

ORDINANCE BILL NO. 5 FOR 2024

ORDINANCE NO. 1328

AN ORDINANCE GRANTING TO ZIPLY FIBER PACIFIC, LLC A NONEXCLUSIVE FRANCHISE FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES WITHIN THE CITY OF SWEET HOME, AND STATING AN EFFECTIVE DATE

WHEREAS, Ziplly Fiber Pacific, LLC, hereinafter referred to as "Grantee", seeks to provide telecommunications services within the City of Sweet Home (*City*), Oregon (*State*); and

WHEREAS, Grantee has applied for a telecommunications franchise, and the City of Sweet Home (*City*) has reviewed said application and has determined that it meets all necessary requirements subject to the terms and conditions stated herein;

NOW, THEREFORE,

THE CITY OF SWEET HOME DOES ORDAIN AS FOLLOWS:

The City hereby ordains that it is in the public interest to grant Ziplly Fiber Pacific, LLC a Franchise to operate a telecommunication system pursuant to the terms and conditions contained herein.

Section 1. The City intends, by the adoption of this franchise, to encourage the continued development and operation of telecommunications facilities within the City of Sweet Home (*city*). This Ordinance will be known as the Ziplly Fiber Pacific and Ziplly Wireless Telecommunications Franchise Ordinance. Within this document, it will also be referred to as "this Franchise" or "the Franchise".

Section 2. Grant of Franchise. The City hereby grants to Grantee, a nonexclusive franchise to use the public rights of way within the city to provide telecommunications services, subject to the provisions of the Sweet Home Municipal Code or as hereafter enacted or amended. Nothing in this Franchise shall limit the rights of Grantee to provide telecommunications services under ORS 759.005.

Section 3. Term. The term of this Franchise will be for ten (10) years, commencing with the effective date of this Ordinance.

Section 4. Franchise Area. The Grantee is authorized by this Franchise to make reasonable and lawful use of the public rights of way within the boundaries of the City of Sweet Home or as these boundaries may be extended in the future.

Section 5. Franchise Fee. As consideration for the use of the City's rights of way, Grantee will remit to the City a franchise fee of seven percent (7%) of gross revenues from the delivery of services taxable under ORS 221.515 within the corporate limits of the City. Grantee's franchise fee payments to the City will be due quarterly within (30) days following

the end of each quarter, defined as the last day of March, June, September and December. Each payment will be accompanied by a statement as to the manner in which the franchise fee is calculated. The Grantee will provide, and at no cost to the City, any additional reports or information it deems necessary, in its sole discretion, to verify the accuracy of the calculation of the franchise fee by the Grantee. Such information may include, but is not limited to: chart of accounts, total revenues by categories and dates, list of products and services, narrative documenting calculations, details on number customer within the City limits, or any other information needed for the City to easily verify compliance.

Within thirty (30) days after the termination of this Franchise, compensation will be paid for the period elapsing since the end of the last quarter for which compensation has been paid. In the event any payment due quarterly is not received within thirty (30) days from the end of the preceding quarter, or is underpaid, Grantee will pay in addition to the payment, or sum due, interest at a rate no higher than the current legal interest rate on judgments in the State, calculated from the date the payment was originally due until the date the City receives the payment. Additionally, if any payment becomes ninety (90) days in arrears, a nine percent (9%) penalty will be applied.

Section 6. Municipal Code, Charter and General Ordinances Apply.

- A. Unless the context requires otherwise or expressly otherwise defined herein, words and phrases used in this Franchise shall have the same meaning as defined in the City Municipal Code. All applicable provisions of the City Municipal Code are incorporated by reference and made a part of this Franchise, specifically including the City's fee schedule as adopted by the City Council. In the event of any inconsistencies between the terms of this Franchise and the Code, this Franchise shall control. The Charter of the City of Sweet Home, Oregon, and ordinances, resolutions, codes, and regulations of the City now in effect or adopted in the future, are incorporated by reference, and made a part of this Franchise. Nothing in this Franchise shall be deemed to waive the requirements of the various ordinances, resolutions, codes and regulations of the City.
- B. Other than City Right-of-Way Permits, payment of the franchise fee shall not exempt Grantee from the payment of any license fee, permit fee, tax, or charge on the business, occupation, property, or income of Grantee that may be lawfully imposed by the City or any other taxing authority.

