

COUNCIL COMMUNICATION

Meeting Date: July 27, 2010	1 st Reading _____ 2 nd Reading _____	Legal Review:	Work Plan # 47	Agenda Location: Consent Calendar	Agenda Item: 8B
Subject: A RESOLUTION AUTHORIZING A NON-EXCLUSIVE RIGHT-OF-WAY USE AGREEMENT BETWEEN THE CITY OF THORNTON AND ZAYO BANDWIDTH, LLC.					
Prepared by: Darrell Alston/ Andrea Short		Approved by: Jack Ethredge		Ordinance previously introduced	
Reviewed by: Bud Elliot		Presented by: Bud Elliot, Deputy City Manager - Infrastructure		by: _____	

KEY CONSIDERATIONS:

- City Code requires communication service companies wishing to place its facilities within the City's right-of-way to obtain permission through a Non-Exclusive Right-of-Way Use Agreement (Use Agreement).
- Zayo Bandwidth, LLC (Zayo) is currently installing conduit and fiber-optic cable in the Denver-metro area to provide bandwidth infrastructure for future communication service providers.
- Zayo's path for installation of conduit and fiber-optic cable is north on Washington Street from south of 83rd Drive through 104th Avenue.
- The City has existing fiber optic conduit on Washington Street between 83rd Drive and 97th Avenue with excess capacity for installation of additional fiber-optic cable.
- Zayo wishes to use excess capacity in the City's conduit on Washington Street to install privately-owned fiber-optic cable.
- In exchange for use of the City's conduit, Zayo will install separate conduit and fiber-optic cable on Washington Street between 97th Avenue and 104th Avenue for exclusive use by the City.
- The initial term of the Use Agreement is for ten years. The Use Agreement is automatically renewed for an additional ten years unless either party notifies the other party through 45 days written notice of its intention to terminate the Use Agreement.
- In the event of termination or non-renewal of the Use Agreement, ownership of Zayo's fiber-optic cable installed in the City's conduit will revert to the City if the cable is not removed within 60 days of termination. Ownership of conduit and fiber-optic cable installed by Zayo exclusively for use by the City shall revert to the City immediately upon termination or non-renewal of the Use Agreement.

BUDGET/STAFF IMPLICATIONS:

- None.

RECOMMENDATION:

- Staff recommends approval of the resolution to set forth the terms and conditions for Zayo Bandwidth, LLC to use City right-of-way and City-owned conduit to establish a bandwidth infrastructure system.

HISTORY: (includes previous City Council action)

- The right-of-way use agreement is tied to City Council Work Plan item #47, Goal II – Economic Development and Job Creation, Action 2B – Pursue public/private partnerships to install conduit and fiber along arterial streets for City and private use.

RESOLUTION

A RESOLUTION APPROVING A NON-EXCLUSIVE RIGHT-OF-WAY USE AGREEMENT BETWEEN THE CITY OF THORNTON AND ZAYO BANDWIDTH, LLC.

WHEREAS, Zayo Bandwidth, LLC, a Delaware limited liability company ("Zayo") is a bandwidth provider that wishes to install, maintain and operate a fiber optic network and associated appurtenances within the City of Thornton ("City") by placement of those facilities in the City's rights-of-way; and

WHEREAS, Zayo has been granted a Certificate of Public Convenience and Necessity from the Public Utilities Commission of the State of Colorado authorizing its operations within the state on April 8, 2009; and

WHEREAS, pursuant to the Thornton City Code, Zayo must also obtain permission to use the City's rights-of-way and to do so upon specific terms and conditions which are incorporated into a right-of-way use agreement, attached hereto and incorporated herein by this reference as Exhibit A; and

WHEREAS, the right-of-way use agreement is necessary to ensure that the use of the public rights-of-way will not adversely affect the public health, safety and welfare and that such use will be consistent with other uses in the public rights-of-way.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF THORNTON, COLORADO, AS FOLLOWS:

The Non-Exclusive Right-Of-Way Use Agreement, Exhibit A, is hereby approved and the City Manager is hereby authorized to execute on behalf of the City, and the City Clerk to attest said agreement.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Thornton, Colorado, on _____, 2010.

