



## MEMORANDUM

**TO:** Mayor Laurel Lunt Prussing and Members of the City Council  
**FROM:** William R. Gray, Public Works Director  
Bradley M. Bennett, Assistant City Engineer  
**DATE:** August 18, 2016  
**RE:** Windstream Agreement for Use of Right-of-Way

### Action Requested

Approval of the attached ordinance entitled "AN ORDINANCE APPROVING A RIGHT-OF-WAY LICENSE AGREEMENT WITH WINDSTREAM KDL, LLC."

### Background and Facts

The City Council approved an agreement for the use of right-of-way (ROW) with Windstream KDL, LLC of Little Rock, Arkansas, on May 2, 2011, (City Ordinance 2011-04-031) for installation of fiber optic cables in below-ground conduits and on above-ground, pole-mounted locations in the City ROW. The agreement had a termination date of June 30, 2016. Windstream KDL is seeking a new agreement with the City to cover the fiber optic facilities already installed as part of the previous agreement. No new fiber optic facilities are being proposed for installation in conjunction with the new agreement.

The new agreement will have a termination period of 20 years from the date the agreement is executed.

### Financial Impact

Windstream KDL is not subject to the City's utility maintenance fee for right-of-way occupation because it is a retailer of telecommunications services as defined under the Illinois Simplified Telecommunications Tax Act and as a result does not provide any direct revenue to the City. There is no direct expense to the City for administering the agreement.

### Recommendations

It is recommended that the City Council approve the attached ordinance entitled "AN ORDINANCE APPROVING A RIGHT-OF-WAY LICENSE AGREEMENT WITH WINDSTREAM KDL, LLC."

Attachments: AN ORDINANCE APPROVING A RIGHT-OF-WAY LICENSE AGREEMENT WITH WINDSTREAM KDL, LLC.  
AGREEMENT FOR USE OF RIGHT-OF-WAY (Windstream KDL, LLC.)

ORDINANCE NO. 2016-08-073

AN ORDINANCE APPROVING A RIGHT-OF-WAY LICENSE AGREEMENT WITH  
WINDSTREAM KDL, LLC

(2016)

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Urbana, Champaign County, Illinois, as follows:

**Section 1.** A Right-of-Way License Agreement between the City of Urbana, Illinois, and Windstream KDL, LLC, in substantially the form of the copy of said Agreement attached hereto and hereby incorporated by reference, be and the same is hereby authorized and approved.

**Section 2.** The Mayor of the City of Urbana, Illinois, be and the same is hereby authorized to execute and deliver and the City Clerk of the City of Urbana, Illinois, be and the same is hereby authorized to attest to said execution of said Agreement as so authorized and approved for and on behalf of the City of Urbana, Illinois.

**Section 3.** This Ordinance shall not be construed to affect any suit or proceeding pending in any court, or any rights acquired, or a liability incurred, or any cause or causes of action acquired or existing prior to the effective date of this Ordinance; nor shall any right or remedy of any character be lost, impaired, or affected by this Ordinance.

**Section 4.** This Ordinance shall be in full force and effect from and after its passage.

This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED BY THE CITY COUNCIL this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

AYES:

NAYS:

ABSENT:

ABSTAINED:

\_\_\_\_\_  
Phyllis D. Clark, City Clerk

APPROVED BY THE MAYOR this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Laurel Lunt Prussing, Mayor

**Mail recorded document to:**

City of Urbana Legal Division  
400 S. Vine Street  
Urbana, IL 61801

City of Urbana – Champaign County

**RIGHT-OF-WAY LICENSE AGREEMENT**

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**Windstream KDL, LLC  
4001 Rodney Parham Road  
Little Rock, AR 72212-2459**

## RIGHT-OF-WAY LICENSE AGREEMENT

This agreement is made between Windstream KDL, LLC, a Kentucky limited liability company ("Company"), and the City of Urbana, an Illinois municipal corporation ("City"), each a "party" and together the "parties," and is effective on the last date signed by a party hereto. The Company and the City agree as follows:

