

## MASTER ENCROACHMENT AGREEMENT

This Master Encroachment Agreement (“**Agreement**”) is by and between the Town of Hillsborough, a municipality organized and existing under the laws of the State of North Carolina (“**Municipality**”), and North State Communications Advanced Services, LLC d/b/a Lumos, a North Carolina limited liability company, and its direct parent, its direct parent’s subsidiaries, successors, and assigns (“**Permittee**”).

### RECITALS

- A. Municipality has jurisdiction over the use of the public rights-of-way in Municipality (“**Public ROW**”).
- B. Permittee desires to submit to Municipality multiple applications for permission to encroach in or on the Public ROW to construct, install, maintain, operate, and control a fiber optic infrastructure network in Public ROW (“**Network**”) for the purpose of offering communications services (“**Services**”), including broadband Internet access service as defined in 47 C.F.R. § 8.1(b) (“**Broadband Internet Services**”) and Voice over Internet Protocol services, but excluding multichannel video programming services that would be subject to a video services franchise and telecommunications services as defined in 47 C.F.R. § 153(53), to residents and businesses in Municipality (“**Customers**”).
- C. The Network consists of equipment and facilities that may include aerial or underground fiber optic cables, lines, wires, or strands; underground conduits, vaults, access manholes and handholes; electronic equipment; power generators; batteries; pedestals; boxes; cabinets; vaults; and other similar facilities (“**Network Facilities**”).
- D. Municipality and Permittee believe it will be more efficient and in the interest of both parties if Permittee’s applications to place Network Facilities in the Municipality’s Public ROW are made subject to the terms and conditions of one Master Encroachment Agreement.

### AGREEMENT

In consideration of the mutual promises made below, Municipality and Permittee agree as follows:

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

- 1.1. Permission to Use and Occupy Public ROW. Subject to Permittee’s compliance with all terms of this Agreement, Municipality grants Permittee permission to use and occupy the Public ROW (the “**License**”) for the purpose of constructing, installing, repairing, maintaining, operating, and if necessary removing the Network and the related Network Facilities in the Municipality’s Public ROW (the “**Work**”). This Agreement and the License do not authorize Permittee to use any property other than the Municipality’s Public ROW as agreed herein. Permittee’s use of any other Municipality property, including poles and conduits, will be governed under a separate agreement regarding that use.
- 1.2. Subject to State and Local Law. This Agreement and the License are subject to Municipality’s valid authority under state and local laws as they exist now or may be amended from time-to-time, and subject to the conditions set forth in this Agreement.

- 1.3. Subject to Municipality's Right to Use Public ROW. This Agreement and the License are subject and subordinate to Municipality's prior and continuing right to use the Public ROW, including constructing, installing, operating, maintaining, repairing, or removing sewers, water pipes, storm drains, gas pipes, utility poles, overhead and underground electric lines and related facilities, and other public utility and municipal uses.
- 1.4. Subject to Pre-Existing Property Interests. Municipality's grant of the License is subject to all valid pre-existing easements, restrictions, conditions, covenants, encumbrances, claims of title or other property interests that may affect the Public ROW. Municipality makes no representations regarding the existence (or non-existence) of any property interests other than its own in the Municipality's Public ROW. Permittee will obtain at its own cost and expense any permission or rights as may be necessary to accommodate such pre-existing property interests.
- 1.5. No Grant of Property Interest. The License does not grant or convey any property interest.
- 1.6. Non-Exclusive. Municipality expressly reserves the right to grant licenses, permits, franchises, privileges or other rights to any other individual, corporation, partnership, limited liability company, trust, joint stock company, business trust, unincorporated association, joint venture, governmental authority or other entity of any nature whatsoever ("**Person**"), as well as the right in its own name as a municipality, to use Public ROW for similar or different purposes allowed Permittee under this Agreement.

## 2. Permittee's Obligations.

- 2.1. Individual Permits Required. Permittee will obtain Municipality's approval of required individual encroachment, construction, and other necessary permits before placing Network Facilities in the Public ROW or other property of Municipality as authorized. Permittee will pay all lawful processing, field marking, engineering, and inspection fees associated with the issuance of individual permits by Municipality. Municipality's agreement to the terms of this License is not, and shall not be deemed to be, approval of any other permits or approvals that may be necessary for Permittee to construct any Network Facilities within Municipality's corporate limits.
- 2.2. Permittee's Sole Cost and Expense. Permittee will perform the Work at its sole cost and expense. To the extent that Permittee's Work requires the use of water from Municipality's public water system, Permittee shall be required to pay for such water in accordance with Municipality's fee schedule in effect at the time of use.
- 2.3. Performance Bond Required. Permittee shall deposit with Municipality a performance bond or other form of security agreeable to Municipality, in the amount of one hundred thousand dollars (\$100,000) as security for Permittee's satisfactory performance of its

obligations under this Agreement and all permits issued by Municipality pursuant to this Agreement.

