

ORDINANCE SUMMARY BY TITLE ONLY FOR PUBLICATION PURPOSES
ORDINANCE NO. 1993

**AN ORDINANCE OF CITY OF DAYTON, WASHINGTON GRANTING TO
THE PORT OF COLUMBIA, A WASHINGTON MUNICIPAL CORPORATION,
THE NONEXCLUSIVE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE
TO LOCATE, CONSTRUCT, INSTALL, OWN, MAINTAIN, REPAIR, REPLACE,
EXTEND, OPERATE AND USE FACILITIES IN, UPON, OVER, UNDER,
ALONG, AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF
THE TRANSMISSION, DISTRIBUTION AND SALE OF FIBER OPTIC
TELECOMMUNICATIONS AND COMMUNICATIONS SERVICES**

The full text of Ordinance 1993 adopted the 11th day of October, 2022 is available for examination at the City Administrator/Clerk-Treasurer's Office, 111 S. 1st St., Dayton, WA during normal business hours, Monday – Friday, 7:00 a.m. to 4:00 p.m. Full text of the Ordinance shall be mailed upon request.

By: /s/ Zac Weatherford, Mayor

Attest: /s/ Debra Hayes, City Clerk

Approved as to form: /s/ Quinn Plant, City Attorney

Published:

The Times, 10/27/2022

ORDINANCE NO. 1993

AN ORDINANCE OF CITY OF DAYTON, WASHINGTON GRANTING TO THE PORT OF COLUMBIA, A WASHINGTON MUNICIPAL CORPORATION, THE NONEXCLUSIVE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO LOCATE, CONSTRUCT, INSTALL, OWN, MAINTAIN, REPAIR, REPLACE, EXTEND, OPERATE AND USE FACILITIES IN, UPON, OVER, UNDER, ALONG, AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF THE TRANSMISSION, DISTRIBUTION AND SALE OF FIBER OPTIC TELECOMMUNICATIONS AND COMMUNICATIONS SERVICES

WHEREAS, the Port of Columbia, a Washington municipal corporation, has filed with the City of Dayton, State of Washington (the "City") a written application for a Franchise to locate, install, construct, operate, maintain telecommunication and fiber optic lines and appurtenances and to use such works, underground and overhead lines, cables, equipment, pedestals, antenna and appurtenances over, under, along and across all of City's rights of way and public property in the City for the purposes of the transmission, distribution and sale of wireline and wireless telecommunications and communications services;

WHEREAS, the City Council has found it desirable for the welfare of the City and its residents that such non-exclusive franchise be granted to the Port of Columbia.

NOW, THEREFORE, the City of Dayton, Washington does hereby ordain as follows:

SECTION 1.0 DEFINITIONS

For the purposes of this Franchise the following terms, phrases, words and their derivations shall have the meaning given in this Section. 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 shall be given their common and ordinary meaning.

1.1 Franchisee. "Franchisee" means Port of Columbia, a Washington municipal corporation.

1.2 City. "City" means City of Dayton, a municipal corporation of the State of Washington, and its respective successors and assigns.

1.3 Days. "Days" means business days.

1.4 Effective Date. "Effective Date" means the date of legal publication of this Ordinance, upon which the rights, duties and obligations of this Franchise shall come into effect, and the date from which the time requirement for any notice, extension and/or renewal shall be measured.

1.5 Facilities. "Facilities" means, collectively, any and all transmission and distribution systems and appurtenances owned by the Franchisee, now and in the future in the Franchise Area, including but not limited to, poles, wires, fiber lines, pipes, conduits, vaults, and other appliances and conductors for such Telecommunications and fiber optic systems.

1.6 Franchise. "Franchise" means the non-exclusive grant by the City of rights, privileges and authority embodied in this Ordinance.

