

RESOLUTION
of the
BOROUGH OF NEW PROVIDENCE
Resolution No. 2016-051

Council Meeting Date: 01-11-2016

Date Adopted: 01-11-2016

TITLE: RESOLUTION AUTHORIZING AGREEMENT BETWEEN THE BOROUGH OF NEW PROVIDENCE AND LIGHT TOWER FIBER LONG ISLAND, LLC. FOR RIGHTS-OF-WAY-USE AGREEMENT

Councilperson Muñoz submitted the following resolution, which was duly seconded by Councilperson Madden.

BE IT RESOLVED by the Mayor and Council of the Borough of New Providence, in the County of Union and State of New Jersey, that they do hereby approve and authorize an agreement between Light Tower Fiber Long Island, LLC, and the Borough of New Providence, in the form attached hereto, and they do further authorize and direct the Mayor and Borough Clerk to execute same on behalf of the Borough of New Providence.

APPROVED, this 11th day of January, 2016.

RECORD OF VOTE

	AYE	NAY	ABSENT	NOT VOTING
GALLUCCIO	X			
GENNARO	X			
KAPNER	X			
MADDEN	X			
MUÑOZ	X			
ROBINSON	X			
MORGAN			TO BREAK COUNCIL TIE VOTE	

I hereby certify that the above resolution was adopted at a meeting of the Borough Council held on the 11th day of January, 2016.

Wendi B. Barry, Borough Clerk

RIGHTS-OF-WAY USE AGREEMENT

THIS RIGHTS-OF-WAY USE AGREEMENT ("Agreement") is dated _____ ("Effective Date"), and entered into by and between the Borough of New Providence ("Municipality"), a New Jersey municipal corporation with an address of 360 Elkwood Avenue, New Providence, New Jersey 07974, and Light Tower Fiber Long Island, LLC d/b/a Lighttower Fiber Networks 1,LLC ("Lighttower"), a limited liability corporation organized and existing under the laws of the Commonwealth of Massachusetts, with a business address of 80 Central Street, Boxborough, Massachusetts 01719.

WHEREAS, Lighttower was approved by the New Jersey Board of Public Utilities to provide local exchange and interexchange telecommunications services throughout the State of New Jersey by Order in Docket No. TM08040212 on June 16, 2008; and

WHEREAS, Lighttower intends to provide telecommunications services in accordance with the Order and rules and regulations of the Federal Communications Commission, and the New Jersey Board of Public Utilities; and

WHEREAS, Lighttower proposes to place its telecommunication facilities aerially on existing poles at specific locations in the Public Rights-of-Way, as that term is defined hereinafter, and under ground along Mountain Avenue in the area of Diamond Hill Road, an area of not more than 200 feet long, and underground along Southgate Road in the area of Ryder Way, an area not more than 640 feet long within the Municipality for the purpose of owning, constructing, installing, operating, repairing and maintaining a Telecommunications System as hereinafter defined; and

WHEREAS, it is in the best interest of the Municipality and its citizenry for the Municipality to grant consent to Lighttower to occupy said Public Rights-of-Way within the Municipality for this purpose under the terms set forth herein; and

WHEREAS, the consent granted herein to Lighttower is for the non-exclusive use by Lighttower of the Public Rights-of-Way within the Municipality for the purpose of owning, constructing, installing, operating, repairing and maintaining a Telecommunications System solely of aerial telecommunications fiber optic cable attached to existing utility poles at specific locations ("Telecommunications System").

NOW, THEREFORE, in consideration of the mutual covenants and obligations hereinafter set forth, the Municipality and Lighttower hereby agree to and with each other as follows:

1. **Incorporation** – The foregoing recitals, including definitions, are hereby incorporated into this Agreement.
2. **Definitions** – The following terms shall have the meanings set forth below unless the context requires otherwise.
 - a. "BPU" – the New Jersey Board of Public Utilities.
 - b. "Public Utility" – Shall carry the same meaning as set forth in N.J.S.A. 48:2-13.
 - c. "Public Rights-of-Way" – The space in, upon, along, across, over and

through any public land, road, street or highway of the Municipality, including lands with Public Utility facilities as the same now or hereafter may exist, that are under the jurisdiction of the Municipality. This term shall not include State or Federal rights-of-way, property restricted by Green Acres regulation, property owned, developed and/or occupied by the Municipality (e.g., municipal parks, municipal administration buildings), or any property owned by any person or agency other than the Municipality, except as provided by the applicable laws, or pursuant to any agreement between the Municipality and any such property owner.

3. **Grant of Consent** – Subject to obtaining the permission of the owner(s) of any existing utility poles or conduits to be used, the Municipality hereby approves and permits Lighttower, and its successors and assigns, to enter upon the Municipal Rights-of-Way, and to attach, install, operate, maintain, and inspect, remove, reattach, reinstall, relocate, or replace its facilities in or on conduits or utility poles or other structures owned by public utility companies located within the Public Rights-of-Way as may be permitted by the public utility company or property owner, as the case may be. The Public Rights-of-Way shall not include rights-of-way under the jurisdiction of any municipal, State or Federal department or agency, or any property owned by any person or governmental entity other than the Municipality, except as provide by law pursuant to an agreement between the Municipality and any person or governmental entity.

