reimburse the Owner upon demand for the actual, direct cost to the Owner of such removal, and shall indemnify and save the Owner harmless from and against all loss, liability or expense (including, but not limited to, claims of third parties) resulting from such unauthorized installation and the removal thereof. No act or failure to act by the Owner with regard to said charge or said unlicensed use shall be deemed as a ratification, or the licensing, of the unlicensed use, and if any license should subsequently be issued, after application and payment of the application fee therefor, said license shall not operate retroactively or constitute a waiver by the Owner of any of its rights or privileges under this Agreement or otherwise.

#### **ARTICLE IV**

##### **MAINTENANCE OF LICENSEE'S INSTALLATION AND INSPECTION**

Each party shall be responsible to perform the scheduled maintenance of the facilities to which it owns legal title, at its own expense. In the event a non-scheduled repair is required, each party shall be responsible to perform the non-scheduled repair of the facilities to which it owns legal title, at its own expense; provided that Licensee may elect to perform such repair of Owner-owned facilities that affect Licensee-owned facilities, and the Owner shall be responsible for the pro rata costs of repair to its facilities. The Licensee shall at any time, at its own expense, upon notice from the Owner, relocate, remove, replace or renew its facilities, transfer to substituted conduit vaults or perform any other work in connection with said Facilities that may be required by the Owner in the maintenance, replacement, removal or relocation of said City System or the

facilities which are or which may from time to time be placed therein, or that may be required for the service needs of the Owner.

If the Licensee neglects or refuses to comply with the directives of such a notice, or in cases of emergency, the Owner shall have the right to remove relocate, replace or renew the facilities placed in said City System by the Licensee, transfer such Facilities to replacement conduit or vaults, or perform any other work in connection with said Facilities and the Licensee shall, on demand, reimburse the Owner for the costs thereby incurred as a result of the Licensee's failure or refusal to act in compliance with such notice.

The Owner reserves the right to make periodic inspections of any part of the cable, wires and equipment of Licensee in the City System and in the vicinity thereof. Inspections will not be made more often than once a year unless, in the Owner's judgment, such inspections are required for reasons involving safety or are required because of a violation of the terms of this Agreement by Licensee. The making of such inspections or the failure to do so shall not operate to relieve Licensee of any responsibility, obligation or liability assumed under this agreement.

The Licensee shall comply with A.R.S. §§ 40-360.21 through 40-360.32 by participating as a member of the Arizona Blue Stake Center with the necessary records and persons to provide location service of Licensee's Facilities upon receipt of a locate call or as promptly as possible, but in no event later than two working days. A copy of the agreement or proof of membership shall be filed with the City Engineer.

Licensee shall maintain As-Built Drawings of its Facilities located within the ROW and furnish a copy both electronically in an ESRI-compatible mapping format (or in a mapping format compatible with the current City electronic mapping format as specified by the City) and in hard copy form. Upon completion of new or relocation construction of underground Facilities in the ROW, Licensee shall create and maintain precise, up-to-date maps of any of its conduit system and/or fiber optic network routes and any above ground equipment located in the ROW and precise and verifiable horizontal and vertical location information and will make this information available to the Owner upon the installation of any new Facilities. Licensee will also provide surface-location marking of any of Licensee's Facilities that are located underground within any public ROW in compliance with Blue Stake law.

If damage occurs to City facilities, Licensee shall replace City fiber, at Licensee's cost from the two closest splice points. This License does not give Licensee permission to use Owner's pullboxes or manholes.

## **ARTICLE V**

### **FEES**

For the Initial Term, Licensee agrees to pay the Owner a one-time fee in the amount of \$58,500.00 for use of the Main Street Area for the placement of Licensee's Facilities pursuant to {00158057.1}

this Agreement. ~~For any Renewal Term, Licensee agrees to pay the Owner a fee calculated as \$0.60 per foot per year; payable either as a one time fee of \$13,512 or in equal annual installments of \$2702.40~~

In the event that any present or future Federal Law, Executive Order or Administrative Rules and Regulations prevent the Owner from charging all or any part of the Fee provided for herein, the Licensee shall, during the time or times that the Owner is prevented from making such charges, pay the portion of said Fee which is permissible under such Federal Law, Executive Order or Administrative Rules and Regulations.

When any charge to the Licensee provided for in this Agreement is to be based upon the Owner's cost, said cost shall be determined in accordance with the Owner's regular and customary method of determining such costs unless otherwise expressly provided herein.

## **ARTICLE VI TERMINATION OF PERMITS**

Upon notice from the Owner to Licensee that the use of any City System is not authorized by Federal, State or County authorities or private property owners, the license covering the use of such City System shall immediately terminate and shall be surrendered and Licensee shall remove its cables, equipment and facilities at once from the affected City System.

If at any time the Owner, or other party under the terms of a joint-use agreement executed prior to the date of this Agreement, desires to make additional installations to any City System carrying facilities of the Licensee, or otherwise to use for its own service needs the space occupied by the Licensee's facilities, and in the Owner's judgment the existing City System is inadequate under applicable requirements and specifications to support such additional facilities or use, the Owner shall give the Licensee notice to that effect and the Permit covering said City System shall terminate and cease to be effective as to said City System.

The Licensee may at any time terminate any Permit or Permits by removing its Facilities from any part of the City System and by notice to the Owner in the form (or other reasonable notice) attached hereto and made a part hereof as **Exhibit C**; the Permit or Permits covering the use of such conduit shall thereupon terminate and cease to be effective.

