

AN ORDINANCE ACCEPTING THE BID SUBMITTED BY LUMOS TELEPHONE LLC FOR A NON-EXCLUSIVE FIBER FRANCHISE AGREEMENT HAVING A TERM OF SEVEN YEARS WITH TWO RENEWAL TERMS AUTHORIZING THE PLACEMENT OF FIBER FACILITIES WITHIN THE CITY'S PUBLIC WAYS.

WHEREAS, pursuant to the provisions of Section 15.2-2100, et seq., of the Code of Virginia of 1950, as amended, the City of Portsmouth has invited bids for a Non-Exclusive Fiber Franchise Agreement authorizing the placement of Fiber Facilities within the city's public ways; and

WHEREAS, the requirements of Sections 15.2-2101 and 15.2-2102 of the Code of Virginia, 1950, as amended, have been met and the Council has carefully considered all bids submitted;

BE IT ORDAINED by the Council of the City of Portsmouth, Virginia:

1. That Lumos Telephone LLC ("Lumos") being the highest responsible bidder, its bid for a Non-Exclusive Fiber Facilities Franchise Agreement having a term of seven years with two renewal terms of seven years each is hereby accepted.
2. That the City Manager is authorized to execute a Non-Exclusive Fiber Franchise Agreement in substantially the form set forth in Exhibit A hereto (the "Agreement") on behalf of the City of Portsmouth and to do all things necessary and proper to carry out its terms.
3. That any and all rights granted to Lumos hereunder shall be of no force or effect until the Agreement has been fully executed.
4. That this ordinance shall take effect on the date of its adoption.

ADOPTED by the Council of the City of Portsmouth, Virginia at a meeting held on September 13, 2022.

Teste:

City Clerk

EXHIBIT A

CITY OF PORTSMOUTH, VIRGINIA NONEXCLUSIVE FIBER FRANCHISE AGREEMENT WITH LUMOS TELEPHONE LLC D/B/A LUMOS

This Nonexclusive Fiber Franchise Agreement (hereinafter “Agreement”) is made and ,

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Section 2. Definitions. For the purpose of this Agreement, and the interpretation and enforcement thereof, the following words and phrases shall have the following meanings, unless the context of the sentence in which they are used shall indicate otherwise:

“*Affiliate*” means a person or entity that directly, or indirectly, through one or more intermediaries, owns, controls, is owned or controlled by, or is under common ownership or control with another person or entity.

“*Cable service*” shall have the same meaning as in the 47 U.S. Code § 522, and shall be synonymous with the term “cable television service.”

“*City*” means the City of Portsmouth, Virginia, and where appropriate to the context, its officers, agents, employees and volunteers.

“*City Attorney*” means the City Attorney or his designee.

“*City Council*” means the City Council of the City of Portsmouth.

“*City Engineer*” means the City Engineer or his designee.

“*City Manager*” means the City Manager or his designee.



“*Conduit*” means any materials, such as metal or plastic pipe, that protects wire, cable, lines, fiber optic cable, or other technology for the provision of telecommunications service.

“*Duct*” means a pipe, tube, channel or similar item for carrying wires, lines, cables, fiber optic cable, or other technology for the provision of telecommunications service.

“*Grantee*” or “ ” means Lumos Telephone LLC d/b/a Lumos .

“*Grantor*” means the City of Portsmouth.

sidewalk, way, bridge, viaduct, alley or other public right-of-way, including unimproved surfaces, now or hereafter held by the City for the purpose of public travel, communications, alarm, street lighting, power distribution, water or sewer service or other public use, whether present or future, to the extent of the City's right, title, interest or authority to grant a franchise to occupy and use such streets and easements for the purpose of providing telecommunications services.

“*Telecommunications Facilities*” means the plant, equipment and property, including, but not limited to, the poles, pipes, mains, conduits, ducts, fiber optic and other cables, circuits, antennae and wires, and any other equipment and related facilities used by to provide telecommunications service.

“Telecommunications Service” means the providing or offering for rent, sale or lease, or in exchange for other value received, the transmittal of signals, including but not limited to, voice, data, image, graphic or video or other programming information, except cable television service, between or among points by wire, lines, cable, fiber optics, circuits, laser or infrared, microwave, radio, cellular, satellite or other telecommunications facilities, but not including cable television service.