1.7 Franchise Area. “Franchise Area” means the surface and space above and below all rights-of-way for:

- (i) public roads, streets, avenues, alleys, bridges, tunnels, easements, and highways of the City, as now laid out, platted, dedicated, acquired or improved within the present corporate limits of the City;
- (ii) public roads, streets, avenues, alleys, bridges, tunnels, easements, and highways that may hereafter be laid out, platted, dedicated, acquired or improved within the present corporate limits of the City and as such limits may be extended by annexation or otherwise during the term of this Franchise;
- (iii) all City-owned utility easements dedicated for the placement and location of various utilities, provided such easements would permit the Franchisee to fully exercise the rights granted under this Franchise within the area covered by the easement; and
- (iv) any other specifically designated City-owned property.

1.8 Maintenance, maintaining, or maintain. The meaning of the terms “Maintenance, maintaining, or maintain” includes, without limit, repairing, replacing, upgrading, examining, testing, inspecting, and removing the Franchisee Facilities, vegetation management, digging and excavating, and restoration of affected right-of-way surfaces.

1.9 Parties. “Parties” means City and the Franchisee collectively.

1.10 Party. “Party” means either City or the Franchisee individually.

1.11 Person. “Person” means a business entity or natural person.

1.12 Public Project. “Public Project” means any City or other government-funded capital improvement project on the Rights-of-way or City property within the Franchise Area.

1.13 Right-of-way. “Right-of-way” means the surface of and the space along, above, and below any street, road, highway, freeway, lane, sidewalk, alley, utility easement and/or right-of-way now or hereafter held or administered by the City.

1.14 State. “State” means the State of Washington.

SECTION 2.0 GRANT OF FRANCHISE

City hereby grants to the Franchisee the right, power, privilege and authority to enter upon all roads, rights of way, streets, alleys, highways, public places or structures, lying within the Franchise Area to locate, construct, operate and maintain its Facilities f within the Franchise Area.

2.1 Effective Date

This Ordinance is effective as of the date of approval, passage and publication as required by law.

2.2 Term

The rights, privileges and Franchise hereby granted to the Franchisee will extend for a term of 25 years from the Effective Date, and shall continue year-to-year thereafter, until it is otherwise renewed for another 25-year term, or terminated by either Party, with not less than 180 days prior written notice to the other Party.

2.3 Non-Exclusive Franchise

This Franchise is not an exclusive Franchise. This Franchise shall not prohibit the City from granting other franchises within the Franchise Area that do not unreasonably interfere with the Franchisee's rights under this Franchise.

2.4 Assignment Of Franchise

The Franchisee shall have the right to sell, transfer or assign its rights, benefits and privileges under this Franchise. Any assignee shall, within thirty (30) days of the date of any assignment, file written notice of the assignment with the City together with its written acceptance of all terms and conditions of this Franchise. As permitted by law and regulation, the Franchisee shall have the right, without notice to or consent of the City, to mortgage or hypothecate its rights, benefits and privileges in and under this Franchise as security for indebtedness.

2.5 Franchise Taxes, Fees and Costs

The Franchisee shall pay all permitting, license fees, costs and/or utility privilege taxes which it might be required to pay in connection with the issuance, maintenance, existence, continuation, or use of this Franchise, to the extent permitted by State law or the City ordinance now in effect or enacted during the term of this Franchise. The City reserves the right to designate the time and manner of payment of all fees, costs or taxes owed by the Franchisee in connection with this Franchise. Additionally, within 30 days following receipt of an invoice prepared by the City, the Franchisee shall reimburse the City for all administrative, legal, and other costs incurred by the City associated with the preparation, review, and approval of this Franchise ordinance. To the extent that any Franchise fees, taxes or other costs are imposed on the Franchisee, as specifically provided by RCW 35.21.860, the City may not impose a franchise fee or any other fee or charge of whatever nature or description upon revenues derived by the Port for use of the right-of-way.