CITY OF THORNTON, COLORADO

Erik Hansen, Mayor

ATTEST:

Nancy A. Vincent, City Clerk

NON-EXCLUSIVE RIGHT- OF- WAY USE AGREEMENT

THIS NON-EXCLUSIVE RIGHT-OF-WAY USE AGREEMENT (“Use Agreement”) is entered into by and between the **CITY OF THORNTON**, a Colorado municipal corporation (the “City”), and **ZAYO BANDWIDTH, LLC**, a Delaware limited liability company (“Zayo”), on this _____ day of _____, 2010. The City and Zayo hereafter may be referred to collectively as “Parties”, or individually as “Party.”

Recitals

A. Zayo, together with its affiliates, is a fiber-based bandwidth provider, and wishes to construct, install, maintain and operate a fiber optic network and associated appurtenances within the City, in accordance with the drawings attached hereto and incorporated herein by this reference, as Exhibit “A”, by placement of its facilities in some of the City’s rights-of-way.

B. Zayo is allowed under state law to place facilities in the City’s rights-of-way upon reasonable municipal regulations concerning time, location, manner and manner of attachment, installation and maintenance of Zayo’s facilities placed in the right-of-way over time.

C. This agreement is entered into by the Parties with the intent to obtain the City’s consent and authorize Zayo to install its facilities throughout the City, in accordance with Exhibit “A”, and upon the terms and conditions contained herein.

NOW THEREFORE, in consideration of the Parties sharing use of specific facilities to the Parties mutual benefit and subject to the following terms and conditions, the Parties hereby agree as follows:

1. **Definitions.** The following definitions shall apply generally to the provisions of this Use Agreement.

City means the City of Thornton and all areas within its boundaries, as those boundaries may change from time to time.

Facilities mean any equipment and materials including cable, conduit and pull boxes owned by either party necessary to provide services.

Rights-of-Way means the space in, upon, above, along, across, and over the public streets, roads, lanes, courts, ways, alleys, boulevards, sidewalks, and bridges, including all dedicated easements or public ways, as the same now or may hereafter exist, that are under the jurisdiction of the City.

2. **Term.** This Use Agreement shall be in effect for an initial term of ten (10) years from the Effective Date of this Use Agreement and shall automatically renew for an additional ten (10) year term so long as this Use Agreement is not terminated as provided herein.

3. **Scope of Use Agreement.**

A. Rights Granted. By virtue of this Use Agreement, the City expressly provides non-exclusive consent to Zayo to place its facilities in the City’s rights-of-way within the City in accordance with the drawing attached as Exhibit “A”. Nothing in this Use Agreement shall be deemed to grant, convey, create or vest in Zayo a real property interest in land, including any fee, leasehold interest or easement. Any work performed pursuant to the rights granted under this Use Agreement may be subject to the reasonable prior review and approval of the City by virtue of any applicable construction permits required. To the extent that any provision of this Use Agreement conflicts with any City Ordinance of general applicability,

the provisions of the Ordinance shall control unless specifically noted otherwise herein.

- B. Joint Use of Conduits. The City hereby grants to Zayo the non-exclusive use of its conduit along Washington Street between 83rd Avenue and 97th Avenue ("Existing Conduit"). Zayo may install its 144 count fiber cable in the Existing Conduit for its use ("New Zayo Cable"). In exchange for the use of the Existing Conduit, Zayo, or its agents, representative or subcontractors, will build and install three conduits, along Washington Street between 97th Avenue and 104th Avenue, consisting of two (2) 2 ¼" HDPE type conduits for Zayo's use ("New Zayo Conduit") and one (1) 3" HDPE type conduit for the exclusive use by the City ("New Conduit"). Zayo will also install its 24 count fiber cable ("New City Cable") in the New Conduit to be used exclusively by the City. The City agrees that it shall only use the New Conduit and New City Cable for its governmental needs, and if the City wishes to allow any non-government entity to place its fibers within the New Conduit, Zayo shall be able to approve or disapprove such placement in its sole discretion. Zayo will also complete any splicing at 97th Avenue and Washington Street that may be required to tie the New City Cable in to the existing City fiber. Zayo shall coordinate with the City on work requiring access into the City's facilities. In conjunction with the construction and installation of the New Conduit and the New City Cable, Zayo, or its agents, representatives or subcontractors will replace pull boxes and handholes, as necessary to accommodate the New City Cable. Installation of the New Conduit and the New City Cable shall be completed by November 1, 2010, or the City may declare default as provided herein.
- C. Maintenance. Zayo shall take on all locate responsibility for notification of the route where its facilities are installed, including the Existing Conduit, the New Conduit or New Zayo Conduit ("Route") as long as Zayo has cable within the Route. Zayo shall have a contractor in charge of emergency restoration and repair in the event of damage to the New Conduit or New Zayo Conduit, and with the City's permission, may repair the Existing Conduit. Each party shall have the right to repair its fiber cables within the shared Route.
- D. Compliance with Law. Zayo agrees to comply with all laws in the exercise and performance of its rights and obligations under this Use Agreement, including any federal, state or local law, rule or regulation in connection with the placement of Zayo's facilities within the City. Zayo recognizes and agrees that it is subject to the City's police power regarding adoption of ordinance necessary for the health and safety of citizens and for the general public welfare.
- E. Obtaining Required Permits.
- (1) Zayo agrees that any and all necessary construction permits for installation of Zayo's Facilities in connection with the installation work authorized by this Use Agreement shall be obtained and shall be applicable during the construction phase associated with such installation work. Any further expansion of Zayo's Facilities shall be in accordance with Subsection H, herein and Zayo agrees to obtain any and all necessary construction permits for such expansion.
 - (2) Zayo agrees that upon completion of the installation of the facilities, Zayo shall provide the City suitable documentation showing the exact location

