

SUBSTITUTE ORDINANCE NO. 5887

AN ORDINANCE AMENDING ORDINANCE 5551 AND ORDINANCE 5734 RELATIVE TO SMART CITY FIBER ACCESS SYSTEMS, ESTABLISHING CRITERIA FOR QUALIFICATION AS SMART CITY FIBER ACCESS SYSTEMS, DEFINING SMART CITY FIBER ACCESS SYSTEMS, AND AUTHORIZING FOR QUALIFYING SMART CITY FIBER ACCESS SYSTEMS ALTERNATIVE REQUIREMENTS, TERMS, CONDITIONS, LIMITATIONS, AND PROVISIONS FOR RECOVERY OF THE CITY'S COSTS INCURRED FOR THE CONSTRUCTION, MAINTENANCE, POLICING, MANAGEMENT OR REPAIR OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY

WHEREAS, the Council adopted Ordinance No. 5551 that addresses and complies with federal decisions construing the Telecommunication Act of 1996 and Tennessee statutes pertaining to the use and occupation of the City's streets and public rights of way by public and private utilities and telecommunications providers;

WHEREAS, the Council adopted Ordinance No. 5734 that establishes standard compensation rates for recovery of the City's costs incurred for the construction, maintenance, policing, management or repair of the City's streets, alleys, thoroughfares and rights-of-way from persons and entities using and occupying the streets, alleys, thoroughfares and rights-of-way of the City for economic gain or benefit of such persons;

WHEREAS, the Council recognizes the importance to the City of broad access by the City to fiber optics communications facilities to support the delivery of efficient, high-quality City services, including existing and emerging Smart City applications;

WHEREAS, the Council recognizes the importance to the City that its residents in all neighborhoods have access to high-speed broadband services;

WHEREAS, the Council recognizes the importance to the City that its low-income residents and students have access to affordable high-speed broadband services;

WHEREAS, the Council finds that it is necessary and appropriate to establish a new Telecommunication Company classification for Telecommunication Companies that enter into binding commitments with the City to develop new fiber optic systems that meet the qualifications and requirements of a Smart City Fiber Access System as specified in this Ordinance;

WHEREAS, the Council desires to define the minimum requirements for Smart City Fiber Access Systems; and

WHEREAS, the Council desires to define the permitting and fee requirements and other conditions for qualifying Smart City Fiber Access Systems.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, AS FOLLOWS:

SECTION 1. SCOPE OF ORDINANCE .

The purpose of this ordinance is to establish a new Telecommunication Company classification under the City's Ordinances governing right of way access by Telecommunication Companies that authorizes flexible permitting and in-kind hybrid fee requirements for Telecommunication Companies that enter into binding commitments with the City to develop and deploy Smart City Fiber Access Systems that will provide the City with dedicated fiber communications resources, will require availability of high-speed broadband services in all of the City's neighborhoods, and will require that low-income residents and students have access to affordable high-speed broadband services from such systems;

SECTION 2. FINDINGS.

The City Council hereby finds, determines and declares as follows:

A. High-speed, reliable communications facilities are essential to permit the City to use digital technology and data to improve City functions and the delivery of City services to residents, businesses, and institutions of the City in a **cost efficient manner.**

B. High-speed, reliable communications facilities are also essential to make available broadband services in all neighborhoods of the City, including low-income and other underserved areas.

C. Making high-speed, reliable communications facilities widely available to City departments, residents, businesses, and institutions of the City will allow the City to more effectively deploy its limited resources, promote economic development, facilitate work-force development among under employed residents and increase the ability of the City's elderly and low-income residents to perform essential functions in the new digital environments;

D. Making high-speed, reliable communications facilities widely available to City departments, residents, businesses, and institutions of the City will improve the productivity of City Departments, businesses and residents and will therefore provide direct and indirect financial benefits for the City and its citizens and ameliorate the increasing cost of City services;

E. It is necessary and appropriate to define the minimum requirements for a Smart City Fiber Access System that will provide these facilities and services to the City and its residents, businesses, and institutions.

F. It is necessary and appropriate to specify the permitting, engineering and right of way access fee requirements that will apply to Telecommunications Companies that commit and agree to the establishment of Smart City Fiber Access Systems.