“Unused Facilities” means where, pursuant to this Agreement, Lumos has commenced the installation of certain f, and (i) such installation work has ceased and remains unfinished for a period of twelve (12) consecutive months; or (ii) after installation, such fiber optic or other cable and related facilities are unused, for whatever reason, for a period of twelve (12) consecutive months; then, in the event of (i) or (ii) such fiber optic or other cable and related facilities or any parts thereof shall be deemed to be unused. For the purposes of this definition, fiber optic or other cable and related facilities shall not be considered unused merely because the fiber is dark, and shall be considered in use if the facilities are connected to other fiber optic or other cable and related facilities owned by that are used. Should all of the fiber optic or other cable and related facilities be determined to be unused, then the City Manager shall, within thirty (30) days thereof, by certified mail, return receipt requested, notify Lumos of the City’s intent to determine if such fiber optic or other cable and related facilities are unused. Lumos shall then have thirty (30) days to respond to the City by demonstrating that such facilities are used. If Lumos is unable to demonstrate that the facilities are used, the facilities shall be deemed Unused Facilities and shall be subject to the provisions of Section 3(b) below.

Section 3. Term of Agreement. a)

(b) Upon the termination or expiration of this Agreement, including any renewal period, or if any portion of facilities are deemed Unused Facilities, shall remove its telecommunications facilities, or, if applicable, the Unused Facilities, from the City’s public streets and public rights-of-way at its own expense; provided, however, that if directed or authorized by the City in writing, may abandon some or all of the facilities in place, and such facilities shall become the property of the City upon their abandonment. If in the event fails to remove its facilities within ninety (90) days after termination or after such facilities are deemed to be Unused Facilities, except facilities abandoned in place at the direction of, or with the consent of the City, the City may cause such facilities to be removed, without further notice, and charge the cost for removal to , which shall pay such costs within thirty (30) days of the demand to do so. The City may collect such costs, expenses and attorney’s fees

as debts owed to the City by bringing action in any court of competent jurisdiction to enforce this section 3(b). The City shall also have a lien on the property of in an amount equal to all such costs, expenses, and legal fees associated with collection efforts.

(c) In the event that the City determines that Lumos is in breach of its material obligations or duties under this Agreement, the City may give written notice to Lumos setting forth in reasonable detail the nature of such breach. If Lumos fails to cure such breach within forty-five (45) days from the date of Lumos' receipt of such notice, or within such other reasonable time as may be agreed to in writing by the parties, then City, at its option, may terminate this Agreement upon giving Lumos written notice of termination.

Section 4. Compliance With Applicable Law. shall at all times during the term of this Agreement, including any renewal period, comply with all applicable federal, state, and local laws, ordinances, and regulations in the exercise of its rights and performance of its obligations under this Agreement. Expressly reserved to the City is the right to adopt, in addition to the provisions of this Agreement and existing laws, such additional ordinances and regulations as are necessary for the lawful exercise of its police power for the benefit and safety of the public and apply equally to all certificated providers of telecommunications services.

Section 5. . All telecommunications facilities of be constructed, installed and located on or in the City's public streets and public rights of way shall be in accordance with the following terms and conditions, unless otherwise specified by the City.

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~~the~~ ~~city~~ ~~city~~

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5.7. The facilities of shall be located so as not to interfere with the public safety or, to the extent possible, with the convenience of persons using the public streets or rights-of-way. shall construct, maintain and locate its telecommunications system so as not to interfere with the construction, location and maintenance of sewer, water, drainage, electrical, signal and fiber optic facilities of the City.

5.8. The City shall have the right to specifically designate the location of the facilities of with reference sewer and water mains, drainage facilities, fiber optic cable, signal poles and lines and similar services, other facilities, such as public telephone utilities, public electric utilities, cable television facilities, and railway, communication and power lines, in such a manner as to protect the public safety and public and private property. Failure by the City to designate the location of s shall not relieve of its responsibilities in matters of public safety, as provided in this Agreement.

5.9. Except in the cases of emergencies, shall not move, alter, change or extend any of its telecommunications facilities in any public street or public right-of-way unless prior written notice of its intention to do so is given to the City Manager and , or such requirement is waived, by the City Manager . Such permission shall be conditioned upon compliance with the terms and conditions of this Agreement, and with such other terms and conditions as will preserve, protect and promote the safety of the public using the public ways, and as will prevent undue interference with or obstruction of the use of the public ways by the public, the City or by any other public utility, public service corporation or cable operator for their respective purposes and functions. Such work by shall also be coordinated with the City's annual paving program through the Office of the City Engineer.