All Permits shall automatically terminate and cease to be effective upon the termination of this Agreement.

**ARTICLE VII**  
**TERMINATION FOR DEFAULT**

If the Licensee shall neglect or refuse to comply with any of the provisions of this Agreement, including the specifications and requirements referred to in Article II hereof, or default on any of its obligations hereunder, and shall fail within thirty (30) days after written notice from the Owner to correct such neglect, refusal or default, the Owner may at its option, in addition to any other remedy available to it, forthwith terminate this Agreement or the Permit or Permits covering the conduit as to which such neglect, refusal or default shall have occurred.

**ARTICLE VIII**  
**REMOVAL UPON TERMINATION**

The Licensee shall remove from any City System its facilities, the Permit or Permits for which have been terminated, within ninety (90) days after the time such Permit or Permits cease to be effective, failing which the Owner shall have the right to remove the Licensee's facilities from said City System without notice or liability of any kind; in the latter event, the Licensee shall reimburse the Owner upon demand for the cost to the Owner of such removal, and shall indemnify and save the Owner harmless from and against all loss, liability or expense (including, but not limited to, claims of third parties), resulting from such removal.

Upon the expiration of the Term of this Agreement, any facilities that Licensee has placed or installed in the City System will become the property of the City.

**ARTICLE IX**  
**LIABILITY AND INSURANCE**

The Licensee shall at its sole expense secure and maintain in force in the name of the Licensee during the entire life of this Agreement, policies of insurance of the following types:

- (a) Worker's Compensation Insurance with Arizona statutory limits.
- (b) Commercial General Liability Insurance, including contractual liability, with a minimum combined bodily injury and property damage single limit of \$2,000,000 per occurrence. Such insurance shall name the Owner as Additional Insured as their interest may appear, and such coverage shall be primary to any insurance maintained by Owner.
- (c) Automobile Liability Insurance with a minimum combined bodily injury and property damage single limit of \$500,000 per occurrence, providing coverage for owned, non-owned and hired vehicle.

Such policies of insurance shall be in a form and with companies satisfactory to the Owner and shall be obtained and become effective prior to the installation of any facilities hereunder. A copy of the policy shall be furnished to the Owner at the Owner's request.

The Licensee shall submit Certificates of Insurance to Owner before the installation of Facilities hereunder. The Certificates of Insurance shall be on the form furnished by the Owner or any other form approved by the Owner's Legal Department. The certificate shall require that the insurance company give at least thirty (30) days prior written notice of cancellation or material change in any such policy.

The Certificate of Insurance shall be submitted to:

The City of Mesa  
City Attorney  
20 E. Main Street  
Suite 850  
Mesa, Arizona 85211

The Licensee shall require all contractors and subcontractors that the Licensee at any time employs in connection with any work to be done regarding Licensee's facilities, to maintain in full force and effect the same types of insurance policies as required of Licensee as stated above.

#### **ARTICLE X ASSIGNMENT**

This agreement shall be personal to the Licensee, and any assignment or other transfer by the Licensee, in whole or in part, of its rights or privileges hereunder, without the prior written consent of the Owner, shall be void and not merely voidable; except that Licensee shall have the right to assign this License to its affiliates. If Licensee assigns this Agreement to an affiliate, Licensee shall give Owner written notice of such assignment to Owner within ten (10) days of the effectiveness of such assignment. Subject to the foregoing, this Agreement shall extend to and bind the successors and assigns of the parties hereto.

#### **ARTICLE XI WAIVER OF TERMS AND CONDITIONS**

Failure of the Owner to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

#### **ARTICLE XII TERM OF AGREEMENT**

This agreement shall take effect as of the date of signing by the City and shall continue in effect for ten (10) years (the "Initial Term"), unless terminated by mutual consent. ~~This agreement shall renew for successive five (5) year periods thereafter (each, a "Renewal Term") unless either party provides the other party at least ninety (90) days' advance written notice of its desire to terminate the agreement at the end of the then-current Initial Term or Renewal Term.~~

### **ARTICLE XIII**

#### **NOTICES AND DOCUMENTS**

Except as otherwise provided in this agreement, the giving or furnishing of any notice or document in connection with this agreement shall be deemed to occur (a) in the case of personal delivery of such notice or document, on the date of such delivery, (b) in the case of mailing of such notice or document by registered or certified mail, on the date of receipt of such registered or certified mail, or (c) in the case of mailing of such notice or document by regular mail, on the second business day following the date of postmark of such mailing.

Notices or other documents to be given or furnished to the Owner shall be delivered or mailed to:

City of Mesa  
Attn: Right-of-Way Manager  
P.O. Box 1466  
Mesa, Arizona 85211-1366

Notices or other documents to be given or furnished to the Licensee shall be delivered or mailed to:

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

Either Party may at any time change a designation of the individual or address to which notices or other documents are to be delivered or mailed by giving notice in writing of such change of designation to the other party.

### **ARTICLE XIV**

#### **PREVIOUS AGREEMENTS**

With respect to the subject matter hereof, this Agreement supersedes all previous representations, understandings and negotiations, either written or oral, between the parties hereto or their representatives, and constitutes the entire agreement between the parties.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate by their duly authorized representatives as of the day and hear hereinabove first written.

{00158057.1}



CITY OF MESA

ZAYO GROUP, LLC

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By: Christopher J. Brady  
City Manager

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By: Dylan DeVito  
Associate General Counsel

## EXHIBIT A

## EXHIBIT B

EXHIBIT C

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