1. **Grant of license.** The City hereby grants and the Company hereby accepts a nonexclusive, nontransferable, nonassignable, and revocable license to maintain, operate, repair, and remove a facility ("Facility") consisting of one direct-buried 48 count ADSS fiber optic cable with trace wire contained within a 1¼-inch duct, a second empty 1¼-inch duct running parallel to the first duct, suitable handholes, above and below-ground pedestals, and aerial 48 Count ADSS fiber, as described in Exhibit A and shown in Exhibit B, within the public right-of-way ("Licensed Property") designated in Exhibit C.
  - A. The license gives the Company permission to use the Licensed Property for the limited purposes and term stated in this agreement. The license is not a warranty of title and does not convey any right, title, or interest in the Licensed Property.
  - B. The license is subject to the rights of any public utility or other person or entity currently having rights, licenses, franchises, or easements in and about the Licensed Property.
  - C. The Company shall fully and faithfully perform and comply with all terms, conditions, and covenants contained in this agreement. If the Company fails to perform or comply with any term, condition, or covenant herein, the City is permitted to revoke the license after giving the Company a period in which to cure such failure as set forth in this agreement.
  - D. The Company shall not transfer or assign the license.
  - E. The license is non-exclusive and at all times subordinate to the City's and the public's use of the Licensed Property for purposes normally associated with a public right-of-way. Accordingly, if necessary to accommodate repair, maintenance, or construction of City utilities or improvements to the Licensed Property, the Company shall, at its sole cost, relocate or remove all or any portion of the Facility not more than ninety (90) days after the City's Public Works Director ("Director") directs such relocation or removal in writing.
  - F. The Company shall use its best efforts to maintain contractors on any work project involving the Facility and to work toward its timely completion, barring inclement weather or other situations beyond the Company's control.

2. **Term; termination.** This agreement is binding upon the parties hereto for a term of twenty (20) years commencing as of its effective date, unless sooner terminated in accordance with this agreement. This agreement may be terminated at any time without notice upon the express written consent of both parties. Either party is permitted to terminate this agreement for cause by giving written notice to the other party at least forty-five (45) days prior to the proposed termination. Such party shall specify the reason or reasons for such termination in the written notice and shall specifically state that such termination will become effective thirty (30) days after the date thereof if the reason or reasons for such notice of termination are not fully and completely cured.

3. **Simplified Municipal Telecommunications Tax.** The Company is a retailer of telecommunications services, as contemplated under the Simplified Municipal Telecommunications Tax Act (35 ILCS 636/5-1 et seq.), as amended, and collects the taxes provided for under that Act and any other taxes that it may be required by law to collect. Accordingly, the Company is exempt from any licensing or right-of-way permit fees.

4. **Plan submission.** Upon completion of construction of the Facility, the Company shall provide as-built plans to the City in an electronic format compatible with the City's Geographic Information System.

5. **Maintenance.** The Company shall maintain the Facility in good and safe condition and in a manner that complies with all applicable laws.

6. **Repair.** After doing any work, the Company at its sole cost and expense shall promptly repair and restore to the extent practicable any right-of-way disturbed by the Company, including without limitation all sidewalks, parkways, or pavements, to their original condition or better in accordance with the specifications of the City.

- A. If any such sidewalk, parkway, or pavement becomes uneven, unsettled, or otherwise requires repairing, because of such disturbance by the Company, the Company, as soon as climatic conditions reasonably permit, shall promptly, and no more than fifteen (15) days from receipt of notice from the City to do so, cause such sidewalk, parkway, or pavement to be repaired or restored. The Company shall complete such restoration no more than (10) days after the date of commencement of such restoration work. If the Company fails to commence and complete the restoration work in the manner and within the times prescribed herein, the City is permitted to perform such work, and the Company shall pay any costs and expenses the City incurs upon written demand by the City.
- B. If such right-of-way or improvement cannot be so repaired, replaced, or restored, the Company shall compensate the City for the cost or reasonable value of such improvements in an amount estimated by an independent architect, engineer, or contractor mutually agreed upon by the parties.
- C. Within a reasonable time after completion of any excavations in lawns or grassy parkways, the Company shall backfill, tamp, and restore with seed or

mulch all disturbed areas to at least as good a condition as existing immediately preceding the excavation.

- D. At the Director's discretion, the Company shall repair or replace any shrubs, bushes, or trees existing within the Licensed Property that are disturbed by reason of the construction, maintenance, or repair of the Facility.
- E. The Company shall promptly repair and restore at its own expense all damage it causes to any other utility, including but not limited to storm and sanitary sewers and their services, street lighting, traffic signals, field tiles or facilities from any other utility company.
- F. The provisions in this Paragraph 6 will survive the termination of this agreement.