SECTION 3. DEFINITIONS.

“Annual Right-Of-Way Access Fees” means the monetary fees established under City Ordinances Nos. 5551 and 5734 or any subsequently adopted ordinance amending such monetary fees.

“Commencement Date” means the date specified in the Development Commitment by which the Telecommunications Company will begin construction of the fiber optics system.

"Cable or Video Services Provider" shall mean any entity, person or joint venture authorized to provide cable or video services over a cable system or video service network facility in the City, pursuant to Title VI of the Communications Act of 1934, compiled in 47 U.S.C. § 521 *et seq.*, and/or under Tennessee Code Annotated § 7-59-303, *et seq.* and/or under Section 17 of the City's Home Rule Charter.

“Development Commitment” means a binding written agreement between the City and a Telecommunications Company approved by the Chief Administrative Officer pursuant to authority granted by this Ordinance, the material terms of which have been adopted by the Memphis City Council. In addition to other requirements, the Development Commitment will contain a Commencement Date, a date for completion, and requirements to submit periodic status reports to the City.

“Development Commitment Effective Date” means the date on which a Development Commitment is approved by the Chief Administrative Officer and made binding between the City and a Telecommunications Company.

“Designation Application” means an application submitted by a Telecommunications Company to the City for purposes of obtaining a designation of its fiber optics system as a Smart City Fiber Access System, which application includes a Development Commitment.

“Initial Qualification Notice” means a written notice from the Chief Administrative Officer to a Telecommunications Company that has submitted a Designation Application and a Development Commitment, informing the Telecommunications Company that its fiber optic system meets the qualifications for being designated as a Smart City Fiber Access System.

“Physical Connection Point” means a physical connection point that is located on the Telecommunications Company network reserved and made available by the Telecommunications Company to the City without cost to the City to enable the City or a related agency or entity to implement at the City’s cost a private network

which exclusively supports the delivery of City-related uses by connecting a City-provided optical network terminal (ONT) to the Telecommunications Company's network. The Telecommunications Company will be responsible for managing the ONT.

“Low-Income Premises” refers to all premises located in the Census Tracts of the City of Memphis listed below where the median household income is lower than the median household income of the City of Memphis as of the date of enactment of this Ordinance. Specifically, Low-Income Premises, as of the date of this ordinance, includes all premises within the following Census Tracts, as identified in the Federal Census of 2020: 200, 300, 400, 600, 700, 800, 900, 1100, 1200, 1300, 1400, 3400, 1500, 1900, 2000, 2100, 2400, 2700, 2800, 3600, 3000, 3700, 3200, 6400, 3800, 3900, 4500, 4600, 5000, 5300, 6000, 5500, 5600, 6200, 5700, 5800, 5900, 6500, 6600, 7000, 6700, 6800, 6900, 7300, 7400, 7500, 7810, 7821, 7822, 7900, 8000, 8110, 8120, 8200, 9700, 8700, 8800, 8900, 9100, 9800, 9901, 10000, 9902, 10110, 10210, 10120, 10220, 10300, 10500, 10720, 10610, 10620, 10630, 10810, 11010, 11020, 11100, 11200, 11300, 11400, 11500, 11600, 20101, 11700, 11800, 20521, 20511, 20512, 20532, 20523, 20524, 20542, 20610, 21111, 21731, 21312, 21724, 21725, 21726, 21710, 21721, 21732, 21746, 21900, 22022, 22023, 22111, 22112, 22130, 22210, 22321, 22220, 22310, 22322, 22330, 22600, and 22700. Following the date of enactment of this Ordinance, the City will adjust such Census Tracts in accordance with the results of each decennial census.

“Minimum Service” means one (1) gigabit per second (Gbps) symmetrical broadband service through June 30, 2028.

“Permitting and Engineering Fees” means permitting and engineering fees determined by the City Engineer in accordance with Ordinance Nos. 5551 and 5766.

“Premises” means any parcel of land with one or more permanent structures used for residential or business purposes that is accessible from the City’s public right-of-way.