- 2.4. Compliance with Laws. Permittee will comply with all applicable laws and regulations when performing the Work, including, but not limited to Municipality's Code of Ordinances and standards in effect at time of install, Municipality's requirements for right of way encroachments (Town Code 7B), pavement restoration, marking the location of existing utility improvements (water, sewer, electric, internet, cable, for example), maintaining proper separation distances between Permittee's Network Facilities and existing utility improvements, and using or installing tracing wire as part of Permittee's Network Facilities. Permittee will place its Network Facilities in conformance with the required permits, plans, and drawings approved by Municipality.
- 2.5. Reasonable Care. Permittee will exercise reasonable care when performing the Work and will use commonly accepted practices and equipment to minimize the risks of personal injury, property damage, soil erosion, and pollution of surface or groundwater. For example, and by way of illustration but not limitation, Permittee shall contact a qualified 811 locator service prior to commencement of work and shall contact Orange County to verify location of any County-owned underground facilities which might not be identified by a contractor locator service. Permittee shall also comply with North Carolina's "Dig Once Policy" while proceeding with the Work. Permittee will install fiber optic network and appurtenances at least three feet from all existing Municipality utility improvements and will use non-destructive excavation technologies to field verify horizontal and vertical locations of existing Municipality utility improvements at all crossings or where less than three feet of separation is proposed.
- 2.6. Contractor Identification. Permittee shall require all contractors performing work on its behalf to have proper identification with them at all times while performing the Work and to have contractor vehicles marked with a legible magnetic decal or similar marking identifying each such vehicle as a "Contractor for Permittee Fiber" or similar phrase acceptable to Municipality and providing a telephone number of Permittee's contact person for the Work.
- 2.7. Neighborhood Notification. Before any Work commences inside the Municipality's corporate limits, Permittee shall meet with Municipality representatives to discuss Permittee's overall work plan and schedule. After the initial meeting, Permittee and Municipality representatives shall meet no less frequently than monthly to discuss progress during the construction phase of the Work. Permittee agrees to meet Municipality's communication practices in the adopted encroachment standards (Town Code appendix 7B).
- 2.8. No Nuisance. Permittee will maintain its Network Facilities in good and safe condition so that its Network Facilities do not cause a public nuisance.
- 2.9. Repair. Permittee will promptly repair any damage to the Public ROW (including streets and sidewalks), Municipality property (other than Municipality's utility improvements that Municipality desires to itself repair), or private property if such damage is directly caused by Permittee's Work and no other Person is responsible for the damage (e.g., where a Person other than Permittee fails to accurately or timely locate its underground facilities as required by applicable law). If Permittee, its

contractor(s) or subcontractor(s) shall damage any existing utility improvements while performing Work they shall (1) stop work immediately to assess the damage, (2) if necessary, notify Municipality's public safety department of the situation, (3) notify Municipality, and (4) notify the owner/operator of the utility improvement damaged. In the event Permittee's Work is directly responsible for damage to Municipality's utility improvements and no other Person is responsible for the damage (e.g., where a Person other than Permittee fails to accurately or timely locate its underground facilities as required by applicable law), and Municipality desires to itself repair such damage, Permittee will reimburse Municipality for its actual, reasonable, and documented costs incurred for the repair of such improvements. No further Work (other than emergency repair work) may continue in the specific location of the damaged utility improvement until Municipality agrees that it is safe to proceed with construction. Municipality may order Permittee to stop work if, in Municipality's sole reasonable discretion, Municipality deems the Work to be unsafe, which order shall remain in effect until Municipality is satisfied that the unsafe condition(s) have been satisfactorily addressed. Permittee's obligation under this Section 2.9 will be limited by, and consistent with, any applicable seasonal or other restrictions on construction or restoration work. Permittee expressly recognizes that significant portions of Hillsborough were developed prior to the 1960s and includes many narrow lanes and sidewalks, with existing utilities located in tight spaces and with some unidentified utility lines likely to be encountered.

