

**AN ORDINANCE AUTHORIZING GOOGLE FIBER MISSOURI, LLC TO OPERATE WITHIN THE RIGHT OF WAYS OF THE CITY OF GLADSTONE TO CONSTRUCT, INSTALL, MAINTAIN, AND OPERATE FIBER SERVICES AND TO AUTHORIZE THE CITY MANAGER TO EXECUTE AGREEMENTS THEREWITH.**

**WHEREAS**, Google Fiber Missouri, LLC (“Google”) is desirous of constructing and maintaining a fiber network for video services in the City of Gladstone (“Gladstone”); and

**WHEREAS**, Gladstone is permitted to license right-of-way users to the extent authorized by Missouri law; and

**WHEREAS**, the Gladstone City Council encourages development of fiber services to provide residents a broad range of choices and to provide providers equal opportunities to compete and operate in Gladstone; and

**WHEREAS**, Google has presented a Right-of-Way License Agreement to Gladstone to memorialize the agreement between them for providing fiber services in the city; and

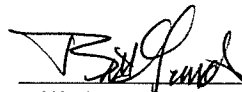
**WHEREAS**, it is in the best interests of the citizens of Gladstone to permit Google to access the city right-of-way to install and maintain a fiber network for video services.

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF GLADSTONE, MISSOURI AS FOLLOWS:**

**THAT**, the City Manager is hereby authorized to execute the Right-of-Way License Agreement;

**THAT**, further the City Manager is hereby authorized to take such steps, in his discretion, as are necessary to carry out the terms of each agreement.

**INTRODUCED, READ, PASSED, AND ADOPTED BY THE COUNCIL OF THE CITY OF GLADSTONE, MISSOURI, THIS 13TH DAY OF MARCH, 2023.**

  
\_\_\_\_\_  
Bill Garnos, Mayor

ATTEST:

  
\_\_\_\_\_  
Becky Jarrett, Deputy City Clerk



## *Request for Council Action*

RES  # City Clerk Only

BILL  # 23-13

ORD  # 4.632

Date: 3/3/2023

Department: General Administration

Meeting Date Requested: 3/13/2023

Public Hearing: Yes  Date: [Click here to enter a date.](#)

Subject: Right-of-way License Agreement

Background:

Budget Discussion: Funds are budgeted in the amount of \$      from the N/A Fund. Ongoing costs are estimated to be \$      annually. Previous years' funding was \$      .

Public/Board/Staff Input: The City entered into an agreement with Google in 2013 to provide fiber optic internet and video services. The current agreement provides for a 5% fee on video services. Google has transitioned away from providing video services, but desires to continue providing internet services through the City right-of-way. Instead of the 5% fee on video services, Google proposes a 1% fee on all broadband internet services. With the impact of this charge is difficult to calculate, staff believes it will result in a moderate reduction in revenues in the short term, but also a moderate increase in revenue over the long term.

Provide Original Contracts, Leases, Agreements, etc. to: City Clerk and Vendor.

Scott Wingerson  
City Manager

JM  
City Attorney

## NON-EXCLUSIVE PUBLIC ROW LICENSE AGREEMENT

This Non-Exclusive Public ROW License Agreement (“**Agreement**”) is by and between **Gladstone**, a city organized and existing under the laws of the State of Missouri (“**City**”), and **Google Fiber Missouri, LLC**, a Missouri limited liability company, and its direct parent, and its direct parent’s subsidiaries, successors, or assigns (“**Licensee**”).

### RECITALS

- A. City has jurisdiction over the use of the public rights-of-way in City (“**Public ROW**”).
- B. Licensee owns, maintains, operates, and controls a fiber optic infrastructure network in Public ROW (“**Network**”).
- C. The Network consists of equipment and facilities that may include aerial or underground fiber optic cables, lines, wires, or strands; underground conduits, vaults, access manholes and handholes; electronic equipment; power generators; batteries; pedestals; boxes; cabinets; vaults; and other similar facilities (“**Network Facilities**”).
- D. Prior to the Effective Date (as defined herein), Licensee operated the Network pursuant to an appropriate state or local video services franchise. Licensee may desire to, and City may desire to license Licensee to, continue to use and occupy Public ROW in order to install, operate, and maintain its Network for the purposes of offering certain communications services (“**Services**”), including broadband Internet access service as defined in 47 C.F.R. § 8.1(b) (“**Broadband Internet Services**”) and Voice over Internet Protocol services, but excluding multichannel video programming services that would be subject to a video services franchise and telecommunications services as defined in 47 C.F.R. § 153(53), to residents and businesses in City (“**Customers**”).