“Re-qualification Notice” means a written notice from the Chief Administrative Officer to a Telecommunications Company intending to obtain a re-designation for its fiber optic system as a Smart City Fiber Access System in accordance with Section 4(E) of the present Ordinance, which notice will inform the Telecommunications Company that its fiber optic system meets the qualifications for being re-designated as a Smart City Fiber Access System.

“Revised Minimum Service” means the revised broadband speed that is established by resolution of the Council on or after July 1, 2028, applicable to Smart City Fiber Access Systems. The Revised Minimum Service shall not exceed the greater of (i) One Hundred Fifty Percent (150%) of the then-effective Minimum Service or, if available, (ii) the average of the highest tier of broadband download speeds offered by fixed broadband providers as reported in the most recently published report of the Federal Communications Commission. The Revised Minimum Service shall become applicable to Smart City Access Systems following one (1) year’s written notice. Thereafter, the City may establish a new Revised

Minimum Service standard for Smart City Fiber Access Systems every five (5) years after July 1, 2028, to be effective for Smart City Fiber Access Systems in each case upon one (1) year's written notice to the Smart City Fiber Access Systems.

"Telecommunications Company" means any cooperative, corporation, partnership, limited liability company, or individual that owns and operates fiber optic or cable facilities and desires to make application to install and/or operate a Smart City Fiber Access System in the City.

SECTION 4. MINIMUM REQUIREMENTS FOR SMART CITY FIBER ACCESS SYSTEM.

A. APPLICATION FOR DESIGNATION AS A SMART CITY FIBER ACCESS SYSTEM.

A Telecommunications Company that desires that its fiber optics system be designated as a Smart City Fiber Access System shall complete a Designation Application provided by the City that will include at least the following information:

1. High-level design showing:
 - (a) Overall network footprint;
 - (b) Number and locations of all Premises passed by the fiber optics system;
 - (c) Number and locations of all Low-Income Premises passed by the fiber optics system;

2. Construction schedule showing, at a minimum, Commencement Date and date for completion;

3. Commitment to meet each of the requirements for qualification as a Smart City Fiber Access System as set forth in Section 4.B;

4. Signed Development Commitment in form and substance approved by the Chief Administrative Officer, the material terms of which have been adopted by the Memphis City Council..

B. INITIAL QUALIFICATION AS SMART CITY FIBER ACCESS SYSTEM.

In order to initially qualify for the designation as a Smart City Fiber Access System, a Telecommunications Company must include in the Development Commitment a commitment to construct and complete, within a specified period of time approved by the Chief Administrative Officer and specified in the Development Commitment, a fiber optics system in the City of Memphis with the following characteristics and service opportunities:

1. During the period until June 30, 2028, the fiber optics system must initially support the Minimum Service to all residences served and must support any Revised Minimum Service standard adopted thereafter; and

2. The fiber optics system must be available to provide the Minimum Service to the following percentages of the total business and residential Premises within the City:

(a) The fiber optics system must be available to at least sixty percent (60%) of the residential and business Premises within the City; and

(b) The fiber optics system must be available to at least sixty percent (60%) of the Low-Income Premises existing within the City prior to the Development Commitment Effective Date; and

3. The Development Commitment must include a commitment approved by the Chief Administrative Officer to improve the opportunities for broadband access by low-income residents; ~~and~~ and a commitment for minority participation at all major levels of the project.

4. The fiber optics system must construct at no cost to the City at least six thousand (6,000) Physical Connection Points at locations throughout the City, of which at least one-third (1/3) shall be located within the Census Tracts encompassing the Low Income Premises existing prior to the Development Commitment Effective Date; and

5. The fiber optics system must provide to the City Internet access at least one hundred (100) locations at no cost to the City as approved by the Chief Administrative Officer and specified in the Development Commitment.

6. Upon finding that the Telecommunications Company has demonstrated that its fiber optics system will satisfactorily meet the requirements for qualification as a Smart City Fiber Access System, the Chief Administrative Officer will provide the Telecommunications Company an Initial Qualification Notice. Upon the issuance of an Initial Qualification Notice, the Telecommunications Company shall become eligible to enter into a Smart City Fiber Access Right of Way Agreement with the City. The effective date of such agreement

will be the date of the Initial Qualification Notice or such later date agreed to by the City and the Telecommunications Company.

