

City of Fayetteville Staff Review Form

2022-0514

Legistar File ID

6/21/2022

City Council Meeting Date - Agenda Item Only  
N/A for Non-Agenda Item

Keith Macedo

6/1/2022

INFORMATION TECHNOLOGY (170)

Submitted By

Submitted Date

Division / Department

Action Recommendation:

Staff recommends approval of a conduit occupancy and fiber swap agreement with OzarksGO, LLC.

Budget Impact:

Account Number

Fund

Project Number

Project Title

Budgeted Item? No

Current Budget

\$ -

Funds Obligated

\$ -

Current Balance

\$ -

Does item have a cost? No

Item Cost

\$ -

Budget Adjustment Attached? No

Budget Adjustment

\$ -

Remaining Budget

\$ -

V20210527

Purchase Order Number:

Previous Ordinance or Resolution #

Change Order Number:

Approval Date:

Original Contract Number:

Comments:



**MEETING OF JUNE 21, 2022**

**TO:** Mayor and City Council

**THRU:** Susan Norton, Chief of Staff

**FROM:** Keith Macedo, IT Director

**DATE:** June 1, 2022

**SUBJECT:** Staff recommends approval of a conduit occupancy and fiber swap agreement with OzarksGO, LLC.

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**RECOMMENDATION:**

Staff recommends approval of a conduit occupancy and fiber swap agreement with OzarksGO, LLC.

**BACKGROUND:**

Fiber optic cabling is the preferred method to support the City's current and future technology needs to connect city facilities and critical infrastructure. Over the last several years City staff has installed empty fiber conduits in conjunction with City infrastructure projects such as trails, sidewalks, street improvements, and parks. The intent of the conduit was a "dig once" concept where the city leveraged existing projects to proactively install conduits for future technology needs. To date the city has focused on installing empty conduits and not the associated fiber optic cable due to cost of fiber and the associated maintenance of fiber. The city developed a fiber conduit concept map in 2019 that staff references to prioritize fiber conduit projects with the long-term goal to serve major city facilities, trails, parks, traffic signal, and water/ wastewater locations. This fiber concept map is the guiding document that helps staff decide if placing conduit in a specific city project provides an adequate return on investment.

**DISCUSSION:**

City Information Technology (IT) staff worked with the City Attorney's Office and OzarksGO to develop the attached agreement that allows OzarksGO to utilize City fiber conduit to install OzarksGO fiber optic cable. The agreement provides the City ten (10) strands of OzarksGo fiber optic cable as a swap for the use of City conduit. The swap allows the City to leverage the fiber conduit investment to obtain fiber optic cable, at no additional cost, to increase the network speed and resiliency of city facilities via fiber optic cable.

**BUDGET/STAFF IMPACT:**

There is no direct cost to the attached agreement. Fiber and conduit swaps will be tracked via the attached service order document, by both City IT staff and OzarksGO staff, to track equitable sharing of conduit and fiber optic cable. OzarksGO is responsible for the maintenance, line locates, and repair of the fiber optic cable which is a cost avoidance over a city staff managed fiber optic cable network.

**Attachments:** Staff Review Form, OzarksGO agreement

## **CONDUIT OCCUPANCY AND FIBER SWAP AGREEMENT**

This Conduit Occupancy and Fiber Swap Agreement (this “Agreement”) is made and entered into as of \_\_\_\_\_, \_\_\_\_\_ (the “Effective Date”) by and between **OzarksGo, LLC** and **City of Fayetteville**. OzarksGo, LLC and City of Fayetteville may be referred to herein as a “Party” or together as the “Parties.”

### **Recitals**

- A. OzarksGo, LLC owns rights in, has constructed or is planning to construct, operate and maintain a fiber optic communications system (the “**OzarksGo, LLC System**”);
- B. City of Fayetteville owns rights in, has constructed or is planning to construct, operate and maintain a fiber optic communications system (the “**City of Fayetteville Conduit System**”);
- C. OzarksGo, LLC wishes to exchange the use of dark fiber (“**OzarksGo, LLC Fiber**”) within the OzarksGo, LLC System for the use of conduit within the City of Fayetteville Conduit Route;
- D. City of Fayetteville wishes to exchange the use of conduit within the City of Fayetteville Conduit Route for the use of dark fiber within the OzarksGo, LLC System;
- E. Each defined term shall have the meaning ascribed where such term is first used or, if no meaning is so set forth, the meaning assigned to such term in the Defined Terms section.