**7. Removal.**

- A. The City is permitted to remove and dispose of the Facility, or any portion thereof, upon occurrence of any of the following:
  - (1) an emergency that presents imminent peril to person or property;
  - (2) the Company's non-compliance with any term, provision, or covenant in this agreement that is not cured within the time provided herein following notice of such non-compliance tendered to the Company;
  - (3) the Director or other responsible City official, in good faith, deems the procedure in Paragraph 6 impracticable under the circumstances present;
  - (4) termination of this agreement for any reason;
  - (5) the Company's abandonment of the Facility's in accordance with the provisions in Paragraph 8 of this agreement; or
  - (6) expiration of this agreement in the absence of any renewal thereof.
- B. The Company shall bear all costs and expenses incurred in the removal and disposal of the Facility and the restoration of the Licensed Property.
- C. If the Company fails in any way to make timely payment to the City for such costs and expenses, the Company shall pay, in addition to any amount so owed, the City's reasonable attorneys' fees and court costs incurred in the collection of such amount. This provision will survive the termination of this agreement.

8. **Lapse and termination.** The license herein granted is limited to the construction, maintenance, operation, repair, and removal of the Facility. Any additional use other than that specifically named herein, without the further express written consent of the City, is a violation of this agreement. Upon cessation of such use, as determined by the Director, this agreement immediately and automatically will lapse and terminate. If the Director believes the Company is no longer using the Facility or that it otherwise has been abandoned, he or she shall notify the Company in writing that the City is asserting its right to declare this agreement lapsed and terminated. Such notice will state that the Company has thirty (30) days to reassert its rights under this agreement and demonstrate that it has not in fact abandoned the license granted by this agreement. If the Company demonstrates within the thirty (30) day period that it has not abandoned the Facility, this agreement will remain in force and effect according to its terms. If the Company does not demonstrate within the thirty (30) day period that it has not abandoned the Facility, this agreement will be deemed lapsed, terminated, and no longer in effect.

9. **Indemnification.** The Company, at its sole cost and expense, shall defend and indemnify the City from and against any and all losses, damage, claims or liability whatsoever for or in connection with the death or injury to any person or damage to any property in connection with the Company's construction, maintenance, repair, use, or removal of the Facility, unless such losses, damage, claims or liability arises solely from a negligent or intentional act or omission by the City or any of its employees, agents or contractors. This provision will survive the termination of this agreement.

10. **Entire agreement; amendment.** This agreement constitutes the entire agreement between the parties, supersedes all other agreements or understandings between them pertaining to the matter of this agreement, and may not be modified or rescinded except by a writing signed by both parties.

11. **Notices.** All notices required under this agreement must be in writing. Notices must be personally hand delivered or mailed by certified U.S. mail, return receipt requested, addressed to the respective party as shown below, or to any changed address either party may have fixed by notice. Notice will be deemed effective upon actual receipt of the notice, or, if certified mail delivery is not accomplished, notice will be deemed given on the date of the mailing. Either party may designate by written notice a different address to which notices must be sent.

Windstream KDL, LLC

Atry Meeker  
Sr. Analyst – Engineering  
Windstream Communications, LLC  
11101 Anderson Drive  
Little Rock, AR 72212

City of Urbana

Director of Public Works  
City of Urbana  
706 S. Glover Avenue  
Urbana, Illinois 61802

12. **Governing Law.** This agreement will be construed in accordance with the laws of the State of Illinois. Any action to interpret, construe, or enforce this agreement will

be initiated and maintained in the Circuit Court for the Sixth Judicial Circuit, Champaign County, Illinois.

13. **Non-waiver.** Either party's failure to enforce any provision of this agreement will not be deemed a waiver of future enforcement of that or any other provision. A waiver of any provision of this agreement is valid only if in writing and signed by the parties.

14. **Compliance with governmental requirements.**

A. **Right-of-way permit.**

- (1) Except in an emergency as provided in this agreement, the Company shall obtain a right-of-way permit from the City before extending, removing, or otherwise changing the Facility. The permit will indicate the time, manner, and place of the work to be performed. Along with each application for a permit, the Company shall provide prints, plans and maps showing the proposed location and design of the Facility to be constructed, the location of each conduit to be entered, and the number and placement of manholes or other openings to gain access to said conduit, along with the appropriate surety bond, insurance certificate, and permit fees required by the Urbana City Code. If the proposed improvements are consistent with the use of the license granted by this agreement, and the application complies with the Urbana City Code, the City shall approve the permit application. The Company shall comply with all conditions of any permits issued to it.
- (2) In an emergency that the Company believes poses a threat of immediate harm to the public or to any of the Company's facilities, the Company is permitted access to the public way to mitigate the threatened harm without the benefit of a permit; provided, however, the Company shall advise the City of the emergency at the earliest reasonable opportunity and shall seek a proper permit within a reasonable period of time thereafter and in the manner as hereinbefore stated.