7. Notwithstanding any other provision of this ordinance to the contrary, any cable or video system of a Cable or Video Services Provider, as defined herein, or of any other telecommunications provider that is covered by Title VI of the Communications Act of 1934, compiled in 47 U.S.C. § 521 *et seq.*, and/or by Tennessee Code Annotated § 7-59-303, *et seq.* shall not qualify as a Smart City Fiber Access System unless such Cable or Video Services Provider or other entity or person provides services over its cable system or video service system that are associated with or classified as non-cable or non-video services under federal law including but not limited to telecommunications services and internet access services for which it is subject to pay Annual Right-of-Way Access Fees under City Ordinance Nos. 5551 and 5734. A designation of any Cable or Video Services Provider as a Smart City Fiber Access System shall exempt such providers from payment of Annual Right-of-Way Access Fees under City Ordinance Nos. 5551 and 5734, if any, but shall not supplant, displace alter or reduce, in whole or part, the authority of the City to collect or the obligation of a Cable or Video Services Provider to pay franchise fees on a percentage of such provider's gross revenues derived from the operation of its cable or video service system pursuant federal or state law or pursuant to a separate franchise or right of way agreement.

C. CONTINUED QUALIFICATION AS SMART CITY FIBER ACCESS SYSTEM

A fiber optics system that has initially qualified as a Smart City Fiber Access System pursuant to Section 4.B. must meet the following requirements by the dates specified to continue its designation as a Smart City Fiber Access System:

1. By the date two (2) years after the Commencement Date, the fiber optics system must be available to at least twenty percent (20%) of the residential and business Premises within the City and at least ten percent (10%) of the Low-Income Premises existing within the City prior to the Development Commitment Effective Date; and

2. By the date three (3) years after the Commencement Date, the fiber optics system must be available to at least forty percent (40%) of the residential and business Premises within the City and at least thirty percent (30%) of the Low-Income Premises existing within the City prior to the Development Commitment Effective Date; and

3. By the date four (4) years after the Commencement Date, the fiber optics system must be available to at least sixty percent (60%) of the residential and business Premises within the City and at least sixty percent (60%) of the Low-Income Premises existing within the City prior to the Development Commitment Effective Date; and

4. By the date four (4) years after the Commencement Date, the fiber optics system must provide to the City Internet access at least one hundred (100) locations at no cost to the City as designated by the City; and

5. By the date four (4) years after the Commencement Date, the fiber optics system must have delivered to the City, at no cost to the City, at least six thousand (6,000) Physical Connection Points for access by the City at its cost, of which at least one-third (1/3) shall be located within the Census Tracts encompassing the Low-Income Premises existing prior to the Development Commitment Effective Date.

6. The fiber optics system must meet Revised Minimum Service standards one (1) year after receipt of written notice of the City's adoption of each Revised Minimum Service standard.

D. EFFECT OF FAILURE TO CONTINUE TO QUALIFY AS A SMART CITY FIBER ACCESS SYSTEM

1. If a fiber optics system that has previously qualified as a Smart City Fiber Access System does not meet one or more of the requirements to continue its designation as a Smart City Fiber Access System, the City may, by written notice to the Telecommunications Company withdraw the designation as a Smart City Fiber Access System. The City's notice will specify the basis for the City's action and the date, no earlier than thirty (30) days after the notice, when the designation will be withdrawn. The City's notice will notify the Telecommunications Company of its right to a hearing if the Telecommunications Company disputes the City's conclusion

and action and will specify the procedure to be used to request a hearing, including the deadline for requesting a hearing. The hearing will be held before an official designated by the Chief Administrative Officer. If dissatisfied with the results of the hearing, the Telecommunications Company may appeal the decision to the Chief Administrative Officer, whose decision will be final.

2. As of the date specified in the City's notice, or at such later date upon which the hearing procedure has been completed, if requested, the fiber optic system's Smart Fiber Access Right-of-Way Agreement will terminate and the fiber optics system will be subject to all requirements of Ordinance 5551, including, without limitation, the fees and charges specified in Ordinance 5734 or any later-enacted ordinance establishing fees and charges applicable to fiber optic systems utilizing the City's public rights-of-way.