### AGREEMENT

In consideration of the mutual promises made below, City and Licensee agree as follows:

#### 1. Permission to Use and Occupy.

- 1.1. Permission to Use and Occupy Public ROW. Upon the License Commencement Date, City grants Licensee permission to use and occupy the Public ROW (the “**License**”) for the purpose of constructing, installing, repairing, maintaining, operating, and if necessary removing the Network and the related Network Facilities (the “**Work**”). This Agreement and the License do not authorize Licensee to use any property other than the Public ROW as agreed herein. Licensee’s use of any other City property, including poles and conduits, will be governed under a separate Agreement regarding that use.
- 1.2. License Commencement Date. The License will be effective upon the later of the date on which (a) (i) Licensee has discontinued provision of facilities-based linear video services to Customers, (ii) Licensee has taken all actions necessary under its state or local video services franchise to terminate such franchise and such franchise has



terminated, and (iii) Licensee has notified the City of (i) and (ii); or (b) the Effective Date (“**License Commencement Date**”).

- 1.3. Subject to State and Local Law. This Agreement and the License are subject to City’s valid authority under state and local laws as they exist now or may be amended from time-to-time, including but not limited to Title VI, Chapter 115 of the Code of Ordinances, as amended, of the City of Gladstone, Missouri (“Code of Ordinances”), and subject to the conditions set forth in this Agreement. If any terms or conditions of this Agreement or the License conflict with the Code of Ordinances, such term shall be subordinate to the requirements set forth in the Code of Ordinances, as amended.
- 1.4. Subject to City’s Right to Use Public ROW. This Agreement and the License are subject and subordinate to City’s prior and continuing right to use the Public ROW, including constructing, installing, operating, maintaining, repairing, or removing sewers, water pipes, storm drains, gas pipes, utility poles, overhead and underground electric lines and related facilities, and other public utility and municipal uses.
- 1.5. Subject to Pre-Existing Property Interests. City’s grant of the License is subject to all valid pre-existing easements, restrictions, conditions, covenants, encumbrances, claims of title or other property interests that may affect the Public ROW. Licensee will obtain at its own cost and expense any permission or rights as may be necessary to accommodate such pre-existing property interests.
- 1.6. No Grant of Property Interest. The License does not grant or convey any property interest.
- 1.7. Non-Exclusive. The License is not exclusive. City expressly reserves the right to grant licenses, permits, franchises, privileges or other rights to any other individual, corporation, partnership, limited liability company, trust, joint stock company, business trust, unincorporated association, joint venture, governmental authority or other entity of any nature whatsoever (“**Person**”), as well as the right in its own name as a city, to use Public ROW for similar or different purposes allowed Licensee under this Agreement.

## 2. Licensee’s Obligations.

- 2.1. Individual Permits Required. Licensee will obtain City’s approval of required individual encroachment, construction, and other necessary permits before placing its Network Facilities in the Public ROW or other property of City as authorized. Licensee will pay all lawful processing, field marking, engineering, and inspection fees associated with the issuance of individual permits by City.
- 2.2. Licensee’s Sole Cost and Expense. Licensee will perform the Work at its sole cost and expense.
- 2.3. Compliance with Laws. Licensee will comply with all applicable laws and regulations when performing the Work. Licensee will place its Network Facilities in conformance with the required permits, plans, and drawings approved by City.