B. **Applicable law.** The Company shall comply with all applicable laws, ordinances, regulations and requirements of federal, state, county, and local regulatory authorities, including without limitation the applicable provisions of the Urbana City Code regarding rights-of-way and their uses, as such ordinances are now or hereafter amended, except to the extent that such ordinances directly and irreconcilably conflict with an express provision of this agreement.

15. **No presumption.** Each party hereto acknowledges that this agreement is the product of good faith negotiations by and between the parties hereto and, as such, neither party may seek to have this agreement strictly construed against the other party as drafter of this agreement.



16. **Due Authorization.** Each party hereto acknowledges that the individual who has executed this agreement has the due and full authority to do so.

17. **Recording.** This agreement will be recorded in the Office of the Champaign County Recorder of Deeds at the expense of the Company.

18. **Counterparts.** The parties are permitted to sign this agreement in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. Signatures delivered by email in Adobe Portable Document Format (PDF) or by facsimile will be deemed original signatures for all purposes.

[SIGNATURE PAGE FOLLOWS]



## **Exhibit A**

### **Path Descriptions**

Each path containing buried fiber optic cable consists of one direct-buried 48 Count ADSS fiber optic cable with trace wire contained inside one 1 ¼" duct. A second empty 1 ¼" duct runs parallel as a spare. Each path consisting of aerial fiber consists of on 48 Ct ADSS fiber optic cable. Each path also includes suitable handholes and pedestals as needed to meet reasonable customer and network management needs in the least intrusive manner feasible. Above-ground pedestals will be used where existing utilities use above-ground pedestals and below-ground space is not required. Standard depth for the buried portions are at least thirty-six (36) inches below finished grade.

#### **Path A-1**

This path consists of 48 Count ADSS fiber and trace wire in two 1 ¼" inch ducts. One duct carries the fiber. The second duct is an empty spare. The path begins on the west side of N. High Cross Rd., at the intersection of N. High Cross Rd. and I-74 W., approximately 85 feet from the center line of N. High Cross Rd. This path runs north for approximately 250 feet.

#### **Path A-2**

This path begins on the west side of N. High Cross Rd., at the intersection of N. High Cross Rd. and I-74 E., approximately 85 feet from the center line of N. High Cross Rd. This portion of the path consists of 48 Count ADSS buried fiber and trace wire in on 1 ¼" in duct, with a second empty 1 ¼" duct running parallel as a spare. The path runs south for approximately 200 feet, and transitions to 48 Count aerial ADSS fiber, continuing to run south for approximately 1,200 feet. At this point, the path transitions to 48 Count ADSS buried fiber and trace wire in on 1 ¼" in duct, with a second empty 1 ¼" duct running parallel as a spare. The buried fiber travels directly east, crossing under, and to the east side of N. High Cross Rd., at a point approximately 75 feet from the center line of N. High Cross Rd. From that point, the path continues to travel south for approximately 250 feet, until transitioning to 48 Count aerial ADSS fiber. This aerial portion of the route travels south for approximately 450 feet, stopping approximately 75 feet from the center line of E. University Ave. /US Rt. 150.

#### **Path B-1**

This consists of 48 Count ADSS fiber and trace wire in two 1 ¼" inch ducts. One duct carries the fiber. The second duct is an empty spare. The path begins on the north side of E. Windsor Rd., approximately 90 feet from the center line of S. High Cross Rd., at the intersection of S. High Cross Rd. and E. Windsor Rd. This path continues underground and south west for approximately 100 feet to the center line of E. Windsor Rd. The path then turns south for approximately 150 feet to a point on the south side of E. Windsor Rd., where it transitions to 48 Count aerial ADSS fiber. The aerial portion of the path turns north east for approximately 170 feet to a point approximately 20 feet west of E. Windsor Rd. The aerial path then continues west approximately 120 feet and parallel to E. Windsor Rd., and then stops.

#### **Path C-1**

This path consists of 48 Count ADSS fiber and trace wire in two 1 ¼" inch ducts. One duct carries the fiber. The second duct is an empty spare. The path begins on the south side of W. Kenyon Rd. approximately 100 feet from the centerline of W. Kenyon Rd., and approximately 80 feet east of N. Federal Dr. The path travels north, north east for approximately 150 feet, until reaching a point approximately 20 feet on the north side of W. Kenyon Rd. The path continues running buried and traveling east parallel with W. Kenyon Rd. for approximately 900 feet. At this point, the path continues buried and turns south crossing beneath W. Kenyon Rd., traveling approximately 450 feet, crossing underneath Killarney St., to a point approximately 20 feet on the south side of Killarney St. At this point, the path continues buried and turns west for approximately 400 feet running parallel to Killarney St. At the intersection of Killarney St. and N. Lincoln Ave., approximately 20 feet on the south side of Killarney St., and 20 feet on the west side of N. Lincoln Ave., the path continues buried and travels south and parallel to N. Lincoln Ave. for approximately 1,700 feet. At this point, the buried path stops, and turns west at a point approximately 20 feet north of Bradley Ave. The path then continues buried running west and parallel to Bradley Ave. for approximately 1,500 crossing beneath N. Goodwin Ave. until reaching a stopping point approximately 20 feet north of E. Bradley Ave.