5.10. shall not open, disturb or obstruct, at any time, any more of the public streets or public rights-of-way than is reasonably necessary to enable it to proceed in laying or repairing its telecommunications facilities. shall not permit any public street or public right-of-way so opened, disturbed or obstructed by it to remain open, disturbed or obstructed for a longer period of time than shall be reasonably necessary. In all cases where any public street or public right-of-way is excavated, disturbed or obstructed by , shall take all precautions necessary or proper for the protection of the public and shall maintain adequate warning signs, barricades, signals and other devices necessary or proper to adequately give notice, protection and warning to the public of the existence of all actual conditions present.

5.11. After the installation, removal, relocation or construction or maintenance of the fiber optic or other cable and related facilities is completed, shall, at its own cost, repair and return the public streets or public rights-of-way to a

minimum of the same or similar condition existing before such installation, removal, relocation construction or maintenance, in a manner as may be reasonably specified by the City and to the reasonable satisfaction of the City. shall be responsible for damage to City street pavements, existing utilities, curbs, gutters and sidewalks due to ' installation, construction, maintenance, repair or removal of its telecommunications facilities in the public streets, public rights-of-way, and shall repair, replace and restore in kind, the said damaged property at its sole expense. Upon failure of to repair, replace and restore said damaged property, in a manner as may be reasonably specified by the City and to the reasonable satisfaction of the City, after thirty (30) days notice in writing shall have been given by the City, the City may cause such necessary repairs to be made and may collect the costs incurred from , including but not limited to, exercising the City's rights to draw on bonds or letters of credit. The City may collect such costs, and any expenses and attorney fees incurred in collecting such costs, as debts owed to the City, by bringing action in any court of competent jurisdiction or in any manner allowed by law.

5.12. Except for actions taken in accordance with this Agreement or otherwise authorized by the City, neither , nor any person acting on behalf, shall take any action or permit any action to be done which may impair or damage any City property, including, but not limited to, any public street, public right-of-way or other property located in, on or adjacent thereto.

5.13. In the event of an unexpected repair or emergency, may commence such repair and emergency response work as required under the circumstances, provided shall notify the City as promptly as possible, before such repair or emergency work is started or as soon thereafter as possible if advance notice is not practicable.

5.14. shall maintain its telecommunications facilities located in the City's public streets and public rights-of-way in good and safe condition and in a manner that complies with all applicable federal, state and local requirements, laws, ordinances, and regulations.

5.15. shall at all times employ a high standard of care consistent with industry practice in the performance of its obligations hereunder and shall install and maintain and use approved methods and devices for preventing failure or accidents which are likely to cause damages, injuries or nuisances to the public.

5.16. shall obtain all required permits from the City and any other governmental entity having jurisdiction prior to commencing work or any nature and

shall comply with all terms and conditions of any such permit. shall furnish detailed plans of the work and other required information, and shall pay all required fees prior to issuance of a permit in accordance with the rates in effect at the time of payment. shall comply with all applicable ordinances and permitting requirements.

A single permit may be issued for multiple excavations to be made in public streets and rights-of-way; provided, however, any applicable fees established by the City shall apply to each such excavation unless otherwise provided by ordinance. Exceptions to the requirement for a written permit may be allowed in cases of emergencies involving public safety or restoration of service. In the case of emergency excavations made in a public street or public right-of-way without a permit, shall make a report of each such excavation to the City pay the applicable fee within the time specified in the City Policy of Engineering Standards for Work in the City of Portsmouth Right of Way, which may be updated from time to time. Currently, that time period is 48 hours from the onset of work. Any permit application and inspection related to repair of excavations shall be promptly acted upon by the City so as not to unreasonably delay in efficiently discharging its public service obligation and in any event shall be granted or denied within thirty (30) days from submission and, if denied, accompanied by a written explanation of the reasons the permit was denied and the actions required to cure the denial.