- 2.4. Reasonable Care. Licensee will exercise reasonable care when performing the Work and will use commonly accepted practices and equipment to minimize the risks of personal injury, property damage, soil erosion, and pollution of surface or groundwater.
- 2.5. No Nuisance. Licensee will maintain its Network Facilities in good and safe condition so that its Network Facilities do not (i) cause a public nuisance or (ii) create a risk to the public health, safety, or welfare.
- 2.6. Repair. Licensee will promptly repair any damage to the Public ROW, City property, or private property if such damage is directly caused by Licensee's Work and no other Person is responsible for the damage (e.g., where a Person other than Licensee fails to accurately or timely locate its underground facilities as required by applicable law). Licensee will repair the damaged property to a condition equal to or better than that which existed prior to the damage, but no less than City standards and ordinances in effect at the time of repair. Licensee's obligation under this Section 2.6 will be limited by, and consistent with, any applicable seasonal or other restrictions on construction or restoration work provided such extension is for the shortest duration necessary to complete the repair.
- 2.7. As-Built Drawings and Maps. Licensee will maintain accurate as-built drawings and maps of its Network Facilities located in City and will provide them to City upon reasonable request and on a mutually-agreed timetable (e.g., piecemeal following the closure of each permit, or all at once after all the Work is complete), subject to applicable confidentiality protections.
- 2.8. Network Design. Nothing in this Agreement requires Licensee to build to all areas of City, and Licensee retains the discretion to determine the scope, location, and timing of the design and construction of the Network.

### **3. City's Obligations.**

- 3.1. Emergency Removal or Relocation by City. In the event of a public emergency that creates an imminent threat to the health, safety, or property of City or its residents, City may remove or relocate the applicable portions of the Network Facilities, provided City provides as much prior notice as practicable to Licensee before making an emergency removal or relocation. In any event, City will provide to Licensee a written description of any emergency removals or relocations of Licensee's Network Facilities as soon as practicable following such removal or relocation. Licensee will reimburse City for its actual, reasonable, and documented costs or expenses incurred for any such work performed by City, the direct cause of which was Licensee's construction, installation, operation, maintenance, repair, or removal of its Network Facilities. Licensee's obligation to reimburse City under this section will be separate from Licensee's obligation to pay the License Fee (as defined below).
- 3.2. Relocation. Licensee shall remove, relocate, or adjust its facilities in accordance with Title VI, Chapter 115, and Section 6.115.570 (including each subparagraph thereof) of the Code of Ordinances, as amended.

- 3.3. Non-Discrimination. City will at all times treat Licensee in a non-discriminatory manner with regard to access, use, and occupancy of the Public ROW as compared to other non-incumbent holders of local or state franchise authority offering facilities-based broadband Internet access services.
- 3.4. Any agreements between City and Licensee that provide Licensee access to public infrastructure, poles, conduits, assets, and Public ROW will be available to other network operators that offer broadband Internet access services, on rates, terms, and conditions that are as favorable as those City provides Licensee for the same access (recognizing that the equivalent consideration afforded by other service providers may be different from the License Fee).
- 3.5. Post-Removal Restoration of Public ROW. When removal or relocation is required under this Agreement, Licensee will, after the removal or relocation of the Network Facilities, at its own cost, repair and return the Public ROW in which the facilities were located to a safe and satisfactory condition in accordance with City standards and ordinances in effect at the time of restoration.

#### **4. Contractors and Subcontractors.**

- 4.1. Use of Contractors and Subcontractors. Licensee may retain contractors and subcontractors to perform the Work on Licensee's behalf.
- 4.2. Contractors to be Licensed. Licensee's contractors and subcontractors used for the Work will be properly licensed under applicable law.
- 4.3. Authorized Individuals. Licensee's contractors and subcontractors may submit individual permit applications to City on Licensee's behalf, so long as the permit applications are signed by individuals that Licensee has authorized to act on its behalf via a letter of authorization provided to City in the form attached as **Exhibit A** ("**Authorized Individuals**"). City will accept permit applications under this Agreement submitted and signed by Authorized Individuals, and will treat those applications as if they had been submitted by Licensee under this Agreement provided that the application conforms to all applicable sections of Title VI, Chapter 115 of the Code of Ordinances, as amended.