#### **Path D-1**

This path consists of aerial 48 Count ADSS fiber. This path begins at a point approximately 20 feet on the south side of the railroad tracks, and on the west side of N. Race St. The path travels approximately 150 feet north east crossing over the railroad tracks and N. Race St., to a stopping point approximately 20 feet on the east side of N. Race St.

#### **Path D-2**

This path consists of 48 Count ADSS buried fiber and trace wire in on 1 ¼" in duct, with a second empty 1 ¼" duct running parallel as a spare. This path begins at the intersection of the railroad tracks and N. Broadway Ave., at a point approximately 50 feet south of the railroad tracks, and 20 feet west of N. Broadway Ave. The path then travels south, south east for approximately 330 feet on the west side of N. Broadway Ave. At that point, the path turns south east for approximately 430 feet crossing beneath N. Broadway Ave. to a point approximately 20 feet east of N. Broadway Ave. The path then continues running south and parallel to N. Broadway Ave. for approximately 600 feet. At that point, the path turns east, south east for approximately 150 feet, crossing beneath E. Water St., and then turns south west for another 50 feet to a stopping point.

#### **Path E-1**

This path consists of buried 48 Count ADSS fiber optic cable with trace wire contained inside one 1 ¼" duct. A second empty 1 ¼" duct runs parallel as a spare. The path begins at a point approximately 20 feet on the west side of N. Goodwin Ave., at a point approximately 50 feet south of the intersection of N. Goodwin Ave. and W. Main St. The path then travels north for approximately 50 feet to a point, and then turns east for approximately 90 feet, crossing beneath N. Goodwin Ave., and coming to a stop on the east side of N. Goodwin Ave.