- 2.10. As-Built Drawings and Maps. Permittee will maintain accurate as-built drawings and maps of its Network Facilities located in Municipality and will provide them to Municipality upon reasonable request and on a mutually-agreed timetable (e.g., piecemeal following the closure of each permit, or all at once after all the Work is complete), subject to applicable confidentiality protections. In any event, Permittee shall provide updated, accurate as-built drawings to Municipality along with associated GIS data of fiber lines in both kmz and shape file formats every three (3) months while the Work is ongoing and shall provide a complete set of final as-built drawings upon completion of the Work.

### **3. Municipality's Obligations.**

- 3.1. Emergency Removal or Relocation by Municipality. In the event of a public emergency that, in Municipality's sole, reasonable discretion, creates an imminent threat to the health, safety, or property of Municipality or its residents, Municipality may remove or relocate the applicable portions of the Network Facilities without prior notice to Permittee. Municipality will, however, make best efforts to provide prior notice to Permittee before making an emergency removal or relocation. In any event, Municipality will promptly provide to Permittee a written description of any emergency removals or relocations of Permittee's Network Facilities. Permittee will reimburse Municipality for its actual, reasonable, and documented costs or expenses incurred for any such work performed by Municipality, the cause of which was the presence of Permittee's Network Facilities.
- 3.2. Relocation to Accommodate Governmental Purposes. If Permittee's then-existing Network Facilities would interfere with Municipality's planned use of the Public ROW or other Municipality property for a legitimate governmental purpose, such as, but not limited to, the construction, installation, repair, maintenance, or operation of water, sewer, or storm drain lines, or a public road, curb, gutter, sidewalk, park, recreational

facility, or other governmental facility, Permittee will, upon written notice from Municipality, relocate its Network Facilities at Permittee's own expense to such other location or locations in the Public ROW as may be mutually agreed by the parties, taking into account the needs of the Municipality's governmental purpose and Permittee's interest in maintaining the integrity and stability of its Network. Permittee will relocate its Network Facilities within a commercially reasonable period of time agreed to by the parties, taking into account the urgency of the need for relocation, the difficulty of the relocation, and other relevant facts and circumstances, except that Municipality may not require Permittee to relocate or remove its Network Facilities with less than ninety (90) days' notice.

- 3.3. Relocation to Accommodate Non-Governmental Purposes. If Permittee's then-existing Network Facilities would interfere with (a) Municipality's planned use of the Public ROW for a non-governmental (e.g., commercial) purpose, or (b) a third-party's use of the Public ROW, Permittee will not be required to relocate its Network Facilities.
- 3.4. Non-Discrimination. Any agreements between Municipality and Permittee that provide Permittee access to public infrastructure, poles, conduits, assets, and Public ROW will be available to other network operators that offer broadband Internet access services, on rates, terms, and conditions that are as favorable as those Municipality provides Permittee for the same access. Permittee shall comply with North Carolina's "Dig Once Policy".

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

- 4.1. Use of Contractors and Subcontractors. Permittee may retain contractors and subcontractors to perform the Work on Permittee's behalf and shall provide Municipality with the name and telephone number of each such contractor and subcontractor before they commence Work. Contractors and subcontractors are obligated to complete Work consistent with this Agreement.
- 4.2. Contractors to be Licensed. Permittee's contractors and subcontractors used for the Work will be properly licensed under applicable law.
- 4.3. Authorized Individuals. Permittee's contractors and subcontractors may submit individual permit applications to Municipality on Permittee's behalf, so long as the permit applications are signed by individuals that Permittee has authorized to act on its behalf via a letter of authorization provided to Municipality in the form attached as **Exhibit A ("Authorized Individuals")**. Municipality will accept permit applications under this Agreement submitted and signed by Authorized Individuals and will treat those applications as if they had been submitted by Permittee under this Agreement.

#### **5. Defense and Indemnity.**

- 5.1. Obligations. Each Party shall defend the other Party and, its officers, elected representatives, and employees (the "Indemnified Party"), and indemnify them against damages and costs finally awarded against the Indemnified Party by a competent tribunal in any legal proceeding filed by a third party for property damage, personal injury, or death to the extent caused by the negligence or willful misconduct of the indemnifying party or its contractors arising from this Agreement ("**Third Party Legal Proceeding**").

5.2. Exclusions. Section 5 (Defense and Indemnity) will not apply to the extent the underlying allegation arises from or is related to the gross negligence or willful misconduct of an Indemnified Party or is made by Indemnified Party's employees and covered under applicable workers' compensation laws.