SECTION 3.0 FRANCHISEE'S OPERATIONS AND MAINTENANCE

3.1 Compliance with Laws, Regulations, Codes and Standards

In carrying out any authorized activities under the privileges granted by this Franchise, the Franchisee shall meet accepted industry standards and codes and shall comply with all applicable laws, regulations and ordinances of any governmental entity with jurisdiction over the Franchisee's Facilities in the Franchise Area. This includes all applicable, laws, regulations and ordinances existing as of the Effective Date or may be subsequently enacted by any governmental entity with jurisdiction over the Franchisee's operations within the Franchise Area. The City shall have the right to make and enforce reasonable rules and regulations pertaining to the conduct of the Franchisee's operations within the Franchise Area. Prior to the adoption of any new rule, procedure or policy, the Franchisee may be provided a written draft document for comment with a response period of not less than thirty days.

3.2 Facility Location and Non-Interference

The Franchisee shall have the discretion to determine the placement of its Facilities within the Franchise Area, subject to the following non-interference requirements. All construction, installation, repair or relocation of the Franchisee's Facilities performed by the Franchisee in the Franchise Area will be done in such a manner as not to interfere with the construction and maintenance of other utilities, drains, drainage and irrigation ditches and structures, and City-owned property within the Franchise Area.

3.3 Facility Location Information

The Franchisee shall provide the City, upon the City's reasonable request, Facility location information in electronic or hard copy showing the location of its Facilities at specific locations

within the Franchised Area, to the extent such information is reasonably available. The Franchisee does not warrant the accuracy of any such Facility location information provided and, to the extent the location of Facilities is shown, such Facilities may be shown in their approximate location. With respect to any excavations within the Franchise Area undertaken by or on behalf of the Franchisee or the City, nothing stated in this Franchise is intended (nor shall be construed) to relieve either party of their respective obligations arising under the State one-call law with respect to determining the location of existing underground utility facilities in the vicinity of such excavations prior to commencing work.

3.4 Vegetation Management

The right of the Franchisee to maintain its Facilities shall include the right, as exercised in the Franchisee's professional discretion, to utilize an integrated vegetation management program to minimize the likelihood that encroaching (either above or below the ground) vegetation can interfere with or limit access to the Franchisee's Facilities or pose a threat to public safety and welfare. The Franchisee or its agents may accordingly remove or limit the growth of vegetation which encroaches upon its Facilities and distribution corridors within the Franchise Area.

3.5 Right Of Excavation

For the purpose of implementing the privileges granted under this Franchise, and after any required notification is made to the City, the Franchisee is authorized to make any necessary excavations in, under and across the streets, alleys, roads, rights of way and public grounds within the Franchise Area, provided that the Franchisee first obtains any necessary permits and/or land use authorizations. Such excavation shall be carried out with reasonable dispatch and with as little interference with or inconvenience to the public as may be feasible. The Franchisee shall remove all debris stemming from excavation and construction. The Right-of-way surface shall be restored by the Franchisee after excavation, in accordance with applicable City and Franchisee specifications.

3.6 Emergency Work

In the event of an emergency requiring immediate action by the Franchisee to protect its Facilities, or the property of the City or other persons in the Franchise Area, the Franchisee may immediately proceed with excavation or other Right-of-way work, with concurrent notice to the City to the extent possible.

SECTION 4.0 RESERVATION OF CITY'S RIGHTS AND POWERS

The City, in granting this Franchise, does not waive any rights which it may now have or may subsequently acquire with respect to road rights-of-way or other property of the City under this Franchise, and this Franchise shall not be construed to deprive the City of any such powers, rights or privileges which it now has or may hereafter acquire to regulate the use of and to control the City's roads, rights-of-way and other public property covered by this Franchise. Nothing in the terms of this Franchise shall be construed or deemed to prevent the City from exercising at any time any power of eminent domain granted to it under the laws of this state.

4.1 Necessary Construction/Maintenance By City

The construction, operation and maintenance of the Franchisee's Facilities authorized by this Franchise shall not preclude the City, its agents or its contractors, from grading, excavating, or doing other necessary road work contiguous to the Franchisee's Facilities, provided that the Franchisee shall be given not less than ten business days' notice of said work, and provided

further that the City, its agents and contractors, shall be liable for any damages, including any consequential damages to third parties, caused by said work to any installations belonging to the Franchisee.