#### **Path E-2**

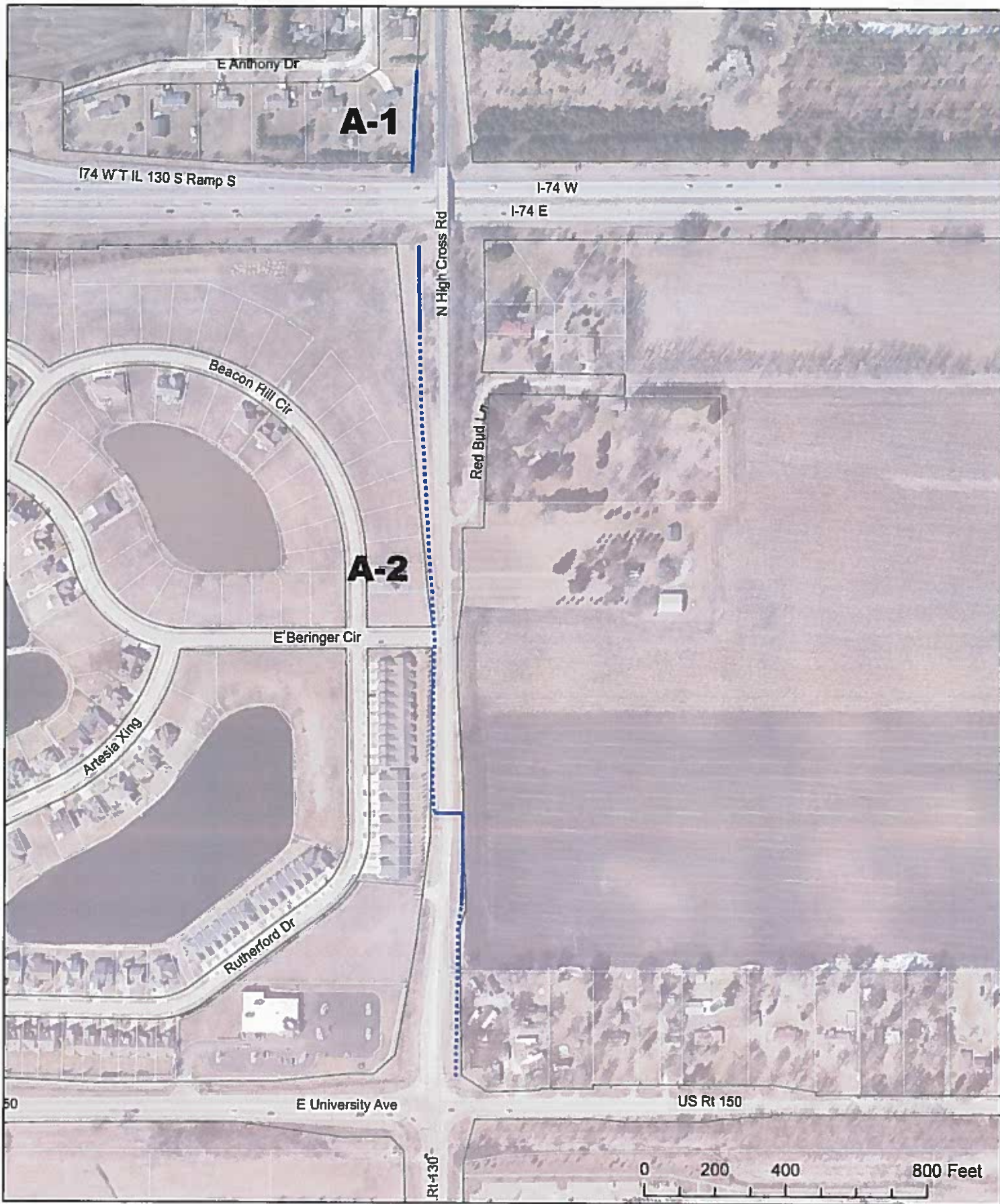
This path consists of 48 Count ADSS aerial fiber, and begins at a point approximately 40 feet south of the intersection of W. University Ave. and N. Lincoln Ave., at a point approximately 20 feet west of N. Lincoln Ave. The path then travels south, parallel to N. Lincoln Ave. for approximately 190 feet, and crossing the intersection of N. Lincoln Ave. and Clark St., to a point approximately 20 feet south of Clark St., and 20 feet west of N. Lincoln Ave. The path then travels east and parallel to Clark St. for approximately 360 feet. At that point, the path transitions to buried 48 Count ADSS fiber optic cable with trace wire contained inside one 1 ¼" duct, and a second empty 1 ¼" duct running parallel as a spare. This buried portion continues to run west and parallel to Clark St. for approximately 150 feet, to a point crossing beneath S. Busey Ave., at the intersection of S. Busey Ave. and Clark St. The path then stops at a point approximately 20 feet on the east side of S. Busey Ave.

#### **Path E-3**

The this path consists of buried 48 Count ADSS fiber optic cable with trace wire contained inside one 1 ¼" duct, and a second empty 1 ¼" duct running parallel as a spare. This path begins at a point approximately 20 feet to the west of N. Coler Ave., at a point approximately 70 feet south of the intersection of Clark St. and N. Coler Ave. At this starting point, this path travels approximately 120 feet east, crossing beneath N. Coler Ave., to a stopping point approximately 20 feet on the east of N. Coler Ave.

#### **Path E-4**

This path consists of buried 48 Count ADSS fiber optic cable with trace wire contained inside one 1 ¼" duct, and a second empty 1 ¼" duct running parallel as a spare. This path begins at a point approximately 20 feet on the west side of N. Orchard St., at a point approximately 50 feet north of the intersection of Sassafras Aly and N. Orchard St. The path then travels north and parallel to N. Orchard St. for approximately 110 feet to a stopping point. At this point, approximately 20 feet south of Broad Aly, and 20 feet west of N Orchard St., at the intersection of Broad Aly and N. Orchard St., the path transitions to 48 Count ADSS aerial fiber. The aerial fiber then travels east for approximately 50 feet, and crosses N. Orchard St., to a stopping at a point approximately 20 feet south of Broad Aly, and 20 feet east of N. Orchard St. at the intersection of Broad Aly and N. Orchard St.



**Legend**

- Existing Underground Fiber Utility
- ⋯ Existing Overhead Fiber Utility
- Right of Way