Section 7. Indemnity.

A. Grantee agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property directly by reason of any negligent construction, excavation or any other act done under this Franchise, by or for Grantee, its officers, agents or employees, or by reason of any neglect or omission of Grantee to keep its Facilities in a safe condition, but not to the extent that such casualty or accident is directly caused by negligence or willful misconduct of the City, its officers, agents or employees or any third party. The City shall provide Grantee

with prompt notice of any such claim, which Grantee shall defend with counsel of its own choosing. No settlement or compromise of any such claim will be done by the Grantee without the prior written approval of the City. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

B. Grantee also shall indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the City Rights-of-Way in a timely manner, when required to do so, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

Section 8. Assignment.

A. All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors, assigns of, and independent contractors of the Grantee, and all rights and privileges, as well as all obligations and liabilities of the Grantee shall inure to its successors, assignees and contractors equally as if they were specifically mentioned herein wherever the Grantee is mentioned.

B. This Franchise shall not be assigned or otherwise alienated without the express prior consent of the City by ordinance. No transfer shall be approved unless the assignee has the legal, technical, financial, and other requisite qualifications to comply with the terms of this Franchise. In the event such a transfer, assignment, or disposal of franchisee's ownership is approved by the Oregon Public Utilities Commission ("OPUC"), the new franchisee shall be deemed qualified, and the City will be deemed to have consented to such transfer. Grantee will provide City with a copy of any such approval.

C. In the case of an assignment or transfer not subject to OPUC approval, Grantee and any proposed assignee or transferee shall provide and certify the following to the City not less than sixty (60) days prior to the proposed date of transfer: (a) complete information setting forth the nature, term and conditions of the proposed assignment or transfer; and (b) all information required by the City of an applicant for a franchise with respect to the proposed assignee or transferee.

D. In the case of an assignment or transfer not subject to OPUC approval, prior to the City's consideration of a request by Grantee to consent to a Franchise assignment or transfer, the proposed Assignee or Transferee shall file with the City a written promise to unconditionally accept all terms of the Franchise, effective upon such transfer or assignment of the Franchise. The City is under no obligation to undertake any investigation of the transferor's state of compliance and failure of the City to insist on full compliance prior to transfer does not waive any right to insist on full compliance thereafter.

Section 9. Insurance.

A. Grantee will maintain in full force and effect the following liability insurance policies that protect the Utility Operator and the City, as well as the City's officers, agents, and employees:

1. Comprehensive general liability insurance with limits not less than:

- i. Five million dollars (\$5,000,000.) for bodily injury or death to each person;
 - ii. Five million dollars (\$5,000,000) aggregate including collapse, explosions, underground hazards and products completed operations.
2. Commercial automobile liability insurance for owned, non-owned and hired vehicles with a limit of three million dollars (\$3,000,000) combined single limit.
3. Worker's compensation within statutory limits and employer's liability with limits of not less than one million dollars (\$1,000,000).
4. Liability insurance will name as additional insured the City and its officers, agents, and employees. Additional insured coverage will be for both on-going operations and products and completed operations, on forms acceptable to the City. Coverage will be Primary and Non-Contributory. Waiver of Subrogation endorsement, in a form acceptable to the City, will be provided for general liability and worker's compensation. Grantee shall furnish acceptable insurance certificates to City with original endorsements for each insurance policy signed by a person authorized by that insurer to bind coverage on its behalf.