Accordingly, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows: Article 1. Grants of Leases

**1.1 Lease to City of Fayetteville.** OzarksGo, LLC hereby leases to City of Fayetteville and City of Fayetteville hereby leases from OzarksGo, LLC:

- (a) The number of dark fibers in the OzarksGo, LLC System specified in the “City of Fayetteville Fiber Lease Orders” which are attached hereto and incorporated by this reference. Any OzarksGo, LLC Fiber Service Order are attached herein and incorporated herein by this reference.

- (b) The OzarksGo, LLC Fibers will be specifically identified by OzarksGo, LLC.
- (c) City of Fayetteville agrees as Lessee of OzarksGo, LLC Fibers, City of Fayetteville shall be subject to all of the provisions of this Agreement.

**1.2 Lease to OzarksGo, LLC.** City of Fayetteville hereby leases to OzarksGo, LLC, and OzarksGo, LLC hereby leases from City of Fayetteville:

- (a) Space in the City of Fayetteville Conduit System.
- (b) The City of Fayetteville Conduit System will be specifically identified by City of Fayetteville.
- (c) City of Fayetteville grants OzarksGo, LLC permission, on the terms and conditions stated herein to install and maintain communication cables and related equipment within the conduit system described herein.

**1.3 Defined Terms.** In reference to the fiber lease, OzarksGo, LLC is sometimes referred to as **Fiber Lessor**, City of Fayetteville is sometimes referred to as **Fiber Lessee**. In reference to the conduit lease, City of Fayetteville is sometimes referred to as **Conduit Lessor**, OzarksGo, LLC is sometimes referred to as **Conduit Lessee**. The “**Lessor Fibers**” shall mean the dark fibers owned by OzarksGo, LLC. The City of Fayetteville Conduit System is sometimes referred individually to as a “**Lessor Conduit System**.” Fiber Lessee and Conduit Lessee may be referred to collectively as “**Lessees**,” whereas Conduit Lessor and Fiber Lessor may be referred to collectively as “**Lessors**.”

**1.4 Conditions.** Each lease is granted on the terms and subject to the covenants and conditions set forth in this Agreement. The **Lessees’** right to use shall be exclusive to the rights being leased to it. Each lease does not include the right of the **Lessees** to own, control, maintain, modify or revise the fibers or conduit, the right to encumber in any manner, or other use of the **Lessors’** property except as expressly set forth herein.

**1.5 Control of Network.** The **Fiber Lessee** shall have full and complete control and responsibility for determining any network and service configuration or designs, routing configurations, regrooming, rearrangement or consolidation of channels or circuits and all related functions with regard to the use of the **Lessor’s Fibers**.

**1.6 No Electronics.** Each Lessee acknowledges and agrees that Lessor is not supplying nor is Lessor obligated to supply to Lessee any optronics or electronics or optical or electrical equipment or other facilities, including without limitation, generators, batteries, air conditioners, fire protection and monitoring and testing equipment, all of which are the sole responsibility of Lessee; nor is Lessor responsible for performing any work other than as

specified in this Agreement.

#### **1.7 Network Access.**

- (a) The OzarksGo, LLC Fibers will be terminated at the points identified by OzarksGo, LLC. OzarksGo, LLC will electronically provide route maps to the City of Fayetteville.
- (b) The City of Fayetteville Conduit System will be constructed at points identified by City of Fayetteville. City of Fayetteville will electronically provide route maps to OzarksGo, LLC.
- (c) All connections to the OzarksGo, LLC fiber shall be performed by OzarksGo, LLC, in accordance with its applicable specifications and operating procedures. OzarksGo, LLC shall not charge City of Fayetteville for the cost of the initial connections at the demarcation points described in the route map, available to City of Fayetteville upon their written request. It is the responsibility of OzarksGo, LLC to obtain all governmental and other approvals and consents necessary for the delivery of the cable and use of the Lessor Fibers.
- (d) The City of Fayetteville shall be responsible for obtaining all building access and other rights and rights of way necessary for the construction and maintenance of the City of Fayetteville Conduit System.
- (e) Each Lessee shall pay the Lessor's agreed upon cost for each additional access. For other services performed by a Lessor, Lessee agrees to pay the agreed upon Costs incurred by Lessor.

