

ORDINANCE NO. 4681

AN ORDINANCE OF THE CITY OF PASCO, WASHINGTON, APPROVING A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, INSTALL, OPERATE, MAINTAIN, REPAIR, OR REMOVE FIBER OPTIC CABLES WITHIN THE PUBLIC WAYS OF THE CITY OF PASCO

WHEREAS, RCW 35A.11.010 grants the City authority to regulate the use of the public rights-of-way, subject to applicable state and federal law; and

WHEREAS, the Pasco City Council passed Pasco City Ordinance 1823 on August 3, 1976, adopting the classification of non-chartered code city for the City of Pasco; and

WHEREAS, Article 11, section 11, of the Washington State Constitution provides that the City of Pasco may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws; and

WHEREAS, the Pasco City Council, by section 35A.11.020 of the Revised Code of Washington, through section 35A.13.230 of the Revised Code of Washington, has any authority ever given to any class of municipality or to all municipalities of this state, and all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law, which may be exercised in regard to the regulation or use of public ways and property of all kinds and improvements thereto; and

WHEREAS, the Pasco City Council enacted chapter 15.40 of the Pasco Municipal Code by Ordinance 3287 on March 3, 1998, regulating the use of public ways and public property for placement of telecommunication facilities in public ways, and, providing in part that facilities must be located underground unless otherwise provided in a franchise or lease granted by the City; and

WHEREAS, the Pasco City Council passed Ordinance 4414 on January 7, 2019 adopting amendments to its local telecommunications regulations in chapters 15.40, 15.60, 15.10.050 of the Pasco Municipal Code; and

WHEREAS, Section 35A.47.040 of the Revised Code of Washington authorizes the City to grant, permit, and regulate non-exclusive franchises for the use of public ways;

WHEREAS, the Pasco City Council passed City Ordinance 4537 on June 7, 2021, adopting an updated comprehensive plan for the City of Pasco, including without limitation, policies requiring underground installation of new utility services, conversion of existing overhead systems to underground systems, coordination of utility projects, and minimization of negative impacts upon the character of the community, and policies recognizing, preserving and protecting Pasco's urban forest; and

WHEREAS, Franchisee has applied to the City of Pasco, Washington for non-exclusive franchise to enter, occupy, and use public ways to construct, install, operate,

maintain, and repair fiber optic facilities to offer and provide telecommunications service for hire, sale, or resale in the City of Pasco; and

WHEREAS, the 1934 Communications Act, as amended by the 1996 Telecommunications Act, 47 USC 151, et seq., relating to telecommunications providers recognizes and provides state and local government certain authority to manage the public rights-of-way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis; and

WHEREAS, Washington's Telecommunications Services Act, 2000 Wash. Laws, Chapter 83, as amended, RCW Ch. 35.99, relating to telecommunications providers recognizes and provides Washington cities authority to require franchises and use permits for constructing, installing, operating, maintaining, repairing, or removing telecommunication facilities in public rights-of-way; and

WHEREAS, a franchise is a legislatively approved master permit granting general permission to a service provider to enter, use, and occupy the public ways for the purpose of locating facilities subject to requirements that a Franchisee must also obtain separate use permits from the City for use of each and every specific location in the public ways in which the Franchisee intends to construct, install, operate, maintain, repair or remove identified facilities; and

WHEREAS, a franchise does not include, and is not a substitute for any other permit, agreement, or other authorization required by the City, including without limitation, permits required in connection with construction activities in public ways which must be administratively approved by the City after review of specific plans; and

WHEREAS, the grant of a non-exclusive franchise under RCW 35A.47.040 shall not be adopted or passed by the City's legislative body on the day of its introduction nor for five days thereafter, nor at any other than a regular meeting, nor without first being submitted to the City attorney, an affirmative vote of at least a majority of the entire City Council and publication at least once in newspaper of general circulation before becoming effective; and

WHEREAS, the City Council finds that the franchise terms and conditions contained in this ordinance are in the public interest.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PASCO, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1: Definitions.

For the purposes of this Ordinance, the following terms, phrases, words, and their derivations will have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined will have the meaning ascribed to those words in the Pasco Municipal Code unless inconsistent herewith.

"Cable Service" has the meaning set forth in, 47 U.S.C. § 522(6).

"City" has the meaning set forth in PMC 15.10.020

"City Property" has the meaning set forth in PMC 15.10.020

"Conduit" means optical cable housing, jackets, or casing, and pipes, tubes, or tiles used for receiving and protecting wires, lines, cables, and communication and signal lines.

"Costs" means costs, expenses, and other financial obligations of any kind whatsoever.

"Days" means calendar days when the reference is to more than 10 Days, and business days when the reference is to 10 days or less.

"Effective Date" means five days following the publication of this Franchise or a summary thereof occurs in an official newspaper of the City as provided by law.

"Emergency" has the meaning set forth in PMC 15.10.020.

"Existing" means in actual physical being upon the effective date of this Franchise, or a repair or replacement of such physical being.

"Facilities" means all of the plant, equipment, fixtures, appurtenances, and other facilities necessary to furnish and deliver telecommunications services, including but not limited to poles with crossarms, poles without crossarms, wires, lines, conduits, cables, communication and signal lines and equipment, braces, guys, anchors, vaults, and all attachments, appurtenances, and appliances necessary or incidental to the distribution and use of telecommunications services.

"Fiber Optics" has the meaning set forth in PMC 15.10.020.

"Franchisee" means Ziply Fiber Pacific, LLC dba Ziply Fiber and the lawful successor, transferee or assignee of said person subject to such conditions as defined herein.

"Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

"Maintenance" or "Maintain" shall mean examining, testing, inspecting, repairing, maintaining and replacing the existing Franchisee Facilities or any part thereof as required and necessary for safe operation.

"Municipal Arborist" means the City's director of parks and recreation, or such other person appointed by the Pasco City Manager to carry out the provisions of the Pasco Municipal Code.

"Optical Cable" means wires, lines, cables and communication and signal lines used to convey communications by fiber optics.

"Overhead Facilities" has the meaning set forth in PMC 15.10.020

"PMC" means the Pasco Municipal Code.

"Person" has the meaning set forth in PMC 15.10.020

"Personal Wireless Services" means commercial mobile radio services as defined by federal laws and regulations.

"Public Street" has the meaning set forth in PMC 15.10.020

"Public Way" has the meaning set forth in PMC 15.10.020.

"Relocation" means permanent movement of Franchisee facilities required by the City, and not temporary or incidental movement of such facilities, or other revisions Franchisee would accomplish and charge to third parties without regard to municipal request. "Relocation" also means to protect, support, temporarily disconnect, relocate, or remove facilities.

"Right-of-Way" has the meaning set forth in PMC 15.10.020.

"Standards" means the Design and Construction Standards and Specifications for Public Works Improvements, latest edition at the time of submission of each right-of-way permit associated with this Franchise Agreement.

"Street Tree" means any tree located in, or that portion over-hanging, any public way and any tree planted on private property near a public way at the direction of the City.

"Telecommunications Service" has the meaning set forth in 47 U.S.C. Section 153(53).

"State" means the State of Washington, its agencies, departments, and governmental subdivisions, and all agencies, departments, and divisions of its agencies, departments, and governmental subdivisions.

"Underground Facilities" has the meaning set forth in PMC 15.10.020

"Utility Poles" has the meaning set forth in PMC 15.10.020.

Section 2: Franchise.

A. The City grants to Franchisee, subject to the terms and conditions of this Franchise, a non-exclusive Franchise to enter, occupy, and use public ways for constructing, installing, operating, maintaining, repairing, and removing wireline facilities necessary to provide telecommunications services, on property located within the corporate boundaries of the City of Pasco, as specified in **Exhibit A**, attached hereto and incorporated by reference (the "Franchise Area"), provided that the Franchise Area shall

be expanded to include territory annexed into the City of Pasco during the term hereof, and as approved under City permits issued pursuant to this Franchise (hereinafter "Franchise"). Except as expressly provided otherwise in this Franchise, Franchisee shall construct, install, operate, maintain, repair, and remove its facilities at its expense.

B. The Franchisee agrees that its use of Franchise Area shall at all times be subordinated to and subject to the City and the public's need for municipal infrastructure, travel, and access to the Franchise Area, except as may be otherwise required by law.

C. The Franchisee shall reimburse the City for all costs of one publication of this Franchise in a local newspaper and required legal notices regarding this Franchise, contemporaneous with its acceptance of this Franchise.

D. As set forth PMC 15.30.010, Franchisee must first obtain a right-of-way use permit in the event it desires to occupy Public Ways. Nothing contained herein shall relieve Franchisee from the requirement for obtaining permits as more fully set forth in Section 12 below.

E. Nothing in this Franchise grants authority to Franchisee to enter, occupy, or use public ways for constructing, installing, operating, maintaining, repairing or removing wireless communication facilities.

F. Nothing in this Franchise grants authority to Franchisee to enter, occupy, or use City Property. If Franchisee desires to use City Property, including poles and structures within the public ways it shall negotiate a separate lease or license agreement with the City.

G. Any rights, privileges, and authority granted to Franchisee under this Franchise are subject to the legitimate rights of the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the public, and nothing in this Franchise excuses Franchisee from its obligation to comply with all applicable general laws enacted by the City pursuant to such power. Any conflict between the terms or conditions of this Franchise and any other present or future exercise of the City's police powers will be resolved in favor of the exercise of the City's police power.

H. Nothing in this Franchise excuses Franchisee of its obligation to comply with applicable codes, rules, regulations, and standards subject to verification by the City of such compliance.

I. Nothing in this Franchise shall be construed to limit taxing authority or other lawful authority to impose charges or fees, or to excuse Franchisee of any obligation to pay lawfully imposed taxes, charges or fees.

J. Nothing in this Franchise grants authority to Franchisee to impair or damage any City Property, Public Way, other ways or other property, whether publicly or privately owned, except as provided herein.

K. Nothing in this Franchise grants authority to Franchisee to alter the City's urban forest to accommodate Franchisee's Facilities, and nothing in this Franchise shall be construed to give Franchisee's Facilities priority of use of public ways over the preservation and protection of the City's urban forest.

L. Nothing in this Franchise shall be construed to create a duty upon the City to be responsible for construction of facilities or to modify public ways to accommodate the Franchisee's Facilities.

M. Nothing in this Franchise grants authority to Franchisee to provide or offer Cable Service.

N. Nothing in this Franchise grants authority to Franchisee to provide or offer personal wireless services to the general public.

O. Nothing in this Franchise shall be construed to create, expand, or extend any liability of the City to any third-party user of Franchisee's Facilities or to otherwise recognize or create third party beneficiaries to this Franchise.

P. Nothing in this Franchise shall be construed to permit Franchisee to unlawfully enter or construct improvements upon the property or premises of another.

Q. Nothing in this Franchise authorizes Franchisee to enter or construct improvements on, in, under, over, across, or within any private property of any third party without that party's permission.