5.17. (a) Promptly after installation, repair or extension of the telecommunications facilities or any portion thereof or any pavement cut by in any public way of the City, the incidental trenches or excavations in a manner acceptable to the City Manager. gutters or any other portions of public ways damaged, disturbed or destroyed by such work shall be promptly restored and replaced with like materials to their former condition by at its own expense; however, where it is necessary, and if authorized by the City, in order to achieve the former conditions, shall use materials whose type, specification and quantities exceed or are different from those used in the installation, then at its own expense shall provide such different materials. Where a cut or disturbance is made in a section of sidewalk or paving, rather than replacing only the area actually cut, shall replace the full width of the existing sidewalk or appropriate sections of paving as determined by the City Engineer and the full length of the section or sections cut, a section being defined as that area marked by expansion joints or scoring or as determined by the City Engineer. shall maintain, repair and keep in good condition for a period of one (1) year following such disturbance all portions of public ways disturbed by, provided such maintenance and repair is required as a result of defective workmanship or materials supplied by

5.18. (a) shall promptly remove or correct any obstruction, damage, or defect in any public street or public right-of-way caused by in the installation, operation, maintenance or extension of telecommunications facilities. Any such obstruction, damage, or defect which is not promptly removed, repaired or corrected by after proper notice to do so, given by the City to may be removed or corrected by the City, and the cost thereof shall be charged against and payable on demand. Any expense, cost, or damages incurred for repair, relocation, or replacement to City water, sanitary sewer, storm sewer, storm drainage, telecommunication facilities or other property resulting from construction or maintenance oftelecommunications facilities shall be borne by and any and all expense and ost incurred in connection therewith by the City shall be fully reimbursed by to the City.

(b) If weather or other conditions do not permit the complete restoration required by this Section, shall temporarily restore the affected property. Such temporary restoration shall be at sole expense and shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

of any activity of any kind by or on behalf of the City.

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(a)

(b)

(c)

Section 6. Mapping

Section 7

(d) *Automobile Liability.* Automobile Liability insurance having minimum limits of liability of One Million Dollars (\$1,000,000) combined single limit applicable to owned or non-owned vehicles used in the performance of any work under this Agreement.

(e) *Pollution*

(g)

(a) shall provide, or cause to be provided, a bond, in the amount of Seventy-Five Thousand Dollars (\$75,000) securing its faithful performance of the terms and conditions of this Agreement ("Performance Bond"). shall maintain such Performance Bond for the duration of this Franchise Agreement, unless otherwise agreed to in writing by the City.

(b) The Performance Bond shall guarantee Lumos' faithful performance of the terms and conditions of this Agreement, including, but not limited to: (1) the timely completion of construction; (2) compliance with applicable plans, permits, technical codes and standards; (3) proper location of the facilities as specified by the City; (4) restoration of the public way and other property affected by the construction as required by this Agreement; (5) the submission of "as-built" drawings after completion of the work as required by this Agreement; (6) timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work; and (7) the payment by Lumos of all lawful liens, taxes, damages, claims, costs or expenses by Lumos under this Agreement and all other payments due to the City from Lumos pursuant to this Agreement.

notice shall be given to . The written notice shall describe in reasonable detail the violation so as to afford an opportunity to remedy the violation. shall have twenty (20) days subsequent to receipt of the notice in which to correct the violation

before the City may make demand upon the Performance Bond.

In addition, shall protect, indemnify, and hold harmless the City, its officers, agents, and employees, from any and all demands by any third party for fees, claims, suits, actions, causes of action, or judgments based on the allegation that (i) any telecommunications facilities which Lumos constructs, installs or operates on or in any of the City's public rights-of-way or public streets, or (ii) any telecommunications services provided by Lumos through the use of any such telecommunications facilities, infringe or violate of any patent, trade secret, copyright or other intellectual property right of such third party, .

Section 11. Hazardous Substances

~~10/11/16~~
~~11/10/16~~

(d)

(f) *Controlling law and venue.*

(g) *Captions.*

If to City to: City of Portsmouth
City Manager
801 Crawford Street, 6th Floor
Portsmouth, Virginia 23704

With copies to: City of Portsmouth
City Attorney
801 Crawford Street, 6th Floor
Portsmouth, Virginia 23704

City of Portsmouth
City Engineer
801 Crawford Street, 4th Floor
Portsmouth, Virginia 23704

If to Grantee to: Lumos Telephone LLC
Chief Network Officer
One Lumos Plaza
Waynesboro, Virginia 22980

With a copy to: Lumos Telephone LLC
General Counsel
One Lumos Plaza
Waynesboro, Virginia 22980

(b) Either

By: _____

Name: _____

Title: _____

CITY OF PORTSMOUTH
a Virginia municipal corporation

By: _____

City Manager/Authorized
Designee of the City Manager

(SEAL)

ATTEST: _____
City Clerk