### **Article 2. Consideration**

**2.1 Exchange.** The consideration to City of Fayetteville for lease of the City of Fayetteville Conduit System is the lease of ten (10) strands of OzarksGo, LLC Fibers. The consideration to OzarksGo, LLC for the lease of OzarksGo, LLC Fibers is the lease of the City of Fayetteville Conduit System.

**2.2 Connectivity.** OzarksGo, LLC shall perform all necessary fiber splicing, and fiber testing, for fiber connection to OzarksGo, LLC fiber. City of Fayetteville shall install hand holes, however OzarksGo, LLC may install additional hand holes at their discretion.

**2.3 Other Charges.** Each Lessee shall pay directly or reimburse Lessor for all other undisputed sums, costs, fees and expenses which are expressly provided to be paid by Lessee under this Agreement.

**2.4 Invoicing.** Each Lessor will send Lessee invoices for payments of all sums, costs, fees and expenses owed by Lessee to Lessor hereunder and Lessee shall pay such undisputed

invoiced amounts within sixty (60) days after receipt of such invoice by Lessee.

### **Article 3. Payment and Term**

- 3.1 Commencement.** The term of this Agreement (the “Term”) shall commence on the Effective Date and shall terminate on January 1, 2042.
- 3.2 Expiration of Term.** Upon the termination of this Agreement, the City of Fayetteville shall remain the owner of its Conduit System but shall provide OzarksGo, LLC the right to remain in its Conduit System to provide communication services. OzarksGo, LLC shall remain the owner of the OzarksGo Fibers. Each lease shall terminate and all rights of Lessee, or any part thereof, shall cease. All rights therein shall revert to Lessor without reimbursement of any costs, fees, expenses or other amounts previously paid with respect thereto. From and after such time Lessee shall have no further rights or obligations hereunder with respect thereto unless such rights or obligations are specifically provided herein to survive the Term.
- 3.3 Term Renewal.** Within 180 days of the expiration of the Term, the parties shall have the option to renew this Agreement for the same term length, upon written agreement on mutually agreeable terms and conditions.
- 3.4 Title.** It is understood and agreed that each Lessor shall maintain legal title to or rights in the Lessor property, and nothing contained herein shall be interpreted to give or convey to Lessee any property right, such as fiber strains and/or conduit, title or interest in such property, which will at all times be and remain Lessor’s personal property notwithstanding that it may be or become attached to or embedded in realty.

### **Article 4. Delivery and Acceptance**

**4.1 Acceptance Testing.** OzarksGo, LLC has tested, or at the time of installation shall test all Fibers to verify that the Fibers have been installed and are operating in accordance with the Dark Fiber Splicing Specifications described in **Exhibit 1. Acceptance Testing & Specifications**. When OzarksGo, LLC has determined that the results of the Fiber Testing show that the Fibers have been installed and are operating in conformity with the Specifications, OzarksGo, LLC shall promptly provide City of Fayetteville with a notice of completion (the “**Completion Notice**”) together with a copy of the test results.

**4.2 Acceptance.** Within thirty (30) days following receipt of Within thirty (30) days following receipt of a Completion Notice, City of Fayetteville shall provide OzarksGo, LLC with a written notice accepting or rejecting the OzarksGo, LLC Fibers, and specifying in reasonable detail, if rejected, the defect or failure in the OzarksGo, LLC fiber. If City of Fayetteville fails to notify OzarksGo, LLC of its acceptance or rejection of the Completion Notice within thirty (30) days following receipt of the same, City of Fayetteville shall be

deemed to have accepted such Lessor Fibers. The date of such notice of acceptance or deemed acceptance of the Lessor Fibers shall be the “**Acceptance Date.**”

**4.3 Completion.** In the event of any good faith rejection by Lessee, Lessor shall take such action as reasonably necessary, and as expeditiously as practicable, to correct or cure such defect or failure in accordance with the Specifications, and the notification and acceptance procedure shall be repeated until the project is within the Specifications. The foregoing notwithstanding, if Fiber Lessee uses the OzarksGo Fibers other than for testing prior to acceptance, such use shall constitute acceptance of the OzarksGo Fibers and the first date of such use shall be the Acceptance Date; provided, however, that no acceptance or deemed acceptance shall constitute a waiver of Lessor’s obligations of maintenance and repair of the OzarksGo Fibers.