Section 3: Term.

A. Authorization granted under this Franchise shall be for a period of ten (10) years from the effective date of this Franchise.

B. Renewal. Franchisee may renew this Franchise pursuant to PMC 15.020.070(1).

C. Failure to Renew Franchise – Automatic Extension. If the parties fail to formally renew this Franchise prior to the expiration of its term, the Franchise automatically continues month to month until renewed or until either party gives written notice at least one hundred eighty (180) days in advance of its intent not to renew the Franchise to the other party.

Section 4: Location of Facilities.

A. Franchisee may place optical cable, optical cable housing, and splicing connections on Existing utility poles as overhead facilities if approved by the owner of the utility poles as well as place the same underground in accordance with the provisions of PMC 15.70.110.

B. Franchisee's Facilities shall not damage or impair the City's urban forest. Franchisee

shall not place optical cable, optical cable housing, or splicing connections as overhead facilities in any area where the municipal arborist of the City determines, in his or her sole discretion, that the facilities will damage or impair a street tree.

C. Franchisee's facilities shall not unreasonably interfere with the use of public ways or City property by the City, the general public, or other persons authorized to enter, occupy, or use public ways or City property as set forth in PMC 15.70.160.

D. Franchisee shall not impair or damage any City property, public way, other ways or other property, whether publicly or privately owned.

E. Relocation or removal of Franchisee's facilities shall be governed by PMC 15.70.180.

1. Where the construction, alteration, repair or improvement of a Public Way is primarily for private benefit, the Franchisee may seek reimbursement from the private party or parties for the cost of relocation in the same proportion as their contribution to the costs of the project; provided, however, in no event shall the City be considered a private party for purposes of seeking reimbursement under this section. Franchisee may require a deposit or other pre-payment of costs before doing any work on a project covered by this section.

2. Where other utilities are present and involved in an undergrounding project and Franchisee is required to pay for such undergrounding, Franchisee shall only be required to pay its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Franchisee Facilities. Common costs shall include necessary costs for common trenching and utility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded.

F. Franchisee shall relocate its facilities at its expense at the request of the City in the event of an unforeseen emergency or causes interference with public facilities as described in Section 4(C) that creates an immediate threat to the public safety, health or welfare.

Section 5: Pole, Structures and Property Owned By Others.

Franchisee will obtain separate agreements from owners of utility poles, structures and property not owned by the City. The City makes no representation and assumes no responsibility for the availability of utility poles, structures, and property owned by third parties for the installation of Franchisee's facilities.

Section 6: Construction and Installation Requirements.

A. Neither approval of plans by the City nor any action or inaction by the City shall relieve Franchisee of any duty, obligation, or responsibility for the competent design, construction, and installation of its Facilities. Franchisee is solely responsible for the supervision, condition, and quality of the work done, whether it is performed by itself or by its contractors, agents, or

assigns.

B. The Franchisee shall provide the City at least 72-hours' notice of its intent to work in the public right-of-way and, for permits relating to underground work, shall indicate the issued permit for the work planned to be performed.

C. Working Hours. All work related to this Franchise Agreement (with the exception of emergency repairs described in this agreement) performed by the Franchisee shall only occur Monday through Saturday and no work will be performed on Sunday's or holidays recognized by the City of Pasco unless otherwise agreed by the City. Such restriction shall not apply to any service drops used in connecting subscribers to Franchisee's Facilities.

D. Dangerous Conditions. Franchisee shall comply with PMC 15.70.280.

E. Utility Locates. Franchisee shall comply with PMC 15.70.080.

F. Qualified, Informed Personnel. The Franchisee shall have qualified, informed personnel onsite anytime construction is occurring that are familiar with the permit requirements, and the City requirements for construction.

G. Licensed, Bonded Contractors. All work performed by the Franchisee shall be performed by licensed, bonded Contractors who have a business license allowing them to work within the City of Pasco.

H. Contractor named on Right-of-Way Permit. The Franchisee shall specifically name the Contractor who will be performing work on the right-of-way permit application. If the Franchisee desires to switch to using another contractor on an open right-of-way permit, the Franchisee shall so notify the City.

I. Sidewalk Safety. At times, weather is not conducive to concrete placement, which can delay surface restoration work if concrete sidewalk panels or curb ramps were removed as part of a construction project. When this occurs, the Franchisee shall use either 5/8 crushed rock or cold patch asphalt (temporary surface type is at the discretion of the City) to maintain a safe, ADA accessible walking surface until the site can be adequately restored.

J. Local Emergency Contact. The Franchisee shall at all times maintain a emergency contact at its Network Operations Center who can be contacted by the City if there is an emergency, or an issue with lack of compliance with the terms of this Franchise Agreement. This emergency contact shall be available as needed 7 days a week, 24 hours a day.

Section 7: Coordination of Construction and Installation Activities and Other Work.

A. Franchisee shall coordinate its construction and installation activities and other work with the City and other users of the public ways at least annually or as determined by the City.

B. All construction or installation locations, activities and schedules shall be coordinated,

as ordered by the City, to minimize public inconvenience, disruption or damages.

C. At least twenty-four hours prior to entering a public way to perform construction and installation activities or other work, Franchisee shall give notice, at its cost, to owners and occupiers of property adjacent to such public ways indicating the nature and location of the work to be performed. Such notice shall be physically posted by door hanger. Franchisee shall make a good faith effort to comply with the property owner or occupier's preferences, if any, on location or placement of underground facilities, consistent with sound engineering practices.