- of the facilities in the public rights-of-way; any construction permits obtained by Zayo will satisfy this provision.
- F. **Uses Restricted.** This Use Agreement is authorization for Zayo to place Facilities in the rights-of-way and is not intended to provide any rights to any third parties in any of the Facilities or does not create a right to install any different or additional facilities in the rights-of-way by any third party without express permission of the City. Under no circumstances is the closing, excavation or opening of any public rights-of-way authorized or permitted under this Use Agreement unless it is in connection with the work associated with this Use Agreement or is in connection with the construction permit issued with respect to the rights granted under this Use Agreement.
- G. **Relocation.** If relocation of the Facilities is requested by the City or a third party, then the City shall bear any such costs as to Existing Conduit and New Conduit.
- H. **Expanded Use.** Zayo may place additional conduit or associated facilities within the City in accordance with applicable construction permits and permissions as required by the City and further, in accordance with the terms and conditions of this Use Agreement.
- I. **Title.** Upon the expiration of the Term or the earlier termination of this Use Agreement, title in the New Conduit and the New City Cable shall revert to the City; provided, however, that Zayo shall retain the right to remove the New Zayo Cable within sixty (60) days of receiving a written notification of such expiration or termination. Failure to remove the New Zayo Cable within such sixty (60) days shall result in title reverting to City as to the New Zayo Cable. Title in the New Zayo Conduit shall remain with Zayo upon negotiation and execution of any type of applicable further use agreement with the City.
- J. **Fees.** The Parties agree that in consideration of the shared use, the City will not impose any fee related to Zayo's occupation of rights-of-way; however, all other applicable permitting, construction, or inspection fee as well as any other applicable charges imposed as a result of Zayo's activity within the City will be imposed.
4. **Indemnification.** Zayo agrees to indemnify, defend, protect, and hold harmless the City, its officers, and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, all costs and cleanup actions of any kind, and all costs and expenses incurred in connection therewith, including reasonable attorney's fees and costs of defense (collectively, the "Losses") directly or proximately resulting from Zayo's activities undertaken pursuant to this Use Agreement, except to the extent arising from or caused by the negligence or willful misconduct of the City, its officers, employees, agents, or contractors.
5. **Insurance.** Zayo agrees to procure and maintain in force during the term of this Use Agreement, at its own cost, the following coverages:
- A. Workers' Compensation Insurance as required by the Labor Code of the State of Colorado and Employer's Liability Insurance. Evidence of qualified self-insured status may be substituted.

B. Commercial General Liability Insurance (**MINIMUM LIMITS**)

(1)	Each Occurrence	\$2,000,000
(2)	Products/Completed Operations Aggregate	\$2,000,000
(3)	Personal and Advertising Injury	\$2,000,000
(4)	General Aggregate	\$2,000,000

The policy shall include coverage protecting against bodily injury, property damage, and personal injury claims arising from the exposures of (1) premises-operations; (2) products and completed operations including materials designed, furnished, and/or modified in any way by Service Provider; (3) independent subcontractors; (4) contractual liability risk covering the indemnity obligations set forth in this Use Agreement; and, (5) where applicable, liability resulting from explosion, collapse, or underground exposures.