E. RE-APPLICATION AFTER WITHDRAWAL OF DESIGNATION AS SMART CITY FIBER ACCESS SYSTEM

1. Should the designation of a fiber optics system as a Smart City Fiber Access System be lost as specified in Section 4.D., the Telecommunications Company may re-apply one (1) time for re-designation of its fiber optic system as a Smart City Fiber Access System. The Telecommunications Company submitting such a re-application will have the burden of demonstrating that its fiber optics system meets all of the requirements for designation as a Smart City Fiber Access System in effect on the date that the re-application is submitted.

2. Upon finding that the Telecommunications Company has carried its burden of demonstrating that its fiber optics system has satisfactorily met the requirements for re-qualification as a Smart City Fiber Access System, the Chief Administrative Officer will provide the Telecommunications Company a Re-qualification Notice. Provided, however, that the Chief Administrative Office may condition the re-designation of the fiber optics system as a Smart City Fiber Access System upon inclusion in the Smart City Fiber Access Right-of-Way Agreement of reasonable reporting requirements and other reasonable conditions that the Chief Administrative Officer deems appropriate to ensure continued compliance with the requirements for a Smart City Fiber Access System. The effective date of the Smart City Fiber Access Right-of-Way Agreement will be the date of the Re-qualification Notice or such later date agreed to by the City and the Telecommunications Company. If the Chief Administrative Officer finds that the Telecommunication

Company has not met its burden, the fiber optic system will be denied re-designation as a Smart City Fiber Access System.

SECTION 5. FEE AND OTHER REQUIREMENTS APPLICABLE TO SMART CITY FIBER ACCESS SYSTEM

A. SMART CITY FIBER ACCESS RIGHT-OF-WAY AGREEMENTS

The Smart Fiber Access Right-of-Way Agreements shall include such standard and other terms as the Chief Administrative Officer deems appropriate, including the following provisions applicable only to Smart City Fiber Access Systems:

1. Exemption from paying Annual Right-of-Way Access Fees for the Smart Fiber Access System approved hereunder during the initial and any renewal term of the Smart Fiber Access Right-of-Way Agreement, except as otherwise provided in Section 4 B.7 of this Ordinance.

2. Payment of Permitting and Engineering Fees normally charged pursuant to applicable ordinances that may be structured and narrowly tailored to the construction schedule and requirements of a telecommunications provider and that are reasonably related to the City's cost to provide engineering services for an applicant's network, the amount of which shall be determined by the Director of Engineering and subject to a written agreement.

3. A term of up to twenty (20) years, subject to earlier termination for reasons described in the Smart City Fiber Access Right-of-Way Agreement,

including the failure of the fiber optics system to continue to qualify as a Smart City Fiber Access System.

4. The opportunity to renew the Smart City Fiber Access Right-of-Way Agreement for an additional term of up to twenty (20) years, upon a determination by the Chief Administrative Officer that the fiber optics system continues to qualify as a Smart City Fiber Access System, and subject to approval by resolution adopted by Council.

5. Reporting requirements to enable the City to monitor the Smart City Fiber Access System's compliance with the requirements of Section 4 hereof.

B. APPLICATION OF STANDARD NON-FEE PROVISIONS OF ORDINANCE NO. 5551 AND OTHER RIGHT OF WAY ORDINANCES

Except as otherwise provided in this Ordinance or in a Development Commitment approved under the authority of this Ordinance, the standard non-fee provisions of Ordinance No. 5551 and any other right of way ordinances of the City shall continue to apply to any Smart City Fiber Access Right-of-Way Agreement, including but not limited to the power and authority of the City's Legislative Council, the City's Administration of the City's Right of Way, engineering and technical requirements, administrative and insurance requirements, any requirements governing traffic control, safety requirements, removal and relocation of facilities.

C. APPLICATION OF STANDARD RIGHT-OF-WAY AGREEMENT TERMS FOLLOWING TERMINATION OR EXPIRATION OF SMART CITY FIBER ACCESS AGREEMENT

If a Telecommunication Company's fiber optics system continues to occupy any of the rights-of-way of the City following the termination or expiration of a Smart City Fiber Access Agreement, the Telecommunications Company will be required to enter into a standard City right-of-way agreement and will be subject to the fees and other requirements applicable to those using the City right-of-way, including those contained in Ordinance 5551 and Ordinance 5734, as those ordinances may be amended in the future.