5.3. Conditions. Section 5.1 (Obligations) is conditioned on the following: (a) Indemnified Party must promptly notify Indemnifying Party in writing of the Third Party Legal Proceeding and any allegation(s) that preceded the Third Party Legal Proceeding no later than fifteen (15) days after Indemnified Party became aware of the Third Party Legal Proceeding; (b) Indemnified Party must reasonably cooperate in the defense at indemnifying Party's request; and (c) Indemnified Party must tender sole control of the indemnified portion of the Third Party Legal Proceeding to indemnifying Party, subject to the following: (i) Indemnified Party may appoint its own non-controlling counsel, at its own expense; and (ii) any settlement requiring Indemnified Party to admit liability, pay money, or take (or refrain from taking) any action, will require Indemnified Party's prior written consent, not to be unreasonably withheld, conditioned, or delayed. Permittee's indemnification and defense obligations under this Section 5 (Defense and Indemnity) augment Permittee's indemnification obligations under the Town Code, including Town Code § 7-13 (Town indemnified; which establishes the minimum indemnification requirements applicable generally in the Town) and any revisions or successors to that Section.

**6. Limitation of Liability.** NEITHER PARTY WILL BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES IN CONNECTION WITH THIS AGREEMENT. THE PARTIES ACKNOWLEDGE THAT THIS LIMITATION WILL BE SUBJECT TO AND MAY BE LIMITED BY APPLICABLE LAW.

**7. Insurance.**

7.1. Permittee will carry and maintain:

7.1.1. Commercial General Liability (CGL) insurance, with policy limits not less than \$5,000,000 in aggregate and \$2,000,000 for each occurrence covering bodily injury and property damage with the following features: (a) CGL primary insurance endorsement; and (b) CGL policy will include an endorsement which names Municipality, its employees, and officers as additional insureds.

7.1.2. Workers' Compensation insurance with policy limits not less than the Municipality's requirements.

7.2. All insurance certificates, endorsements, coverage verifications and other items required pursuant to this Agreement will be mailed directly to Municipality's insurance compliance representative upon Municipality's written request.

**8. Term.** This Agreement is effective on the date the last party to sign executes this Agreement ("**Effective Date**"). The Agreement will expire automatically on the twentieth anniversary of the Effective Date ("**Original Term**"), unless earlier terminated in accordance with the provisions herein. Thereafter, the Agreement will automatically renew for successive 5-year terms (each a "**Renewal Term**") unless a party provides at least six (6) months' prior written notice to the other party of its intent not to renew.

## **9. Termination.**

- 9.1. Termination by Municipality. Municipality may terminate this Agreement if Permittee is in material breach of the Agreement, provided that Municipality first provides Permittee written notice of the breach and one hundred eighty (180) days to cure, unless the cure cannot reasonably be accomplished in that time period, in which case Permittee must commence its efforts to cure within that time period and the cure period will continue as long as such diligent efforts continue. No termination under this paragraph will be effective until the relevant cure period has expired.
- 9.2. Termination by Permittee. Permittee may terminate this Agreement for convenience upon one hundred eighty (180) days' written notice to Municipality. Upon termination, Permittee may abandon part or all of its Network Facilities or transfer its Network Facilities to Municipality or third party, provided, however, that upon Municipality's written request, Permittee shall remove specific Network Facilities from the Public ROW and restore any disturbed Public ROW to a condition equal to or better than its condition prior to commencement of the Work within ninety (90) days from the date of such written request.

## **10. Assignment.** Except as set forth below, neither party may assign or transfer its rights or obligations under this Agreement, in whole or part, to a third party, without the prior written consent of the other party. Any agreed upon assignee must agree in writing to be bound by the terms of this Agreement, and the assigning party will be released from all of its rights and obligations upon such assignment.

- 10.1. Notwithstanding the foregoing, Permittee may at any time, on written notice to Municipality, assign this Agreement or any or all of its rights and obligations under this Agreement:
- 10.1.1. to any Affiliate (as defined below) of Permittee;
  - 10.1.2. to any successor in interest of Permittee's business operations in Municipality in connection with any merger, acquisition, or similar transaction if Permittee determines after a reasonable investigation that the successor in interest has the resources and ability to fulfill the obligations of this Agreement; or
  - 10.1.3. to any purchaser of all or substantially all of Permittee's Network Facilities in Municipality if Permittee determines after a reasonable investigation that the purchaser has the resources and ability to fulfill the obligations of this Agreement.
- 10.2. Following any assignment of this Agreement to an Affiliate, Permittee will remain responsible for such Affiliate's performance under the terms of this Agreement. For purposes of this section, (a) "Affiliate" means any Person that now or in the future, directly or indirectly controls, is controlled with or by, or is under common control with Permittee; and (b) "control" means, with respect to: (i) a U.S. corporation, the ownership, directly or indirectly, of fifty percent (50%) or more of the voting power to elect directors thereof, or (ii) a non-U.S. corporation, if the voting power to elect directors thereof is less than fifty percent (50%), the maximum amount allowed by

applicable law; and (iii) any other Person, fifty percent (50%) or more ownership interest in said Person, or the power to direct the management of such Person.