If the above insurance is written on a claims-made form, it shall continue for three (3) years following termination of this Use Agreement. The insurance shall provide for a retroactive date of placement prior to or coinciding with the effective date of this Use Agreement.

C. Professional Liability Insurance (**MINIMUM LIMITS**) for all engineering services performed pursuant to this Use Agreement.

(1)	Each Claim	\$1,000,000
(2)	Aggregate	\$1,000,000

If the above insurance is written on a claims-made form, it shall continue for three (3) years following termination of this Use Agreement. The insurance shall provide for a retroactive date of placement prior to or coinciding with the effective date of this Use Agreement.

D. Automobile Liability Insurance with minimum combined single limits for bodily injury and property damage of not less than One Million Dollars (\$1,000,000) for any one occurrence. This insurance will insure against bodily injury and/or property damage arising out of the Service Provider's operation, maintenance, use, loading or unloading of any auto including owned, non-owned, hired, and employee autos.

E. Other insurance with varying limits which from time to time may reasonably be required by mutual agreement between the City and Zayo against other insurable hazards relating to the work to be done, as needed.

F. Zayo shall procure and maintain, and shall cause any subcontractor of Zayo to procure and maintain, the minimum insurance coverages listed herein. Such coverages shall be procured and maintained with forms and insurers acceptable to the City. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by Zayo pursuant to Section. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

G. Zayo shall name Thornton, its officers, agents, contractors, and employees as additional insureds with respect to the liability coverage in paragraph (b) above. A Certificate of Insurance shall be completed by Zayo's insurance agent(s) as

evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the City prior to commencement of the scope of work identified in this Use Agreement. The Certificate(s) shall identify this Use Agreement and shall provide that the coverages afforded under the policies shall not be canceled, terminated or materially changed until at least 30 days prior written notice has been given to the City. The completed Certificate of Insurance shall be mailed to the City at the address specified in Section 8 below.

- H. Failure on the part of Zayo or subcontractor to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of Agreement upon which the City may immediately terminate this Agreement, or at its discretion the City may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City shall be repaid by Zayo to the City upon demand, or the City may offset the cost of the premiums against any monies due to contractor from the City.
 - I. The City reserves the right to request and receive a certified copy of any policy and any endorsement thereto. Zayo agrees to execute any and all documents necessary to allow the City access to any and all insurance policies and endorsements pertaining to this particular Project.
 - J. Every policy required above shall be primary insurance and any insurance carried by the City, its officers, or its employees shall be excess and not contributory insurance to that provided by the Zayo. Zayo shall be solely responsible for any deductible losses under the policies required above.
 - K. Zayo shall not be relieved of any liability, claims, demands, or other obligations assumed pursuant to this Use Agreement by reason of its failure to procure and maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amounts, durations, or types.
6. **Severability of Interest.** Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the City. "Cross liability," "severability of interest," or "separation of insureds" clauses shall be made a part of the commercial general liability and commercial automobile liability policies.
7. **Governmental Immunity.** The City's execution of this Use Agreement is done in the furtherance of the general public's health, safety, and welfare, and no immunity is waived thereby. The parties hereto understand and agree that the City is relying on, and does not waive or intend to waive by any provision of this Use Agreement, the monetary limitation (presently \$150,000 per person and \$600,000 per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. §24-10-101, et. seq., as from time to time amended, or otherwise available to the City, its officers, agents, and employees.
8. **Limitation of Liability.** The Parties liability under this Use Agreement shall be limited to direct damages incurred. Neither Party shall be liable to the other for any indirect, consequential, special, incidental, reliance or punitive damages of any kind or nature

whatsoever. This limitation shall not apply to any claims arising out of any indemnification obligations under Section 4.

9. Notices.

A. Form of Notice and Notice Address. All notices which shall or may be given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by overnight deliver service as just described, addressed as follows:

If to the City:

City of Thornton

City Manager
9500 Civic Center Drive
Thornton, Colorado 80229

If to Zayo:

Zayo Bandwidth, LLC
Christopher P. Yost
400 Centennial Pkwy., Suite 200
Louisville, Colorado 80027

B. Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next day in the case of facsimile, email, or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

C. Emergency Notice. Notwithstanding the above, as applicable, the Parties agree Zayo shall have a right to provide notice for a situation that requires immediate maintenance and repair by contacting the City at 720-977-6500 (M-F, between 8:AM and 5:PM), or 303-263-4355 (at all other times), prior to undertaking repairs.