## **Article 5. Maintenance**

**5.1 OzarksGo Duties.** OzarksGo will be responsible for the technical operation, maintenance and repair of its OzarksGo Fibers so as to assure continuing conformity of the applicable system and specifications, including any maintenance as it deems reasonably necessary for the normal operation of the applicable system, during the Term of this Agreement. Maintenance shall be performed in accordance with the maintenance specifications set forth in **Exhibit 2. Maintenance Specifications and Procedures** that is attached hereto and incorporated herein by this reference. OzarksGo, LLC, at its sole discretion, may provide these services with its own personnel or select a qualified subcontractor.

**5.2 City of Fayetteville Duties.** City of Fayetteville will be responsible for the construction of the City of Fayetteville Conduit System described herein. City of Fayetteville represents, warrants, and covenants that the project described herein will be performed in a professional, competent, diligent, and workmanlike manner by knowledgeable, trained, and qualified personnel and in accordance with the terms of this Agreement. City of Fayetteville, may provide these services with its own personnel or select a qualified subcontractor.

**5.3 OzarksGo Inspection Rights.** OzarksGo, LLC may conduct periodic inspections of the conduit construction and maintenance to ensure compliance with required standards and Specifications. OzarksGo, LLC requires a post-construction inspection and may require random or scheduled inspections upon notice to City of Fayetteville. OzarksGo, LLC shall be solely responsible for paying the costs of such inspections.

### **5.4 Interruption.**

(a) If during the Term the use of either the City of Fayetteville Conduit System or

OzarksGo, LLC Fibers is interrupted for any reason, including without limitation an interruption caused by or related to matters concerning the Underlying Rights, defined below, (other than the rights described in Section 6.3) the Lessor shall exercise all reasonable efforts to restore the use of the property as quickly as practicable following notice of the interruption. If the interruption is a network interruption of OzarksGo Fibers other than an Excused Interruption, OzarksGo shall, to the extent available, make available to the City of Fayetteville alternate fibers or network systems with capacity at least equal to the capacity of the OzarksGo Fibers whose use has been interrupted.

(b) If Lessor or its designee is unable or unwilling to provide to Lessee the maintenance services as defined in this Agreement, then Lessor shall allow Lessee to assume responsibility for maintenance service as Lessor's designee, provided that Lessee performs such maintenance services under substantially similar standards as provided herein. In such an event, Lessor agrees to promptly provide to Lessee all necessary information relating to any other parties and any other information that Lessee may require to perform such maintenance services.

**5.5 Cost of Maintenance and Repairs.** The cost of maintenance and repairs described in this section will be covered by the City of Fayetteville through a maintenance fee, if applicable, provided in Exhibit 1.

**5.6 Maintenance or Other Work Within Public Rights of Way.** Ozarks Go, LLC shall comply with all City of Fayetteville ordinances and regulations regarding utility work within public rights of way. This shall include obtaining all necessary permits through the Public Works Department, Engineering Division, or any other department, divisions, or agency of the City. If the work is covered by an existing franchise agreement, a permit may not be necessary.

## **Article 6. Permits; Underlying Rights; Relocation**

**6.1 Lessor Rights of Way.** Each Lessor has obtained certain rights of way and building access rights for construction and operation of their obligations herein (the "**Underlying Rights**"). This Agreement is subject to the terms and limitations of the Underlying Rights, and subject to the terms under which the right of way and other property interests are owned or held by the grantor of the Underlying Rights, including, but not limited to, covenants, conditions, restrictions, easements, reversionary interests, bonds, mortgages and indentures, and other matters, whether or not of record, and to the rights of tenants and licensees in possession. Nothing herein shall be construed as to be a representation, warranty or covenant of Lessor's right, title or interest with respect to the right of ways or the Underlying Rights, all of which are disclaimed.

**6.2 Lessee's Obligations.** Each Lessee agrees to use the Lessor property only for lawful purposes in a manner consistent with the Underlying Rights, and that its rights shall in all

respects be subject to the terms and conditions of the Underlying Rights. Each Lessee agrees not to cause or allow to be caused any default under the Underlying Rights.