4.2 Removal Of Abandoned Facilities

During the Term of this Franchise, or upon a revocation or non-renewal of this Franchise, the City may direct the Franchisee to remove designated abandoned Facilities from the Franchise Area at its own expense and as soon as practicable, but only where such abandoned Facilities constitute a demonstrated threat to public health and safety. If it becomes necessary for the City to remove the designated Facilities the City shall be paid the reasonable and actual costs of removal by the Franchisee.

4.3 Vacation Of Properties By City

If, at any time, the City shall vacate any road, right of way or other public property which is subject to rights granted by this Franchise, such vacation shall be subject to the reservation of a perpetual easement to the Franchisee for the purpose of operating and maintaining the Franchisee's Facilities on the affected property. The City shall, in its vacation procedure, reserve and grant said easement to the Franchisee for the Franchisee's Facilities and shall also expressly prohibit any use of the vacated properties which will interfere with the Franchisee's full enjoyment and use of said easement.

SECTION 5.0 RELOCATION OF FRANCHISEE'S FACILITIES

5.1 Public Project Construction

Whenever the City causes the construction of any Public Project and/or the alteration or improvement of any road, highway or Right-of-way within the Franchise Area, and such construction necessitates the relocation of the Franchisee's Facilities from their existing location to another location within the Franchise Area, such relocation will be at no cost to the City. City shall notify the Franchisee of any intended or expected requirement or request to relocate the Franchisee's Facilities as early as practicable, but not less than 120 days prior to any such relocation. After receipt of such notice, the Franchisee shall complete relocation of its Facilities at least ten days prior to commencement of the project or an agreed upon date by both parties. If any relocation to accommodate the City forces the Franchisee off of a Right-of-way then City will make a reasonable effort to accommodate said relocation on alternative public Right-of-way.

5.2 Public Project Related Relocation Costs

The City shall have no responsibility for the costs of the relocations described in Section 5.1 unless City has failed to provide the required advanced notice, then any and all reasonable excess costs caused by the failure to provide such notice shall be paid by the City. If the City requires the subsequent relocation of any the Franchisee Facilities previously relocated per Section 5.1, due to a Public Project within five years from the date of the initial relocation, the City shall bear the entire cost of such subsequent relocation. The City will provide Franchisee a copy of its plans for capital improvements of/for City-owned utilities and a copy of its six year road transportation improvement program.

5.3 Relocation Of Facilities Requested By Third Parties

If the Franchisee's Facilities within the Franchise Area are to be relocated at the request of or for the primary benefit of a third party (including compliance by such party with any condition or requirement associated with approvals or permits to be obtained pursuant to any

zoning, land use, construction or other development regulation), the City shall not require the Franchisee to relocate its Facilities until such time as the third party has entered into an agreement with the Franchisee for the up-front reimbursement of Facility relocation costs, as specified by applicable tariffs.

5.4 Availability of Other Funds

In the event federal, state or other funds are available in whole or in part for utility relocating purposes related to a Public Project, the City shall apply for such funds and the Franchisee will be reimbursed to the extent any such funds are actually obtained.

SECTION 6.0 INSURANCE AND INDEMNIFICATION

6.1 Insurance

Within ninety (90) days following the grant of a franchise, the Franchisee shall obtain, pay all premiums for and make available to the City at its request copies of the following insurance policies:

- (i)** A general comprehensive liability policy indemnifying, defending and saving harmless the City, its officers, boards, commissions, agents or employees from any and all claims by any person whatsoever on account of injury to or death of a person or persons occasioned by the operations of the Franchisee under the franchise herein granted, or alleged to have been so caused or occurred, with a minimum liability of One Million Dollars (\$1,000,000) per personal injury or death of any one person, and Two Million Dollars (\$2,000,000) for personal injury or death of any two or more persons in any one occurrence;
- (ii)** Property damage insurance for property damage occasioned by the operation of the Franchisee under the franchise herein granted, or alleged to have been so caused or occurred, with a minimum liability of One Million Dollars (\$1,000,000) for property damage to any one person and Two Million Dollars (\$2,000,000) for property damage to the property of two or more persons in any one occurrence;
- (iii)** All insurance policies called for herein shall be in a form satisfactory to the City and shall require thirty (30) days written notice of any cancellation to both the City and the Franchisee. The Franchisee shall, in the event of any such cancellation notice, obtain, pay all premiums for, and file with the City, written evidence of the issuance of replacement policies within thirty (30) days following receipt by the City or the Franchisee of any notice of cancellation.

6.2 Alternative Insurance

As an alternative to the Insurance obligations set forth in Section 6.1, Franchisee may provide the City with proof of its membership in a risk sharing pool authorized by and operating pursuant to Chapter 48.62, RCW.

6.3 Indemnification of the City

The Franchisee agrees to defend and indemnify the City, its appointed and elected officers and employees, from any and all liabilities, claims, causes of action, losses, damages and expenses, including costs and reasonable attorney's fees, that the City may sustain, incur, become liable for, or be required to pay, as a consequence of or arising from the construction, installation, maintenance, condition or operation of the Franchisee's Facilities in the Franchise Area; provided, however, that this indemnification provision shall not apply to the extent that said

liabilities, claims, damages and losses were caused by or result from the negligence of the City, its employees or agents.

6.4 Indemnification of the Franchisee

City agrees to defend and indemnify the Franchisee, its officers and employees, from any and all liabilities, claims, causes of action, losses, damages and expenses, including costs and reasonable attorney's fees, that the Franchisee may sustain, incur, become liable for, or be required to pay, as a consequence of or arising from the negligent acts or omissions of the City, its officers, employees or agents in connection with City's obligations under this Franchise; provided, however, that this indemnification provision shall not apply to the extent that said liabilities, claims, damages, losses and so forth were caused by or result from the negligence of the Franchisee, its employees or agents.

SECTION 7.0 FRANCHISE DISPUTE RESOLUTION

7.1 Non-waiver

Failure of a Party to declare any breach or default of this Franchise immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default, but the Party shall have the right to declare any such breach or default at any time. Failure of a Party to declare one breach or default does not act as a waiver of the Party's right to declare another breach or default. In addition, the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a revocation and forfeiture for breach of the conditions of the Franchise.

7.2 Revocation and Forfeiture of Franchise

If the Franchisee shall willfully violate or fail to comply with any of the provisions of this Franchise through willful and unreasonable neglect or willful and unreasonable failure to heed or comply with any notice given the Franchisee under the provisions of this grant, this Franchise may be revoked by the City and the Franchisee shall forfeit all rights conferred under the Franchise; provided, however, the City shall give 90-days' written notice of its intention to revoke the Franchise during which period the Franchisee shall have the opportunity to remedy any breach.

7.3 Dispute Resolution by the Parties

Disputes regarding the interpretation or execution of the terms of this Franchise, that cannot be resolved the Parties, shall be submitted to the City's attorney and the Franchisee's attorney for resolution. If a mutually satisfactory or timely resolution cannot then be reached by the above process, prior to resorting to a court of competent jurisdiction, the Parties shall submit the dispute to a non-binding alternate dispute resolution process agreed to by the Parties.

7.4 Right of Enforcement

No provision of this Franchise shall be deemed to bar the right of the City or the Franchisee to seek judicial relief from a violation of any provision of the Franchise to recover monetary damages for such violations by the other party or to seek enforcement of the other Party's obligations under this Franchise by means of specific performance, injunctive relief or any other remedy at law or in equity. Any litigation between the City and the Franchisee arising under or regarding this Franchise shall occur, if in the state courts, in Columbia County Superior Court, and if in the federal courts, in the United States District Court for the Eastern District of Washington.

7.5 Attorneys' Fees and Costs

Each Party shall pay for its own attorneys' fees and costs incurred in any dispute resolution process or legal action arising out of the existence of this Franchise.