**Windstream Communications, LLC**  
**Exhibit "B" - Path maps**  
**License Agreement**

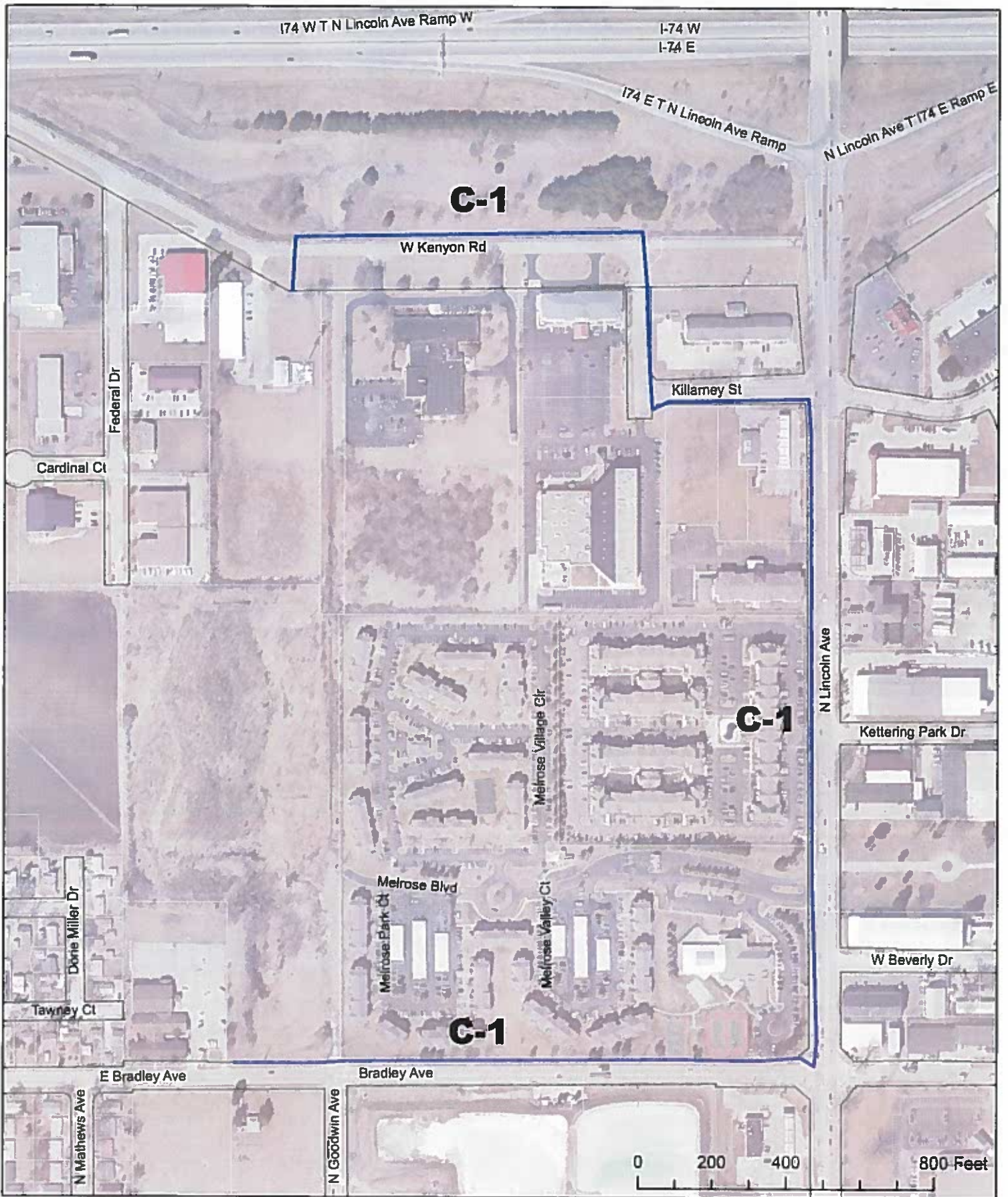


**Legend**

- Existing Underground Fiber Utility
- ..... Existing Overhead Fiber Utility
- Right of Way