**6.3 Relocations.** The Parties hereto understand that any relocation not agreed upon by both Parties could disrupt the services provided. Lessor must notify Lessee of any changes or relocation, Lessor must determine in good faith the extent of, the time of, and the methods to be used for any relocation; provided that: (a) any such relocation shall be constructed and leased fiber shall be tested in accordance with the specifications set forth in **Exhibit 1. Acceptance Testing & Specifications**; and (b) if the relocation is recommended or required, Lessor assumes all relocation costs.

#### **Article 7. City of Fayetteville's Use of the Fibers**

**7.1 Underlying Rights.** The requirements, restrictions, and/or limitations on Fiber Lessee's right to use the Lessor Fibers, and safety, operational and other rules and regulations imposed in connection with the Underlying Rights are referred to collectively as the "**Underlying Rights Requirements.**"

**7.2 Compliance.** City of Fayetteville represents, warrants, and covenants that it will use the Lessor Fibers in compliance with and subject to the Underlying Rights Requirements and all applicable government codes, ordinances, laws, rules and regulations.

**7.3 Non-Interference.** City of Fayetteville shall not use the Lessor Fibers in a way that interferes in any way with or adversely affects the use of the fibers or cable of any other person using OzarksGo Fibers. The Parties acknowledge that the City of Fayetteville Conduit may include other participants, and other owners and users of telecommunication systems.

**7.4 Purposes.** Subject to the provisions specified above and in Article 6, City of Fayetteville may use the Lessor Fibers for any lawful purpose.

#### **Article 8. Limitation of Liability and Indemnification**

**8.1 Waiver of Certain Damages.** Notwithstanding any provision of this Agreement to the contrary, neither Party shall be liable to the other Party for any special accidental, indirect, punitive or consequential costs, liabilities or damages suffered by the other Party, whether foreseeable or not, arising out of, or in connection with, such Party's performance of its obligations under this Agreement.

(a) .

## Article 9. Insurance

**9.1 Insurance Required.** Each Party shall procure and maintain in force, at its own expense such insurance as required by Arkansas law or as the party deems necessary to insure its own property. Each Party shall be listed as an additional insured on all applicable insurance policies maintained by the other Party and such other Party's contractors and subcontractors..

**9.2 Pursuit of Claim.** If coverage is denied or reimbursement of a properly presented claim is disputed by either Party for the insurance provided above, the Party carrying such coverage shall make good-faith efforts to pursue such claim with its insurer.

**9.3 Waiver.** City of Fayetteville and OzarksGo, LLC hereby mutually waive their respective rights of recovery against each other and the officers, elected or appointed officials, directors, shareholders, partners, joint ventures, employees, agents, customers, invitees, or business visitors of either Party, for any loss arising from any cause covered or that could be covered by fire, extended coverage, All Risks, or other insurance required to be carried under this Agreement or now or hereafter existing for the benefit of the respective Party. City of Fayetteville and OzarksGo, LLC will cause from time to time their respective insurers to issue appropriate waiver of subrogation rights endorsements to all property insurance policies carried in connection with their respective property.

## Article 10. Notices

All notices and other communications required or permitted under this Agreement shall be in writing and shall be given by United States first class mail, postage prepaid, registered or certified, return receipt requested, or by hand delivery (including by means of a professional messenger service or overnight mail) addressed as follows:

All notices and other communications shall be given to City of

Fayetteville at: Mayor's Office via mail to 113 W.

Mountain St., Fayetteville, AR 72701; and email at

[mayor@fayetteville-ar.gov](mailto:mayor@fayetteville-ar.gov)

All notices and other communications shall be given to OzarksGo, LLC at: Steve Bandy via email at [sbandy@ozarksgo.net](mailto:sbandy@ozarksgo.net)

In addition, Lessor may give Lessee notice of the availability or interruption of the services, or a planned maintenance or construction, by electronic delivery at all of the following Internet addresses:

Electronic Notice address for City of Fayetteville:

ithelpdesk@fayetteville-ar.gov

Electronic Notice address for OzarksGo, LLC:

noc@ozarksgo.net

In the case of an emergency, either Party may notify the other Party either through the Internet addresses set forth above, or at the following telephone numbers:

Telephone Number City of  
Fayetteville: City of  
Fayetteville Information  
Technology Department  
479-575-8367

Telephone Number OzarksGo,  
LLC: NOC: (479)300-1001

Any such notice or other communication shall be deemed to be effective when actually received or refused. Either Party may by similar notice change the address to which future notices or other communications shall be sent.