B. The limits of the insurance will be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon (*State*). The insurance will be without prejudice to coverage otherwise existing. The coverage must apply as to claims between insureds on the policy. The insurance will not be canceled or materially altered without thirty (30) Days prior written notice first being given to the City. If the insurance is canceled or materially altered, the Utility Operator will obtain a replacement policy that complies with the terms of this section and provide the City with a replacement certificate of insurance. The Utility Operator will maintain continuous uninterrupted coverage, in the terms and amounts required.

C. The Grantee will maintain on file with the City a certificate of insurance certifying the coverage required above.

Section 10. Performance Surety.

Upon the effective date of this Agreement, the Licensee will 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 sum of Ten Thousand Dollars (\$10,000), conditioned that the Licensee will well and truly observe, fulfill, and being sufficient to assure proper restoration of any street, sidewalk or other surface disturbed by Grantee, their representative or contractor. Licensee will pay all premiums charged for the bond and will keep the bond in full force and effect at all times throughout the term of the Agreement, including, if necessary, the time required for removal of all of Licensee's Facilities installed in the Public Rights of Way. The Bond may be released on the 5-year anniversary of this agreement at the sole discretion of the City, provided the Grantee has demonstrated the ability to comply with utility construction requirements. The bond will contain a provision that it will not be terminated or otherwise allowed to expire without thirty days prior written notice first being given to the City. The bond will be reviewed and approved as to form by the City Attorney.

City may, in the event of any construction which is likely to be substantially greater than \$10,000, or in the event the City's cost to complete or repair such construction upon Grantee's failure to perform the same would be greater than \$10,000, as reasonably determined by the City, require the amount of the performance bond to be increased. The performance bond is subject to increase each time Grantee applies for permits to perform work within the City. Grantee will provide to City all necessary documentation demonstrating Grantee's cost estimation in a format reasonable acceptable to the City.

Section 11. Sale of subscriber lists prohibited. Except as otherwise expressly permitted by law, the Grantee will not sell, or otherwise make available any list which identifies subscribers by name or address, to any person, agency, or entity, except as needed to maintain current services or implement new services to subscribers in connection with Grantee's services.

Section 12. Revocation or Termination. The City may, upon thirty (30) days' prior written notice, terminate or revoke the franchise granted pursuant to this Ordinance for any of the following reasons ("Default"):

1. Violation of any of the material provisions of this Franchise;
2. Misrepresentation in the Franchise application or a rights of way construction application;
3. The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City.
4. Failure to pay taxes, compensation, fees or costs due to the City after final determination by the City of the taxes, compensation, fees or costs;
5. Failure to restore the ROW as required by this Ordinance or other applicable State and local laws, ordinances, rules and regulations;
6. Failure to comply with technical, safety and engineering standards related to Work in the ROW; or
7. Failure to obtain or maintain any and all licenses, permits, certifications and other authorizations required by State or federal law or City Code for the placement, maintenance or operation of the Utility Facilities.

If, within the thirty-day notice period, Grantee cures the Default or commences to cure a Default that cannot reasonably be cured within thirty days of the notice, the notice of Default shall be deemed withdrawn and the Franchise shall not terminate. Any termination or revocation of this Franchise shall not restrict or modify Grantee's ability to provide telecommunications services under ORS 759.005.

Section 13. Franchise Acceptance. Within thirty (30) days of the passage of this Ordinance by City Council, Grantee will file with the City certificates of insurance and an unconditional written statement accepting the terms and conditions of this Franchise grant. Failure to fulfill this requirement will nullify and void this Ordinance, and any and all rights of Grantee to own or operate a telecommunications facility within the Franchise Area under this Ordinance will be of no force or effect.

Section 14. Franchise Nonexclusive. The Franchise hereby granted is not exclusive and will not be construed as any limitation on the right of the City to grant rights, privileges

and authority to other persons or corporations or to itself to make any lawful use of the City's rights of way.

PASSED by the Council and approved by the Mayor this 22nd day of October, 2024.

Mayor

ATTEST:

City Manager Pro Tem – Ex Officio City Recorder