10. Notice; Rights of Termination. This Use Agreement may be terminated by either party upon forty-five (45) days prior written notice to the other party upon a default of any covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or, if such default is not curable within forty-five (45) days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice.

A. Except as expressly provided herein and subject to the City's police power to protect the public health and safety, the rights granted under this Use Agreement

are irrevocable during the term. Notwithstanding the provisions regarding the opportunity to cure defaults, the City may terminate this Use Agreement if (a) Zayo becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt; (b) Zayo practices any fraud or deceit in its conduct or relations with the City under this Use Agreement; or (c) the City condemns substantially all of Zayo's conduit and cable within the City by lawful exercise of eminent domain. If Zayo is involved in a voluntary or involuntary bankruptcy under the Bankruptcy Act which results in Zayo proceeding to liquidation without a purchaser assuming this Use Agreement, the ownership of all facilities placed in the public rights-of-way after the execution of this Use Agreement, and any related equipment or appurtenances shall automatically transfer to the City.

- B. If Zayo chooses to no longer use the Existing Conduit or chooses not to install its cable in the Existing Conduit, Zayo shall notify the City in writing, in accordance with Section 8 herein, that at time certain Zayo will remove its cable from the Existing Conduit at no cost to the City. Such decision shall not affect any other obligation Zayo has agreed to undertake pursuant to Section 3(B).

11. **Miscellaneous Provisions.** The provisions that follow shall apply generally to the obligations of the parties under this Use Agreement.

- A. Non-Assignment. This Use Agreement shall not be assigned by Zayo without the prior written consent of the City. Notwithstanding the foregoing, an "assignment" shall not include (i) a transfer to an affiliate, subsidiary or parent of Zayo, (ii) a transfer pursuant to a purchase of substantially all of Zayo's assets, or (iii) a transfer pursuant to a change of control, merger, consolidation or reorganization.
- B. Nonexclusive Use. Zayo understands that this Use Agreement does not provide Zayo with exclusive use of the public right-of-way or any Municipal Facility and that City shall have the right to permit other providers of information or communications services to install equipment or devices in the public right-of-way and on municipal facilities.
- C. Severability of Provisions. If any one or more of the provisions of this Use Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Use Agreement and shall not affect the legality, validity, or constitutionality of the remaining portions of this Use Agreement. Each party hereby declares that it would have entered into this Use Agreement and each provision hereof irrespective of the fact that any one or more provisions be declared illegal, invalid or unconstitutional.
- D. Venue; Governing Law. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of Colorado, without reference to its conflict of law principles. Venue for any legal action brought hereunder shall be in the District Court, County of Adams, State of Colorado.
- E. Waiver of Breach. The waiver by either party of any breach or violation of any Provision of this Use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other Provision of this Use Agreement.

- F. No Third-Party Beneficiaries. The City and Zayo shall not be obligated or liable under the terms of this Use Agreement to any person or entity not a party hereto. Nothing expressed or to be implied by this Use Agreement is intended or shall be construed to give any person other than the parties hereto any legal right, remedy, or claim under or in respect to this Use Agreement or any covenants, conditions, and provisions hereof.

- G. Entire Agreement. This Use Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Use Agreement, which are not fully expressed herein.

IN WITNESS WHEREOF, and in order to bind themselves legally to the terms and conditions of this Use Agreement, the duly authorized representative of the parties have executed this Use Agreement to be effective as of the date first written above.

CITY OF THORNTON

By: _____
Jack Ethredge, City Manager

ATTEST:

Nancy Vincent, City Clerk

APPROVED AS TO FORM:

Margaret Emerich, City Attorney

ZAYO BANDWIDTH, LLC

By: _____

Title:

STATE OF COLORADO)
) ss.
COUNTY OF _____)

Subscribed and sworn to before me this _____ day of _____, 2010,
by _____, as _____ of Zayo
Bandwidth, LLC.

Witness my hand and official seal

My commission expires: _____

Notary Public