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

Permittee's e-mail address for notice is ospdeliveryrequest@lumosfiber.com, with a copy to rachel.brewster@lumosfiber.com.

**12. General Provisions.** This Agreement is governed by the laws of the state where Municipality is located. If any provision of this Agreement shall be held or made invalid by a court decision, statute or rule, or shall be otherwise rendered invalid, the remainder of this Agreement shall not be affected thereby. Neither party will be liable for failure or delay in performance to the extent caused by circumstances beyond its reasonable control. This Agreement sets out all terms agreed between the parties and supersedes all previous or contemporaneous agreements between the parties relating to its subject matter. This Agreement, including any exhibits, constitutes the entire agreement between the parties related to this subject matter, and any change to its terms must be in writing and signed by the parties. The parties may execute this Agreement in counterparts, including facsimile, PDF, and other electronic copies, which taken together will constitute one instrument. Each party to this Agreement agrees that Permittee may use electronic signatures.

*[Signature page follows]*

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



**North State Communications Advanced  
Services, LLC d/b/a Lumos**

*Dan Fishback*

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

Dan Fishback

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

VP OSP and Construction

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

**Address:**

1201 W. Fairfield Rd, High Point, NC 27263

\_\_\_\_\_  
1201 W. Fairfield Rd, High Point, NC 27263

**Date:** May 18, 2023

**Town of Hillsborough**

*Eric J. Peterson*

Eric J. Peterson (May 18, 2023 14:22 EDT)

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

Eric J. Peterson

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

Town Manager

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

**Address:**

P.O. Box 429, Hillsborough, NC 27278

\_\_\_\_\_  
P.O. Box 429, Hillsborough, NC 27278

**Date:** May 18, 2023

**EXHIBIT A  
FORM OF LETTER OF AUTHORIZATION**

**[PERMITTEE LETTERHEAD]**

**[Date]**

Via Email (**[Email Address]**)

Town of Hillsborough

**[Addressee]**

**[Address]**

Re: **[Amended]** Letter of Authorization

Dear **[Name]**,

In accordance with Section 4.3 of the Master Encroachment Agreement dated **[ ]** between the Town of Hillsborough and \_\_\_\_\_ (“**Permittee**”), Permittee hereby designates the following Authorized Individuals (as that term is defined in the Agreement), who may submit and sign permit applications and other submissions to the Municipality on behalf of Permittee. **[If applicable: This letter amends and supersedes the Letter of Authorization dated \_\_\_\_\_.]**

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

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

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

Kind regards,

**[Name]**

**[Title]**

**[Company]**











# -Town of Hillsborough Master Encroachment Agreement - Lumos final

Final Audit Report

2023-05-18

Created:	2023-05-16
By:	Matt Efird (matt.efird@hillsboroughnc.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAAfaUYYpsQCaKEIX7-9OobzB8rfL2MnCeI

## "-Town of Hillsborough Master Encroachment Agreement - Lumos final" History

-  Document created by Matt Efird (matt.efird@hillsboroughnc.gov)  
2023-05-16 - 2:43:27 PM GMT
-  Document emailed to eric.peterson@hillsboroughnc.gov for signature  
2023-05-16 - 2:45:58 PM GMT
-  Email viewed by eric.peterson@hillsboroughnc.gov  
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-  Email viewed by eric.peterson@hillsboroughnc.gov  
2023-05-18 - 6:21:07 PM GMT
-  Signer eric.peterson@hillsboroughnc.gov entered name at signing as Eric J. Peterson  
2023-05-18 - 6:22:03 PM GMT
-  Document e-signed by Eric J. Peterson (eric.peterson@hillsboroughnc.gov)  
Signature Date: 2023-05-18 - 6:22:05 PM GMT - Time Source: server
-  Document emailed to Dan Fishback (dan.fishback@lumosfiber.com) for signature  
2023-05-18 - 6:22:06 PM GMT
-  Email viewed by Dan Fishback (dan.fishback@lumosfiber.com)  
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-  Document e-signed by Dan Fishback (dan.fishback@lumosfiber.com)  
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-  Agreement completed.  
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