## **Article 11. Default**

**11.1 Defined.** A default shall be deemed to have occurred under this Agreement if:

- (a) By Lessee, if Lessee uses the leased property in any manner that is prohibited by this Agreement and Lessee fails to cease such use within ten (10) days of receipt of notice from Lessor; or
- (b) By either Party in the case of a failure to pay any undisputed amount when due and payable under this Agreement, if the Party fails to pay such undisputed amount within ten (10) days of receipt of notice from the other Party specifying such failure and requiring payment of such undisputed amount; or In the case of any other material breach of this Agreement, a Party fails to cure such breach within thirty (30) days after notice specifying such breach; provided that if the breach is of a nature that it cannot be cured within thirty (30) days, a default shall not have occurred so long as the breaching Party has commenced to cure within said time period and thereafter diligently pursue such cure to completion.

**11.2 No Waiver.** A waiver by either Party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any breach of covenant or other matter

subsequently occurring.

**11.3 Breach.** The Parties agree that neither shall proceed against the other for breach or default under this Agreement before the offending Party has had notice of and a reasonable time and opportunity to respond to and cure any breach or default. For purposes of this Agreement, a reasonable time to cure any breach or default shall be deemed to be thirty (30) days after notice, unless for safety, or legal reasons fewer than thirty (30) days are required.

## **Article 12. Termination**

**12.1** Upon termination of this Agreement, the permissions granted to each Party under the lease provisions are immediately relinquished. Each Party shall work with the other to promptly remove any of Lessee's electronics, equipment, and other Lessee property at its sole cost and under Lessor's supervision. Termination of this Agreement shall not affect the rights or obligations of either Party that have arisen before the date of termination or expiration.

## **Article 13. Assignment and Fiber Transfers**

**13.1 Restrictions.** Lessee may not transfer or assign all or any part of its interest in this Agreement nor may Lessee sell, assign, lease, or grant an indefeasible right of use with respect to, exchange, encumber, or otherwise in any manner transfer or make available as dark fiber in any manner to any third party, the Lessor Fibers, in whole or in part, or delegate any duties, burdens, or obligations arising hereunder, without the consent of Lessor, which consent may not be unreasonably withheld.

**13.2 Breach.** A transfer or assignment or other use of the Lessor Fibers in violation of this Article shall constitute a material breach of this Agreement. Article 14. Representations, Warranties and Acknowledgements

**13.3 Warranties.** Each Party represents and warrants to the other Party that:

- (a) It has the full right and authority to enter into, execute, deliver and perform its obligations under this Agreement; and
- (b) This Agreement constitutes a legal, valid and binding obligation enforceable against such Party in accordance with its terms, subject to bankruptcy, insolvency, creditors' rights and general equitable principles.

## **Article 14. Disclaimer**

**14.1 DISCLAIMER.** Each party as lessor makes no warranty, express or implied, with

respect to the lessor fibers, including any warranty of merchantability or fitness for a particular purpose, and all such warranties are hereby expressly disclaimed.

### **Article 15. Force Majeure**

Neither Party shall be liable to the other Party, and each Party's performance under this Agreement shall be excused, if and to the extent that any failure or delay in such Party's performance of one or more of its obligations hereunder is caused by any of the following conditions, and such Party's performance of such obligations shall be excused and extended for and during the period of any such delay: act of God; fire, flood, shortages or unavailability or other delay in material delivery not resulting from the responsible Party's failure to timely place orders therefor; lack of or delay in transportation; government codes, ordinances, laws, rules, regulations or restrictions; war or civil disorder; strikes or other labor disputes; failure of a third party to grant or recognize an Underlying Right; inability of a Party to obtain rights of way, easements, building access or other rights from private property owners; inability of Lessor to obtain access to the lessor system; or any other cause beyond the reasonable control of such Party (each a "**Force Majeure Event**"). The Party claiming relief under this Article shall notify the other in writing of the existence of the event relied on and the cessation or termination of said event, and the Party claiming relief shall exercise reasonable commercial efforts to minimize the time of any such delay.