D. Franchisee shall make available open trenches for use by third party utilities with the costs to be allocated as agreed between the parties provided that such third party has a similar obligation with respect to Franchisee.

E. The City shall give reasonable advance notice to Franchisee of plans to open Public Ways for construction or installation of Facilities and Franchisee afforded the opportunity to install facilities in the applicable location, when possible; provided, however, the City shall not be liable for damages for failure to provide such notice. When notice has been given, Franchisee may provide notice to City of its intent to construct in the open Public Way and provide information regarding its requirements for such constructions. If so elected, Franchisee may only construct or install facilities during such period that the City has opened the Public Way for construction or installation.

F. Emergency Operations. Franchisee shall comply with PMC 15.70.250.

Section 8: Temporary Removal, Adjustment or Alteration of Facilities.

See Section 4 above.

Section 9: Safety and Maintenance Requirements.

Franchisee shall comply with PMC 15.70.280.

Section 10: Abandonment of Facilities.

PMC 15.70.260(1) shall govern the abandonment of facilities.

Section 11: Restoration of Public Ways and Other Property.

A. When Franchisee, or any person acting on its behalf, does any work in or affecting any Public Way or other property, it shall, at its own expense, promptly remove any obstructions therefrom and restore, at Franchisee's cost, such ways and property to as good a condition as existed before the work was undertaken, unless otherwise directed by the City. Upon completion of any construction by the Franchisee, the site of construction shall be restored in accordance with all the requirements in the PMCs and the City's Standards, including but not limited PMC 15.70.270.

B. If weather or other conditions do not permit the complete restoration required by this section; the Franchisee shall temporarily restore the affected ways or property. Such temporary restoration shall be at the Franchisee's cost, and Franchisee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

C. All restoration work is subject to inspection and final approval by the City. If restoration is not made to the satisfaction of the City within the established time frame, the City may make the restoration itself at the cost of Franchisee or have them made at the cost of Franchisee.

Section 12: Use and/or Development Authorization and Permits.

A. Franchisee shall obtain use and/or development authorization and required permits from the City and all other appropriate regulatory authorities prior to constructing or installing facilities or performing other work in a public way.

The City must act on applications for use and/or development authorization or required permits within thirty (30) days of receipt of a completed application, unless Franchisee consents to a different time period. The City may, upon notice to Franchisee, extend this period to ensure that the City has adequate resources available to provide the necessary inspection work. Franchisee agrees to reimburse the City for any additional costs required to provide inspections for work performed by the Franchisee after-hours and on weekends.

B. A permit may require the posting of a construction bond. Any such requirement and amount of the bond is set forth in City code.

Section 13: Hold Harmless and Assumption of Risk.

The Franchisee agrees to be bound by the provisions of PMC 15.70.290(2) which are hereby incorporated into this Franchise.

Section 14: Insurance.

Franchisee shall obtain and maintain, at its cost, worker's compensation insurance and the following liability insurance policies insuring both Franchisee and the City, and its elected and appointed officers, officials, agents, employees, representatives, engineers, consultants, and volunteers as an additional insureds against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges, and authority granted to Franchisee:

A. Commercial General Liability insurance shall be at least as broad as ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, stop gap liability, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract. There shall be no exclusion for liability arising from explosion, collapse or underground property damage. The City shall be named as

an additional insured under the Franchisee's Commercial General Liability insurance policy with respect this Franchise Agreement using ISO endorsement CG 20 12 05 09 if the Franchise Agreement is considered a master permit, or CG 20 26 07 04 if it is not, or substitute endorsement providing at least as broad coverage.

Commercial General Liability insurance shall be written with limits no less than \$5,000,000 each occurrence, \$5,000,000 general aggregate.

B. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01.

Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$5,000,000 per accident.

C. Contractors Pollution Liability insurance shall be in effect throughout the entire Franchise Agreement covering losses caused by pollution conditions that arise from the operations of the Franchisee. Contractors Pollution Liability shall cover bodily injury, property damage, cleanup costs and defense, including costs and expenses incurred in the investigation, defense, or settlement of claims.

Contractors Pollution Liability insurance shall be written in an amount of at least \$2,000,000 per loss, with an annual aggregate of at least \$2,000,000.

D. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

E. Excess or Umbrella Liability insurance shall be excess over and at least as broad in coverage as the Franchisee's Commercial General Liability and Automobile Liability insurance.

Excess or Umbrella Liability insurance shall be written with limits of not less than \$5,000,000 per occurrence and annual aggregate. The Excess or Umbrella Liability requirement and limits may be satisfied instead through Franchisee's Commercial General Liability and Automobile Liability insurance, or any combination thereof that achieves the overall required limits.

F. Other Insurance Provisions. Franchisee's Commercial General Liability, Automobile Liability, Excess or Umbrella Liability, Contractors Pollution Liability insurance policy or policies are to contain, or be endorsed to contain, that they shall be primary insurance as respect the City. Any insurance, self-insurance, or self-insured pool coverage maintained by the City shall be excess of the Franchisee's insurance and shall not contribute with it.

G. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: Vil.

H. Verification of Coverage. The Franchisee shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Franchise. Upon request by the City, the Franchisee shall furnish certified copies of all required insurance policies, including endorsements, required in this Franchise and evidence of all subcontractors' coverage.