#### **5. License Fee**. Licensee will pay City a fee ("**License Fee**") to compensate City for Licensee's use and occupancy of Public ROW pursuant to the License. Licensee and City acknowledge and agree that the License Fee provides fair and reasonable compensation for Licensee's use and occupancy of Public ROW and other City property as authorized. The License Fee will begin accruing on the License Commencement Date (as defined herein) and will be calculated as set forth in Section 5.1.

- 5.1. License Fee. Licensee will pay City one percent (1%) (the "**Revenue Percentage**") of Gross Revenues for a calendar quarter, remitted within forty five (45) days of the end of each calendar quarter, commencing on the License Commencement Date. The payment will be accompanied by a report showing the basis for the computation and such other relevant facts and/or records as may be required by City to determine the accuracy of the payment. Licensee shall maintain all applicable supporting documentation for a period no less than three (3) years.

5.1.1. As used herein, “**Gross Revenues**” means all consideration of any kind or nature, including without limitation, cash, credits, property, and in-kind contributions (services or goods) received by Licensee from Customers for Broadband Internet Services that are provided to Customers through Network Facilities located at least in part in Public ROW.

5.1.2. Gross Revenues do not include:

- (i) any revenue not actually received, even if billed, such as bad debt;
- (ii) refunds, rebates, or discounts made to Customers, or City;
- (iii) revenue received from the sale of Broadband Internet Services for resale in which the purchaser is required to collect and remit similar fees from the purchaser’s customer;
- (iv) revenue derived from the provision of Broadband Internet Services to Customers where none of the Network Facilities used to provide such Broadband Internet Services are located in Public ROW;
- (v) any forgone revenue from Licensee’s provision of Broadband Internet Services to Customers at no charge if required by state law;
- (vi) any revenue derived from advertising;
- (vii) any revenue derived from Services other than Broadband Internet Services, including without limitation, any revenue derived from rental of modems or other equipment used to provide or facilitate the provision of the Broadband Internet Services;
- (viii) any revenue derived from referral or marketing agreements with third party providers of online services which Licensee may make available to Customers;
- (ix) any tax of general applicability imposed upon Licensee or its Customers by City or by any state, federal, or any other governmental entity, and required to be collected by Licensee and remitted to the taxing entity (including but not limited to sales and use tax, gross receipts tax, excise tax, utility users tax, public service tax, communications taxes, and fees not imposed by this Agreement);



- (x) any forgone revenue from Licensee's provision, in Licensee's discretion, of free or reduced cost Broadband Internet Services to any Person, including without limitation employees of Licensee; provided, however, that any forgone revenue which Licensee chooses not to receive in exchange for trades, barter, services, or other items of value will be included in Gross Revenues; and
  - (xi) sales of capital assets or sales of surplus equipment.
- 5.2. Not a tax or in Lieu of Any Other Tax or Fee: (i) Payment of the License Fee shall not be considered in the nature of a tax. (ii) The License Fee is in addition to all other payments that the Licensee may be required to pay under any federal, state, or local law.
- 5.3. Pass Through. Licensee may identify and collect, as a separate item on the regular bill of any Customer whose Broadband Internet Services are provided by Network Facilities located at least in part in Public ROW, that Customer's pro rata amount of the License Fee.
- 5.4. Interest on Late Payments. Any payments that are due and payable under this Agreement that are not received within sixty (60) days from the specified due date will be assessed interest at an annual rate equal to the prevailing commercial prime interest rate in effect upon the due date.
- 5.5. Change in Law. Notwithstanding anything to the contrary herein, in the event of a change in applicable law that (i) prohibits collection by any municipality or franchising authority of any fee, including franchise fees, from any provider of video programming or communications services, including broadband Internet services, or (ii) reduces the percentage of revenue on which the fee, including franchise fee, paid by any provider of video programming or communications services is based to a percentage that is lower than the Revenue Percentage, then Licensee will have no obligation to pay the Licensee Fee or to pay a Licensee Fee based on the Revenue Percentage, as the case may be. In the case of a reduction in the percentage of revenue on which such fees may be based, the Revenue Percentage will be commensurately reduced. Licensee affirms and agrees that as of the Effective Date, Licensee is not a public utility or public utility right-of-way user as such terms are defined by Section 67.1830, RSMo., as amended, and accordingly Section 67.1832 through 67.1848, RSMo., do not apply to this Agreement and Licensee's use of the City right-of-way.
6. **Defense and Indemnity**.
- 6.1. Obligations. Licensee shall comply with the indemnity requirements set forth in Section 6.115.1130 of the Code of Ordinances, as amended.
- 6.2. Exclusions. Section 6 (Defense and Indemnity) will not apply to the extent the underlying allegation (a) arises from or is related to the negligence or willful misconduct of an indemnified party or (b) is made by City's employee and covered under applicable workers' compensation laws.