### **Article 16. General**

**16.1 Binding Effect.** The failure of either Party hereto to enforce any of the provisions of this Agreement, or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall nevertheless be and remain in full force and effect.

**16.2 Impositions.** OzarksGo, LLC shall be responsible for and shall timely pay any and all Impositions with respect to the construction or operation of the OzarksGo, LLC fiber systems.

#### **16.3 Public Records.**

- (a) Nothing herein shall be construed as granting any right or license under any copyrights, inventions, or patents, or enhancements thereto, now or hereafter owned or controlled by Lessor or Lessee.
- (b) Neither Party shall, without first obtaining written consent of the other Party, use any trademark or trade name of the other Party in any

promotional activity or otherwise.

(c) The provisions of this Section shall survive expiration or other termination of this Agreement.

(d) This Agreement and any records related to this Agreement are subject to disclosure under the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101, *et seq.*

**16.4 Attorneys' Fees.** If either Party brings any legal action or proceeding against the other to enforce or interpret this Agreement, or otherwise arising out of this Agreement, the prevailing Party in such action or proceeding shall be entitled to recover from the other Party its reasonable costs and expenses of suit and enforcing the judgment awarded to it, including reasonable attorneys' fees, in addition to any other relief or award to which it may be entitled.

**16.5 Rules of Construction.** The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement or as amplifying or limiting any of its content. Words in this Agreement which import the singular connotation shall be interpreted as plural, and words which import the plural connotation shall be interpreted as singular, as the identity of the parties or objects referred to may require.

(a) Unless expressly defined herein, words having well known technical or trade meanings shall be so construed. All listing of items shall not be taken to be exclusive, but shall include other items, whether similar or dissimilar to those listed, as the context reasonably requires.

(b) Except as set forth to the contrary herein, any right or remedy of City of Fayetteville or OzarksGo, LLC shall be cumulative and without prejudice to any other right or remedy, whether contained herein or not.

(c) Nothing in this Agreement is intended to provide any legal rights to anyone not a Party of this Agreement.

(d) This Agreement has been fully negotiated between and jointly drafted by the Parties. All actions, activities, consents, approvals and other undertakings of the Parties in this Agreement shall be performed in a reasonable and timely manner, it being expressly acknowledged and understood that time is of the essence in the performance of obligations required to be performed by a date expressly specified herein. Except as specifically set forth herein, for the purpose of this Agreement the standards and practices of performance within the telecommunications industry in the relevant market shall be the measure of a Party's performance.

**16.6 Entire Agreement.** This Agreement constitutes the entire and final agreement and

understanding between the Parties with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are integral parts hereof and are hereby made a part of this Agreement. To the extent that any of the provisions of any Exhibit hereto are inconsistent with the express terms of this Agreement, the terms of this Agreement shall control. This Agreement may only be modified or supplemented by an instrument in writing executed by each Party and delivered to the Party relying on the writing.

**16.7 No Personal Liability.** Each action or claim against any Party arising under or relating to this Agreement shall be made only against such Party as a corporation or municipal entity, and any liability relating thereto shall be enforceable only against the corporation or municipality. No Party shall seek to pierce the corporate veil or otherwise seek to impose any liability relating to, or arising from, this Agreement against any shareholder, employee, elected or appointed official, officer or director of the other Party. Each of such persons is an intended beneficiary of the mutual promises set forth in this Article and shall be entitled to enforce the obligations of this Article.

**16.8 Relationship of the Parties.** The relationship between City of Fayetteville and OzarksGo, LLC shall not be that of partners, agents, or joint ventures for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes. City of Fayetteville and OzarksGo, LLC, in performing any of their obligations hereunder, shall be independent contractors or independent parties and shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.

**16.9 Severability.** If any term, covenant or condition contained herein is, to any extent, held invalid or unenforceable in any respect under the laws governing this Agreement, the remainder of this Agreement shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

*[signature page follows]*

In confirmation of their consent and agreement to the terms and conditions contained in this Agreement and intending to be legally bound hereby, the Parties have executed this Agreement as of the date written below.