I. Subcontractors. The Franchisee shall cause each and every Subcontractor to provide insurance coverage that complies with all applicable requirements of the Franchisee-provided insurance as set forth herein, except the Franchisee shall have sole responsibility for determining the limits of coverage required to be obtained by Subcontractors. The Franchisee shall ensure that the City is an additional insured on each and every Subcontractor's Commercial General liability insurance policy using an endorsement as least as broad as ISO CG 2026.

J. Cancellation. The Franchisee's insurance cannot be terminated by the Franchisee except after thirty (30) days' prior written notice to the City by certified mail, return receipt requested, has been given to the City.

K. Failure to Maintain Insurance. Failure on the part of the Franchisee to maintain the insurance as required shall constitute a material breach of this Franchise, upon which the City may, after giving five business days' notice to the Franchisee to correct the breach, terminate the Franchise or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the City on demand.

L. City Full Availability of Franchisee Limits. If the Franchisee maintains higher insurance limits than the minimums shown above, the City shall be insured for the full available limits of Commercial General and Excess or Umbrella liability maintained by the Franchisee, irrespective of whether such limits maintained by the Franchisee are greater than those required by this Franchise or whether any certificate of insurance furnished to the City evidences limits of liability lower than those maintained by the Franchisee.

M. Franchisee - Self-Insurance. If the Franchisee is self-insured or becomes self-insured during the term of the Franchise Agreement, Franchisee or its affiliated parent entity shall comply with the following: (i) provide the City, upon request, a copy of Franchisee's or its parent company's most recent audited financial statements, if such financial statements are not otherwise publicly available; (ii) Franchisee or its parent company is responsible for all payments within the self-insured retention; and (iii) Franchisee assumes all defense and indemnity obligations as outlined in the indemnification section of this Franchise Agreement.

N. Primary Insurance. The Franchisee's insurance coverage shall be primary insurance as respects the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be in excess of the Franchisee's insurance and shall not contribute with it.

O. Coverage Scope. The coverage shall contain no special imitations on the scope of protection afforded to the City, its officers, officials, or employees. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whose claim is made or suit is brought, except with respect to the limits of the insurer's liability. Franchisee's insurance shall be primary. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be in excess of the Franchisee's insurance, and shall not contribute with it. Coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits for the duration of this Franchise Agreement.

Section 15: Performance Bond.

A. Franchisee shall provide a performance bond in the amount of fifty thousand dollars (\$50,000) to ensure the faithful performance of its responsibilities under this Franchise and applicable law, including, by way of example and not limitation, its obligations to relocate and remove its facilities. The performance bond shall be in a standard industry form. Grantee shall pay all premiums or costs associated with maintaining the bond, and shall keep the same in full force and effect at all times.

B. The bond shall not be canceled or materially altered so as to be out of compliance with the requirements of this Section without forty-five (45) days written notice first being given to the City. If the bond is canceled or materially altered so as to be out of compliance with the requirements of this Section within the term of this Franchise, Franchisee shall provide a replacement bond.

C. After the giving of notice by the City to Franchisee, and expiration of any applicable cure period, the performance bond may be drawn upon by the City for purposes that include, but are not limited to the following:

1. Failure of Franchisee to pay the City sums due under the terms of this Franchise;
2. Reimbursement of costs borne by the City to correct Franchise violations not corrected by Franchisee; and
3. Damages assessed against Franchisee as provided in this Franchise.

D. The City shall give Franchisee written notice of any withdrawal under this Section upon such withdrawal. Within ten (10) days following receipt of such notice, Franchisee shall restore and replenish the performance bond to the amount required under this Franchise. Franchisee's maintenance of the performance bond shall not be construed to excuse unfaithful performance by Franchisee or limit the liability of Franchisee to the amount of the performance bond or otherwise limit the City's recourse to any other remedy available at law or in equity.

E. Franchisee shall have the right to appeal to the City Council for reimbursement in the event Franchisee believes that the performance bond was drawn upon improperly. After a determination by the City Council, Franchisee shall also have the right of judicial appeal if Franchisee believes the performance bond has not been properly drawn upon in accordance with this Franchise. Any

funds the City erroneously or wrongfully withdraws from the performance bond shall be returned to Franchisee with interest, from the date of withdrawal at a rate equal to the prime rate of interest as quoted in The Wall Street Journal on the date the City withdrew funds from the performance bond until the date the City returns the funds to Franchisee.

Section 16: Taxes, Charges, And Fees.

Franchisee shall pay and be responsible for taxes permitted by law.

Section 17: Acquisition of Facilities.

Upon Franchisee's acquisition of any facilities in the Public Way, or upon any addition or annexation to the City of any area in which Franchisee has facilities, such facilities shall immediately be subject to the terms of this Franchise without further action of the City or Franchisee.

Section 18: Vacation of Public Ways.

The City reserves the right to change, regrade, relocate, abandon, or vacate any right-of-way within the Franchise Area. If, at any time during the term of this Franchise, the City vacates any portion of the Franchise Area containing Franchisee Facilities, the City shall reserve an easement for public utilities within that vacated portion, pursuant to RCW 35.79.030 and PMC 12.40, within which the Franchisee may continue to operate any existing Franchisee Facilities under the terms of this Franchise for the remaining period set forth under Section 3.

Section 19: Provision of Information.

Within thirty (30) days of a written request from the City, Franchisee shall furnish the City with information reasonably requested by the City to coordinate municipal functions with Franchisee's activities, to fulfill municipal obligations under State law or to demonstrate compliance with terms of this Franchise.

A. The documents and records maintained by Franchisee and requested by the City shall be made available to the City at reasonable times and intervals; provided, however, that nothing in this section shall be construed to require Franchisee to violate state or federal law regarding subscriber privacy, nor shall this section be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.