SECTION 8.0 GENERAL PROVISIONS

8.1 Franchise As Contract, No Third Party Beneficiaries

This Franchise is a contract between the Parties and binds and benefits the Parties and their respective successors and assigns. This Franchise does not and is not intended to confer any rights or remedies upon any persons, entities or beneficiaries other than the Parties.

8.2 Force Majeure

In the event that the Franchisee is delayed in or prevented from the performance of any of its obligations under the Franchise by circumstances beyond the Franchisee's control (Force Majeure) including, without limitation, third party labor disputes, fire, explosion, flood, earthquake, power outage, acts of God, war or other hostilities and civil commotion, then the Franchisee's performance shall be excused during the period of the Force majeure occurrence. the Franchisee will use all commercially reasonable efforts to minimize the period of the disability due to the occurrence. Upon removal or termination of the occurrence the Franchisee will promptly resume performance of the affected Franchise obligations in an orderly and expeditious manner.

8.3 Severability

The Franchise is granted pursuant to the laws of the State of Washington relating to the granting of such rights and privileges by City. If any article, section, sentence, clause, or phrase of this Franchise is for any reason held illegal, invalid, or unconstitutional, such invalidity shall not affect the validity of the Franchise or any of the remaining portions. The invalidity of any portion of this Franchise shall not abate, reduce, or otherwise affect any obligation required of the Franchisee.

8.4 Changes or Amendments

No change or amendment to this Franchise shall be effective until lawfully adopted by the City and agreed to by the Franchisee.

8.5 Supremacy and Governing Law

This Agreement shall be interpreted, construed and enforced in all respects in accordance with the laws of the State of Washington. In the event of any conflict between this Franchise and any City ordinance, regulation or permit, the provisions of this Franchise shall control. In the event of a conflict between the provisions of this Franchise and the Franchisee's applicable Tariff on file with the Commission, the Tariff shall control.

8.6 Headings

The headings or titles in this Franchise are for the purpose of reference only and shall not in any way affect the interpretation or construction of this Franchise.


8.7 Acceptance of Franchise

The Franchisee shall, within 30 days after passage of this Ordinance, file with the City Clerk, its acceptance of the terms and conditions of this Franchise.

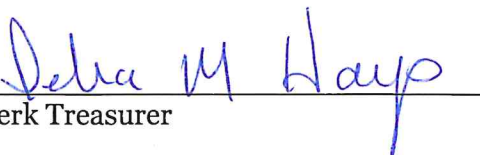
8.8 Franchise Effective Date

The Effective Date of this Franchise shall be November 2, 2022 provided that it has been duly accepted by the Franchisee as specified above. This Ordinance shall be in full force and effective five (5) days following its passage, approval and publication.

Passed and adopted by the City Council of the CITY OF DAYTON, Washington the 11th day of October, 2022.



Mayor

Attest: 

City Clerk Treasurer

Approved as to form and content:



City Attorney

Letter of Acceptance by Franchisee Port of Columbia

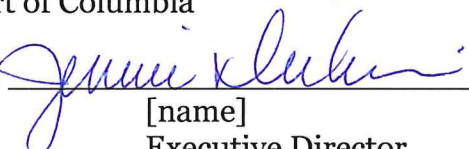
HONORABLE MAYOR AND CITY COUNCIL
CITY OF DAYTON, STATE OF WASHINGTON

IN RE: City of DAYTON, Ordinance No. 1993

**“Granting a Franchise to Port of Columbia Franchisee for the
Construction, Operation and Maintenance of Telecommunications
Facilities Within the City.”**

Port of Columbia, for itself, its successors and assigns, hereby accepts the terms and conditions of the Franchise Agreement contained in the subject Ordinance and files this written acceptance with the City of Dayton. This acceptance is executed on October 11, 2022.

Port of Columbia

By: 
[name]
Executive Director

Copy Received for the City of Dayton

On: 10/11/2022

By: ZAC WEATHERFORD


Mayor