SECTION 6. LOW-INCOME ACCESS FUND

A. PURPOSE OF FUND

1. There is hereby created a low-income access fund to help defray or subsidize the costs of a Telecommunications Provider to provide drops for direct connections to a Smart City Fiber Access System for qualifying Low-Income Premises ("Drop Subsidy") to be disbursed to Telecommunications Providers operating an approved Smart City Fiber Access System on a first-come first served basis up to one-half of the documented cost per drop.

2. The Low-Income Access Fund shall also defray the internal costs of the City to provide outreach and educational programs, either directly and/or through third-party contractors, to help eligible low-income and disadvantaged Memphians access private, city and federal broadband subsidy programs that would aid them in obtaining and maintaining a home broadband connection to a Smart City Fiber Access System. ("Outreach and Educational Subsidy").

B. INITIAL FUNDING

The Council hereby approves a one-time allocation of \$7,000,000 from available funds of the City to be identified by the City Administration and appropriated by resolution of the Council as follows:

- a) \$3.5 million for the Drop Subsidy;
- b) \$3.5 million for the Outreach and Educational Subsidy

If Additional funds are contributed voluntarily by individuals, businesses, other governmental entities or non-profit organizations to subsidized Drops or Outreach/Education programs, such funds shall be appropriated by the Council equally to augment the Drop Subsidy and the Outreach and Educational Subsidy or as directed by the donating entity.

C. ADMINISTRATION AND ACCOUNTING

The Low Income Subsidy Fund shall be maintained and accounted for by the City as a separate discrete fund to be used until all monies therein are exhausted and only for the purposes specified in this Ordinance, unless otherwise provided by the Council by resolution, in accordance with procedures and rules promulgated by the City Administration.

SECTION 7. MISCELLANEOUS PROVISIONS

A. TENNESSEE LAW GOVERNS

In any controversy or dispute under this ordinance, Ordinance 5551, or Ordinance 5734, the law of the State of Tennessee, including its choice of law provisions, shall apply to the extent such law has not been superseded or preempted.

B. CONFLICT WITH EXISTING ORDINANCES

Ordinance Nos. 5551, 5734, 5766 or any City Ordinance pertaining to access, construction or repair of the City's rights of way ("ROW Ordinances"), as amended or modified hereby, remain in full force and effect. In the event, there is any dispute as to the applicability of the Prior Ordinances or this Ordinance, it is the intent of the Council that the provisions shall be interpreted in such a way to apply the ROW Ordinances except as modified by the terms of this Ordinance or a Development Commitment approved under the authority of this Ordinance give precedence to the ROW Ordinances.

C. SEVERABILITY

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Authorization ordinance is for any reason held invalid or unenforceable by any court of competent jurisdiction, the remainder of this Authorization ordinance shall not be affected thereby, but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant and portion of this

Authorization ordinance shall be valid and enforceable to the fullest extent permitted by law.

D. ENACTMENT CLAUSE

Be it further ordained that this Ordinance shall take effect after having been passed by City Council, signed by the Chair of Council, certified and delivered to the office of the Mayor in writing by the comptroller, and becomes effective as otherwise provided by law and shall remain effective and operative unless and until the City Council alters, amends clarifies or repeals it by a superseding, amending, clarifying or codifying ordinance.

SPONSOR: CITY ADMINISTRATION

MARTAVIUS JONES
CHAIRMAN

THE FOREGOING ORDINANCE
5887 PASSED
1st Reading 10/24/23
2nd Reading 11/7/23
3rd Reading 11/21/23
Approved Martavius Jones
Chairman of Council

Date Signed: 7-Dec-23

[Signature]
Mayor, City of Memphis
Date Signed: 12/7/23

I hereby certify that the foregoing is a true copy, and said document was adopted by the Council of the City of Memphis as above indicated and approved by the Mayor.

Valerie C. Sipes
Comptroller