**Windstream Communications, LLC**  
**Exhibit "B" - Path maps**  
**License Agreement**





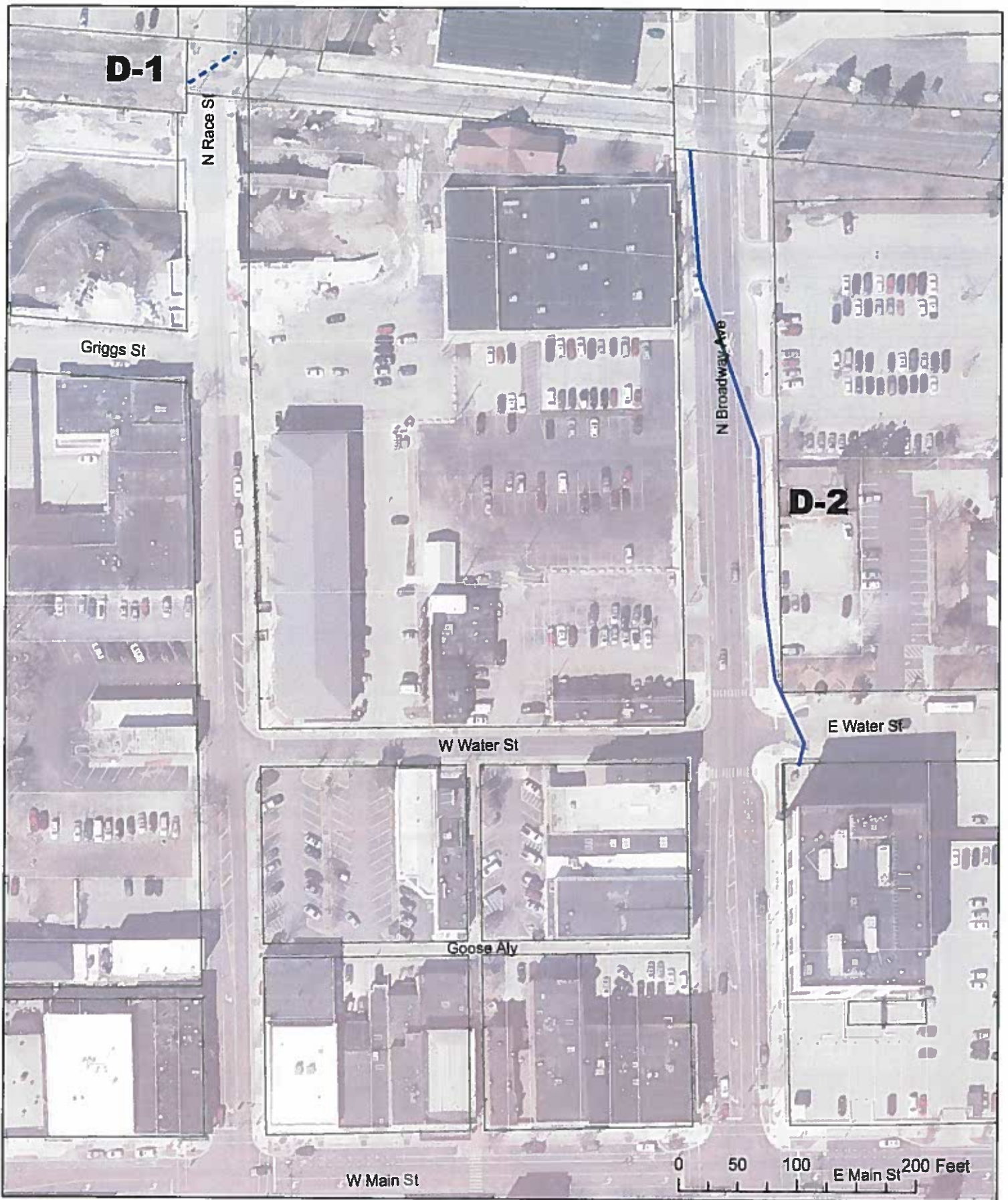
**Legend**

- Existing Underground Fiber Utility
- ..... Existing Overhead Fiber Utility
- Right of Way

**Windstream Communications, LLC**  
**Exhibit "B" - Path maps**  
**License Agreement**







**Legend**

- Existing Underground Fiber Utility
- - - Existing Overhead Fiber Utility
- Right of Way

**Windstream Communications, LLC**  
**Exhibit "B" - Path maps**  
**License Agreement**





**Legend**

- Existing Underground Fiber Utility
- ..... Existing Overhead Fiber Utility
- Right of Way

**Windstream Communications, LLC**  
**Exhibit "B" - Path maps**  
**License Agreement**



## **Exhibit C**

### **Licensed Property**

North High Cross Road between East University Avenue and East Anthony Drive (A-1 and A-2)

East Windsor Road between South Stone Creek Boulevard and South High Cross Road (B-1)

West Kenyon Road between North Federal Drive and West Killarney Street (C-1)

West Killarney Street between West Kenyon Road and North Lincoln Avenue (C-1)

North Lincoln Avenue between West Killarney Street and West Bradley Avenue (C-1)

West Bradley Avenue between North Mathews Avenue and North Lincoln Avenue (C-1)

North Race Street between West University Avenue and West Griggs Street (D-1)

North Broadway Avenue between East University Avenue and East Water Street (D-2)

North Goodwin Avenue between West Clark Street and West Main Street (E-1)

North Lincoln Avenue between West University Avenue and West Clark Street (E-2)

West Clark Street between North Lincoln Avenue and North Busey Avenue (E-2)

North Coler Avenue between West Clark Street and West Main Street (E-3)

North Orchard Street between Broad Alley and West Griggs Street (E-4)