- 6.3. Conditions.** Section 6.1 (Obligations) is conditioned on the following: (a) City must promptly notify Licensee in writing of the Third Party Legal Proceeding and any allegation(s) that preceded the Third Party Legal Proceeding no later than fifteen (15) days after City became aware of the Third Party Legal Proceeding; (b) City must reasonably cooperate in the defense at Licensee's request; and (c) City must tender sole control of the indemnified portion of the Third Party Legal Proceeding to Licensee, subject to the following: (i) City may appoint its own non-controlling counsel, at its own expense; and (ii) any settlement requiring City to admit liability, pay money, or take (or refrain from taking) any action, will require City's prior written consent, not to be unreasonably withheld, conditioned, or delayed.
- 7. Limitation of Liability.** NEITHER PARTY WILL BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES IN CONNECTION WITH THIS AGREEMENT. THE PARTIES ACKNOWLEDGE THAT THIS LIMITATION WILL BE SUBJECT TO AND MAY BE LIMITED BY APPLICABLE LAW.
- 8. Performance Bond.** Licensee shall comply with the bonding provisions set forth in Section 6.115.1120 of the Code of Ordinances, as amended. The performance bond will remain in full force during the Term of this Agreement. At Licensee's election, any performance bond previously provided by Licensee to City and associated with its state or local video service franchise may be applied to its obligations, in whole or in part, under this paragraph.
- 9. Insurance.** Licensee shall comply with the insurance requirements set forth in Section 6.115.1110 of the Code of Ordinances, as amended and the maximum amounts of liability set forth in Section 537.610, RSMo, and as adjusted pursuant to Section 537.610.5, RSMo.
- 10. Term.** This Agreement is effective on the later of (a) the date the last party to sign executes this Agreement and (b) the date on which any implementing ordinance becomes effective in accordance with its terms and state law ("**Effective Date**"). The Agreement will expire automatically on the twentieth anniversary of the License Commencement Date ("**Original Term**"), unless earlier terminated in accordance with the provisions herein. Thereafter, the Agreement will automatically renew for successive 5-year terms (each a "**Renewal Term**") unless a party provides at least six (6) months' prior written notice to the other party of its intent not to renew.
- 11. Termination.**
- 11.1. Termination by City.** City may terminate this Agreement if Licensee is in material breach of the Agreement, provided that City must first provide Licensee written notice of the breach and one hundred eighty (180) days to cure, unless the cure cannot reasonably be accomplished in that time period, in which case Licensee must commence its efforts to cure within that time period and the cure period will continue as long as such diligent efforts continue. No termination under this paragraph will be effective until the relevant cure period has expired.
- 11.2. Termination by Licensee.** Licensee may terminate this Agreement for convenience upon one hundred eighty (180) days' written notice to City.

**12. Assignment.** Except as set forth below, neither party may assign or transfer its rights or obligations under this Agreement, in whole or part, to a third party, without the written consent of the other party. Any agreed upon assignee will take the place of the assigning party, and the assigning party will be released from all of its rights and obligations upon such assignment.

12.1. Notwithstanding the foregoing, or the assignment provisions of Title VI, Chapter 115 of the Code of Ordinances, as amended, Licensee may at any time on written notice to City, assign this Agreement or any or all of its rights and obligations under this Agreement:

12.1.1. to any Affiliate (as defined below) of Licensee;

12.1.2. to any successor in interest of Licensee's business operations in City in connection with any merger, acquisition, or similar transaction if Licensee determines after a reasonable investigation that the successor in interest has the resources and ability to fulfill the obligations of this Agreement; or

12.1.3. to any purchaser of all or substantially all of Licensee's Network Facilities in City if Licensee determines after a reasonable investigation that the purchaser has the resources and ability to fulfill the obligations of this Agreement.