B. Franchisee shall reasonably cooperate in City's planning efforts, including working with the City in its development of its Comprehensive Plan Utilities Element. The cooperation may include:

1. An annual meeting or communications outlining the plans of Franchisee and the City for the Public Ways during the upcoming year.

2. Coordination of construction activities with the City and other franchisees.
3. Planning and implementation of emergency response procedures.

C. In connection with information requests mentioned above, the City may request as-built drawings of Franchisee's Facilities and maps showing the location of existing or planned facilities within the City. Said information may be requested either in hard copy or electronic format, in a format used by Franchisee in the maintenance of its own records.

D. Confidentiality. Information provided by Franchisee to the City shall be considered confidential and proprietary to Franchisee. If the City receives a request under the Washington State Public Records Act to inspect or copy the information provided by Franchisee and the City determines that release of the information is required by the Public Records Act, the City notify Franchisee (a) of the request and (b) of the date that such information will be released to the requester unless Franchisee initiates a proceeding to enjoin that disclosure pursuant to the Public Records Act.

Section 20: Assignment or Transfer.

Franchisee's rights, privileges, and authority under this franchise, and ownership or working control of facilities constructed or installed pursuant to this Franchise, may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of Franchisee, by operation of law or otherwise, except after consent by the City, which shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, no City consent shall be required in the event that this Franchise is, directly or indirectly, transferred assigned or disposed by sale, lease, merger consolidation or other act of Franchisee, by operation of law or otherwise, in connection with any transaction approved by the Washington Utilities and Transportation Commission, such approval to be deemed consent of the City.

Except as set forth above, PMC 15.70.320 shall apply to this Franchise.

Section 21: Notices.

A. Written notices to the parties shall be sent by certified mail to the following addresses, unless a different address shall be designated in writing and delivered to the other party.

City:	City of Pasco Community and Economic Development 525 N. 3rd Avenue Pasco, WA 99301 (509) 545-3441
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with a copy to: Pasco City Clerk
525 N. 3rd Avenue
Pasco, WA 99301

Franchisee: Ziplly Fiber Pacific, LLC
Attn: Legal Department
135 Lake Street South, Suite 155
Kirkland, WA 98033
legal@ziplly.com
[add phone]

Franchisee's Local Contact for Emergency Situations or Franchise compliance issues requiring immediate attention:

Ziplly Fiber Pacific, LLC
[address]
[e-mail]
[office phone]
[cell phone for after hours contact if needed]

B. Franchisee shall additionally provide a phone number and designated responsible officials to respond to emergencies. After being notified of an emergency, Franchisee shall cooperate with the City and make best efforts to immediately respond to minimize damage, protect the health safety of the public and repair facilities to restore them to proper working order. Annually, on request of the City, Franchisee will meet with City emergency response personnel to coordinate emergency management operations and, at least once a year, at the request of the City, actively participate in emergency preparations.

C. Any changes to the above-stated Franchisee information shall be sent to the City's Director of Community & Economic Development Department, with copies to the City Clerk, referencing the title of this agreement.

D. The above-stated Franchisee and City telephone numbers shall be staffed at least during normal business hours, Pacific time zone, notwithstanding the requirements of the Local Emergency Contact provisions pursuant to Section 6(J).

Section 22: Non-waiver.

The failure of the City to exercise any rights or remedies under this Franchise or to insist upon compliance with any terms or conditions of this Franchise shall not be a waiver of any such rights, remedies, terms or conditions of this Franchise by the City and shall not prevent the City from demanding compliance with such terms or conditions at any future time or pursuing its rights or remedies.

Section 23: Eminent Domain.

This Franchise is subject to the power of eminent domain and the right of the City Council to repeal, amend or modify the Franchise in the interest of the public. In any proceeding under eminent domain, the Franchise itself shall have no value.

Section 24: Limitation of Liability.

Administration of this Franchise may not be construed to create the basis for any liability on the part of the City, its elected officials, officers, employees, servant, agents, and representatives for any injury or damage from the failure of the Franchisee to comply with the provisions of this Franchise; by reason of any plan, schedule or specification review, inspection, notice and order, permission, or other approval or consent by the City; for any action or inaction thereof authorized or done in connection with the implementation or enforcement of this Franchise by the City; or for the accuracy of plans submitted to the City.

Section 25: Damage to Facilities.

Unless directly and proximately caused by the negligence of the City, the City shall not be liable for any damage to or loss of any facilities as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind on, in, under, over, across, or within a public way done by or on behalf of the City.

Section 26: Governing Law and Venue.

This Franchise and use of the applicable public ways will be governed by the laws of the State of Washington, unless preempted by federal law. Franchisee agrees to be bound by the laws of the State of Washington, unless preempted by federal law, and subjected to the jurisdiction of the Courts of the State of Washington. Any action relating to this Franchise must be brought in the Superior Court of Washington for Franklin County, or in the case of a federal action, the United States District Court for the Eastern District of Washington at Richland, Washington, unless an administrative agency has primary jurisdiction.

Section 27: Severability.

If any section, sentence, clause or phrase of this Franchise or its application to any person or entity should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality will not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Franchise nor its application to any other person or entity.

Section 28: Repair and Emergency Work.

The terms of PMC 15.70.250 is hereby incorporated into this Franchise.

Section 29: Location Preference.