**OzarksGo, LLC:**



Steven Bandy, General Manager

Dated: 04/28/2022

**City of Fayetteville:**

\_\_\_\_\_  
Lioneld Jordan, Mayor

Dated: \_\_\_\_\_

Attest: \_\_\_\_\_

Kara Paxton, City Clerk Treasurer

**Exhibit 1**  
**Acceptance Testing and Specifications**

**1. GENERAL**

- a. OzarksGo will perform all tests, provide documentation, and meet the standards identified in this exhibit at its own cost.

**2. TESTING**

- a. OzarksGo will test the Dark Fiber both with: (i) a calibrated light source and power meter, and (ii) a recently calibrated OTDR.
- b. Each fiber will be traced using a 2 km launch reel at the front end of the path so that the events near the source can be seen. Traces shall be taken at 1550 nm and 1310 nm unless different wavelengths are requested. The OTDR will be set to use the shortest pulse width that gives the cleanest trace from end to end. For bi-directional traces, the OTDR settings must be identical on both sides of the Dark Fiber being tested.
- c. Each fiber will be tested bi-directionally at the requested wavelengths, if not specified wavelengths 1550 nm and 1310 nm will be used. The OTDR settings shall be identical for bi-directional testing.

**3. FIBER STANDARDS**

- a. The Dark Fiber will comply with the manufacturer's fiber specifications.
- b. The majority of OzarksGo's fiber optic cable is loose tube single armor or ribbon single armor ITU-T G.652D (reduced water peak) single-mode fiber optic cable <0.25 dB/km @ 1550nm.
- c. Standards Compliance: Telcordia GE-20-CORE  
RDUP PE-90 Designation MLT  
ICEA S-87-640-2011  
RoHS-compliant
- d. Field Splice Standards: OzarksGo will use the following criteria for splicing:
  - i. All splices will be fusion splices achieved using a modern fusion splicer.
  - ii. Average Bi-directional Loss shall be  $\leq 0.1$  dB per splice.

- e. The aforementioned standards are objectives, and not the basis for acceptance. The acceptance standard for each fiber per span shall be calculated as follows:

$$\text{Span Loss} \leq a * \text{span distance in km} + b * 0.15\text{db/splice} + c * (0.5\text{dB/connector})$$

Where:

a = 0.28 db/km @ 1550nm

b = number of splices for span

c = number of connectors per span

#### **4. INNER DUCT ACCEPTANCE TESTING**

Each innerduct has an operable mule tape and extends far enough into each hand hole or junction box. Inner duct butt splices should be joined with a coupling system that is approved by the inner duct manufacturer and installed according to manufacturer specifications

## **Exhibit 2**

### **Maintenance Specifications**

#### ***Route Maintenance:***

Route work is defined as work to address potential hazards or requirements associated with the identification of construction deficiencies across the network. This work WILL NOT be service impacting. This work can be scheduled to resolve the network issue, unless a safety issue can or will put community person(s) or the network in harm. Routine Maintenance includes:

- Corrective maintenance activities
- Safety issues

OzarksGo, LLC shall perform periodic routine maintenance and repair checks at their reasonable discretion. OzarksGo, LLC shall provide the City of Fayetteville with five (5) days notice of any routine maintenance that will disrupt the City of Fayetteville's use.

#### ***Emergency Maintenance:***

Emergency work is defined as work performed (restoration) as a result of an accident or damage to facilities that resulted in a customer(s) out of service situation. Break/Fix situation. Emergency Maintenance includes:

- Service Outages
- Damages resulting in a hazard to the network or community (person(s)).

OzarksGo, LLC or its designee shall promptly respond to any failure, interruption or impairment in the operation of the fiber within two (2) hours after receiving a report of any such failure, interruption or impairment. Such response shall consist of engagement of the on-duty/on-call staff and notification. OzarksGo, LLC shall use its reasonable efforts to perform maintenance and repair to correct any failure, interruption or impairment within eight (8) hours, when reasonably possible. City of Fayetteville may assist with emergency maintenance if approved by OzarksGo, LLC.

#### ***Maintenance Fee:***

OzarksGo, LLC and the City of Fayetteville may mutually agree upon cost for maintenance under this Agreement. There shall be no annual maintenance fee.

# Service Orders

Requested Service Date:

Service Type:

Term:

Order No.:

Billing Phone:

:

**Description of Cable Segments: City of Fayetteville Fibers**

ROUTE NAME	Fiber Count	Mileage

OzarksGo, LLC

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

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

City of Fayetteville:

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

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