12.2. Following any assignment of this Agreement to an Affiliate, Licensee will remain responsible for such Affiliate's performance under the terms of this Agreement. For purposes of this section, (a) "Affiliate" means any Person that now or in the future, directly or indirectly controls, is controlled with or by, or is under common control with Licensee; and (b) "control" means, with respect to: (i) a U.S. corporation, the ownership, directly or indirectly, of fifty percent (50%) or more of the voting power to elect directors thereof, or (ii) a non-U.S. corporation, if the voting power to elect directors thereof is less than fifty percent (50%), the maximum amount allowed by applicable law; and (iii) any other Person, fifty percent (50%) or more ownership interest in said Person, or the power to direct the management of such Person.

**13. Notice.** All notices related to this Agreement will be in writing and sent, if to Licensee to the email addresses set forth below, and if to City to the address set forth in City's signature block to this Agreement. Notices are effective (a) when delivered in person, (b) upon confirmation of a receipt when transmitted by electronic mail, (c) on the next business day if transmitted by registered or certified mail, postage prepaid (with confirmation of delivery), (d) on the next business day if transmitted by overnight courier (with confirmation of delivery), or (e) three (3) days after the date of mailing, whichever is earlier.

Licensee's e-mail address for notice is [googlefibernotices@google.com](mailto:googlefibernotices@google.com), with a copy to [legal-notices@google.com](mailto:legal-notices@google.com).

**14. General Provisions.** This Agreement is governed by the laws of the state where City is located. Neither party will be liable for failure or delay in performance to the extent caused by circumstances beyond its reasonable control. This Agreement sets out all terms agreed between the parties and supersedes all previous or contemporaneous agreements between the parties relating to its subject matter. This Agreement, including any exhibits, constitutes

the entire agreement between the parties related to this subject matter, and any change to its terms must be in writing and signed by the parties. The parties may execute this Agreement in counterparts, including facsimile, PDF, and other electronic copies, which taken together will constitute one instrument. Each party to this Agreement agrees that Licensee may use electronic signatures.

*[Signature page follows]*



Signed by authorized representatives of the parties on the dates written below.

**Google Fiber Missouri, LLC**

**City of Gladstone**

\_\_\_\_\_  
(Authorized Signature)

John W. Winger  
\_\_\_\_\_  
(Authorized Signature)

\_\_\_\_\_  
(Name)

Scott Winger  
\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

City Manager  
\_\_\_\_\_  
(Title)

Address:  
1600 Amphitheatre Parkway  
Mountain View, CA 94043

Address:  
7010 N. Holmes  
Gladstone, MO 64118

Date: \_\_\_\_\_

Date: March 14, 2023



**EXHIBIT A  
FORM OF LETTER OF AUTHORIZATION**

[LICENSEE LETTERHEAD]

[Date]

Via Email ([Email Address])

City of Gladstone

[Addressee]

[Address]

Re: [Amended] Letter of Authorization

Dear [Name],

In accordance with Section 4.3 of the Non-Exclusive Public ROW License Agreement dated [redacted] between **The City of Gladstone** and **Google Fiber Missouri, LLC** (“**Google Fiber**”), Google Fiber hereby designates the following Authorized Individuals (as that term is defined in the Agreement), who may submit and sign permit applications and other submissions to the City on behalf of Google Fiber. *[If applicable: This letter amends and supersedes the Letter of Authorization dated [redacted].]*

*[Insert name and title for each Authorized Individual, including any Authorized Individual previously named and whose authority continues. Strike through the names of any individuals who are no longer authorized, if any.]*

1. Name, Title
2. Name, Title
3. Name, Title (previously authorized, authorization continues)
4. Name, Title (authorization withdrawn)

This authorization may be withdrawn or amended and superseded by a written amendment to this Letter of Authorization, which will be effective 24 hours after receipt by the City.

Kind regards,

[Name]

Manager, **Google Fiber Missouri, LLC**