Any structure, equipment, appurtenance, or tangible property of a utility, other than the Franchisee's, which was installed, constructed, completed, in place, or planned for installation prior in time to Franchisee's application for a permit to construct or repair Franchisee Facilities under this Franchise shall have preference as to positioning and location with respect to the Franchisee Facilities. The City reserves the right to deny of any of the Franchisee's facilities that may possibly interfere with possible future installation of City utilities. However, to the extent that the Franchisee Facilities are completed and installed prior to another non-City utility's submittal of a permit for new or additional structures, equipment, appurtenances, or tangible property, then the Franchisee Facilities shall have priority. All City utility and road infrastructure, whether existing or future shall have priority over the Franchisee's. These rules governing preference shall continue in the event of the necessity of relocating or changing the grade of any City road or right-of-way. A relocating utility shall not necessitate the relocation of another utility that otherwise would not require relocation. This Section shall not apply to utilities that may in the future require the relocation of Franchisee Facilities. Such relocations shall be governed by Section 4. Franchisee shall comply with PMC 15.70.110.

Section 30: Enforcement and Remedies.

The terms of PMC 15.90.010-050 is hereby incorporated into this Franchise.

Section 31: Compliance with Laws and Regulations.

A. This Franchise is subject to, and the Franchisee shall comply with all applicable federal and state or City laws, regulations and policies (including all applicable elements of the City's comprehensive plan), in conformance with federal laws and regulations, affecting performance under this Franchise. Furthermore, notwithstanding any other terms of this agreement appearing to the contrary, the Franchisee shall be subject to the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the general public in relation to the rights granted in the Franchise Area.

Section 32: Consequential Damages Limitation.

Notwithstanding any other provision of this Agreement, in no event shall the City or other utility providers (with the exception of the Franchisee) be liable for any special, incidental, indirect, punitive, reliance, consequential or similar damages.

Section 33: Survival.

All the provisions, conditions and requirements of this agreement shall be in addition to any and all other obligations and liabilities the Franchisee may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to the Franchisee for the use of the areas mentioned herein, and any renewals or extensions thereof. All the provisions, conditions, regulations, and requirements contained in this Franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Franchisee

and all privileges, as well as all obligations and liabilities of the Franchisee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Franchisee is named herein.

Section 34: Miscellaneous.

A. Equal Employment and Nondiscrimination. Throughout the term of this Franchise, Franchisee will fully comply with all equal employment and nondiscrimination provisions and requirements of federal, state, and local laws, and in particular, FCC rules and regulations relating thereto.

B. Local Employment Efforts. Franchisee will use reasonable efforts to utilize qualified local contractors, including minority business enterprises and woman business enterprises, whenever the Franchisee employs contractors to perform work under this franchise.

C. Descriptive Headings. The headings and titles of the sections and subsections of this Franchise are for reference purposes only and do not affect the meaning or interpretation of the text herein.

D. Costs and Attorneys' Fees. If any action or suit arises in connection with this Franchise, the prevailing party will be entitled to recover all of its reasonable costs, including attorneys' fees, in addition to such other relief as the court may deem proper.

E. No Joint Venture. Nothing herein will be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner that would indicate any such relationship with the other.

F. Mutual Negotiation. This Franchise was mutually negotiated by the Franchisee and the City and has been reviewed by the legal counsel for both parties. Neither party will be deemed to be the drafter of this Franchise.

G. Third-Party Beneficiaries. There are no third-party beneficiaries to this Franchise.

H. Actions of the City or Franchisee. In performing their respective obligations under this Franchise, the City and Franchisee will act in a reasonable, expeditious, and timely manner. Whenever this Franchise sets forth a time for any act to be performed by Franchisee, such time shall be deemed to be of the essence, and any failure of Franchisee to perform within the allotted time may be considered a material breach of this Franchise, and sufficient grounds for the City to invoke any relevant remedy.

I. Entire Agreement. This Franchise represents the entire understanding and agreement between the parties with respect to the subject matter and supersedes all prior oral and written negotiations between the parties.

J. Modification. The parties may alter, amend or modify the terms and conditions of this Franchise upon written agreement of both parties to such alteration, amendment or modification. Nothing in this subsection shall impair the City's exercise of authority reserved to it under this Franchise.

K. Non-exclusivity. This Franchise does not confer any exclusive right, privilege, or authority to enter, occupy or use public ways for delivery of telecommunications services or any other purposes. This Franchise is granted upon the express condition that it will not in any manner prevent the City from granting other or further franchises in, on, across, over, along, under or through any public way.

L. Rights granted. This Franchise does not convey any right, title or interest in public ways, but shall be deemed only as authorization to enter, occupy, or use public ways for the limited purposes and term stated in this Franchise. Further, this Franchise shall not be construed as any warranty of title.

M. Contractors and subcontractors. Franchisee's contractors and subcontractors must be licensed and bonded in accordance with the City's ordinances, rules, and regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Franchisee.

N. Risks. Franchisee acknowledges by acceptance of the grant that it has read the terms and conditions of this agreement carefully, and accepts all reasonable risks related to the possible interpretation of the provisions, terms, and conditions of this agreement.

Section 35: Acceptance of Franchise.

Within thirty (30) days after the passage and approval of this ordinance, this Franchise may be accepted by the Franchisee by its filing with the City Clerk an unconditional written acceptance thereof. Failure of the Franchisee to so accept this Franchise within said period of time shall be deemed a rejection thereof by the Franchisee, and the rights, privileges, and authority herein granted shall, after the expiration of the 30-day period, absolutely cease and terminate, unless the time period is extended by ordinance duly passed for that purpose.

Section 36: The City Clerk.

The City Clerk is authorized and directed to publish a summary hereof in accordance with Revised Code of Washington 35A.13.200 and 35A.12.160.

Section 37: Severability. If any section, subsection, sentence, clause, phrase or word of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality thereof shall not affect the validity or constitutionality of any other section, subsection, sentence, clause, phrase or word of this Ordinance.

Section 38: Corrections. Upon approval by the city attorney, the city clerk or the code reviser are authorized to make necessary corrections to this Ordinance, including scrivener's errors or

clerical mistakes; reference to other local, state, or federal laws, rules, or regulations; or numbering or referencing of Ordinances or their sections and subsections.

Section 39: This Ordinance shall take full force and effect five (5) days after approval, passage and publication as required by law.

PASSED by the City Council of the City of Pasco, Washington, on this 5th day of September, 2023.



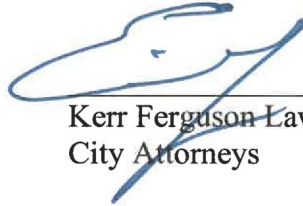
Craig Maloney
Mayor Pro Tem

ATTEST:



Debra Barham, CMC
City Clerk

APPROVED AS TO FORM:



Kerr Ferguson Law, PLLC
City Attorneys

Published: September 8, 2023

SUMMARY OF ORDINANCE

AN ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, INSTALL, OPERATE, MAINTAIN, REPAIR, OR REMOVE FIBER OPTIC CABLES WITHIN THE PUBLIC WAYS OF THE CITY OF PASCO

The Pasco City Council passed Municipal Ordinance No. 4681 at its September 5, 2023 regular meeting which in summary grants a non-exclusive franchise to Ziplly Fiber Pacific, LLC dba Ziplly Fiber to construct, install, operate, maintain, repair, or remove fiber optic cables within the City right-of-way.

The full text of Municipal Ordinance 4681 will be provided upon request made to the Pasco City Clerk at Pasco City Hall, 525 N. Third Avenue., Pasco, WA 99301.

Summary approved as to form:



Kerr Ferguson Law, PLLC
City Attorneys

ACCEPTANCE:

The provisions of this amended Franchise are agreed to and hereby accepted. By accepting this Franchise, Franchisee covenants and agrees to perform and be bound by each and all of the terms and conditions imposed by the franchise and the municipal code and ordinances of the City.

By:

George Baker Thomson, Jr.

Printed Name: GEORGE BAKER THOMSON, JR.

Title: VP, ASSOCIATE GENERAL COUNSEL, ZIPPLY FIBER

CERTIFICATION OF COMPLIANCE WITH CONDITIONS AND EFFECTIVE DATE:

I certify that I have received confirmation that: (1) the Franchisee returned a signed copy of this Franchise to the City Council in accordance with this Franchise; (2) the Franchisee has presented to the City acceptable evidence of insurance and security as required in this Franchise; and (3) the Franchisee has paid all applicable processing costs set forth in the Franchise.

The effective date of this Franchise Ordinance is September 13, 2023

By:

Debra Bark

Printed Name:

DEBRA BARKHAM

Title:

CITY CLERK, CITY OF PROCO, WA

AGENDA REPORT

FOR: City Council August 30, 2023
TO: Adam Lincoln, City Manager City Council Regular Meeting: 9/5/23
FROM: Eric Ferguson, City Attorney
City Manager
SUBJECT: Ordinance No. 4681 - Ziplly Fiber Franchise Agreement

I. REFERENCE(S):

Ordinance/Franchise Agreement

II. ACTION REQUESTED OF COUNCIL / STAFF RECOMMENDATIONS:

MOTION: I move to adopt Ordinance No. 4681, approving a non-exclusive franchise to construct, install, maintain, repair, or remove fiber optic cables within the public ways of the City of Pasco and, further, authorize publication by summary only.

III. FISCAL IMPACT:

Undetermined

IV. HISTORY AND FACTS BRIEF:

For the past several months, the City of Pasco and Ziplly Fiber, LLC (Ziplly) have been involved in extensive negotiations for Ziplly to be able to obtain a franchise agreement to allow them to place fiber-optic facilities in the City's rights-of-way (ROW). After some initial discussion with the applicant, it became clear that Ziplly intended to apply for a full franchise agreement for the use of the City's ROW's.

Subsequently, an initial draft was forwarded to the appropriate departments for review. Due to the numerous challenges incurred with the implementation of fiber-optic facilities in both Kennewick and Richland, City staff felt it was imperative that the City maintain the ability to closely monitor implementation in Pasco to avoid issues with other services (e.g., irrigation, permitting, etc.).

Multiple meetings over several months have taken place both internally with City staff, between legal counsels for the City and Ziplly, and with the applicant's staff and upper management, which included the CEO of Ziplly, as well as the City Manager and the Mayor.

In short, while the negotiation process has been difficult at times, the proposed draft franchise agreement has been extensively drafted and reviewed to attempt to address potential issues with implementation of fiber-optic facilities in the City of Pasco and to meet the needs of the applicant to be able to provide their services to the residents of Pasco.

Staff presented the initial proposed franchise agreement to Council at the July 24, 2023, Workshop and stated that there would be additional changes before coming back for final approval. The proposed changes were significant, and staff wanted returned to the August 28th Workshop to answer Council questions prior to coming back for final approval on September 5th Regular Meeting.

V. DISCUSSION:

Staff is recommending passage of the ordinance related to a non-exclusive franchise agreement Ziplly Fiber for fiber optic cables within the public rights-of-way in the City of Pasco.