4. **Public Purpose** – It is deemed to be in the best interest of the Municipality and its citizenry, including commercial and industrial citizens, for the Municipality to grant consent to Lighttower to occupy said Public Rights-of-Way under the terms set forth herein.

5. **Scope of Agreement** – Any and all rights granted to Lighttower under this Agreement, which shall be exercised at Lighttower’s sole cost and expense, shall be subject to the prior and continuing right of the Municipality, under applicable laws, to use any and all parts of the Public Rights-of-Way exclusively or concurrently with any other person or persons, and shall be further subject to all deed, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record which may affect such Public Rights-of-Way. Nothing in this Agreement shall be deemed to grant, convey, create or vest in Lighttower a real property interest in the Public Rights-of-Way, including any fee, leasehold interest, easement, or any other form of interest or ownership.

6. **Fees** – In consideration of the rights and privileges granted to Lighttower, Lighttower agrees to reimburse the Municipality for its reasonable attorney fees incurred in connection with the negotiation and preparation of this Agreement and related Ordinance, as well as the accompanying Resolution authorizing execution of this Agreement prior to the commencement of any work.

7. **Compliance with Ordinance** – This Agreement shall be codified in the Borough Code of the Borough of New Providence. Lighttower shall comply with the terms of this Ordinance, as well as all other applicable statutes, ordinances and regulations, now existing or hereinafter promulgated.

8. **Duration of Consent** – The non-exclusive municipal consent granted herein shall expire ten (10) years from the Effective Date and shall automatically renew for

successive ten (10) year terms up to fifty (50) years, unless either party gives written notice of its intention not to renew before expiration of the then current terms.

9. **Indemnification** – Lighttower, its successors, assigns, subcontractors, agents, servants, officers, employees, guests and invitees hereby indemnify, defend and hold harmless the Municipality, its successors and assigns, elected officials, officers, employees, servants, contractors, designees and invitees from and against any and all personal injury and property damage claims, demands, suits, actions at law or equity or otherwise, judgments, arbitration determinations, damages, liabilities, decrees of any person(s) or entities claiming to be or being harmed as a result of Lighttower’s actions under this Agreement and costs in connection therewith. This indemnification shall specifically include, but not be limited to, any and all costs, reasonable attorney fees, court costs and any other expense that may be incurred by the Municipality in connection with any and all claims, demands, suits, action at law or equity or otherwise and/or arbitration proceeding which may arise in connection with Lighttower activities pursuant to the rights granted in this Agreement.

10. **Notices** – All notices or other correspondence required or permitted to be given in connection with this Agreement shall be in writing and delivered personally, by electronic transmission, by overnight carrier service or by registered or certified mail to the parties at the following address, or other address as provided by the parties in writing:

If to Lighttower: Light Tower Fiber Long Island, LLC
d/b/a Lighttower Fiber Networks I, LLC
80 Central Street
Boxborough, Massachusetts 01719

If to the Borough of Douglas Marvin, Administrator
New Providence: New Providence Borough Hall
360 Elkwood Avenue
New Providence, New Jersey 07974

With a copy to: Paul R. Rizzo, Esq.
DiFrancesco, Bateman, Coley, Yospin, Kunzman,
Davis, Lehrer & Flaum, P.C.
15 Mountain Boulevard
Warren, New Jersey 07059

11. **Liability Insurance** – Lighttower shall, at all times, maintain a comprehensive liability insurance policy with a single amount of at least One Million (\$1,000,000) Dollars covering liability for any death, personal injury, property damage or other liability arising out of the construction, installation, operation or maintenance of the Telecommunications System contemplated herein, and an excess liability policy (or “Umbrella”) in the amount of Five Million (\$5,000,000) Dollars. The insurance required by this Section shall be evidenced by Certificate(s) of Insurance naming the Municipality as an additional insured. Each Certificate of Insurance shall require that a thirty (30) day notice shall be given to the Municipality by registered mail, return receipt requested, if any policy or individual coverage is altered or cancelled. All such notices shall be provided in accordance with Section 10 hereof.

Notwithstanding the foregoing, if in the commercially reasonable opinion of the Municipality, the foregoing insurance coverage limits are inadequate to protect the interest of the Municipality, Lighttower shall provide insurance with such increased limits as the Municipality shall reasonably request.

Prior to the commencement of any work pursuant to this Agreement, Lighttower shall file with the Municipality for review and approval Certificates of Insurance with endorsements evidencing the coverage provided by said liability and excess liability policies.

The Municipality shall notify Lighttower within fifteen (15) days after the presentation of any claim or demand to the Municipality, either by suit or otherwise, made against the Municipality on account of any work performed by Lighttower, its subcontractors, agents, employees, officers, servants, designees, guests and invitees (or inaction) pursuant to the rights granted in this Agreement.

12. **Restoration** – In the event that Lighttower shall, from time to time, disturb any utility lines, fixtures, equipment, or other facilities, roads, sidewalks, trees or shrubs, or other surfaces in the natural topography or any other matter whatsoever, Lighttower shall, at its sole cost and expense, reasonably restore and replace such places and things so disturbed to and in not less than as good condition that existed prior to each disturbance. In doing so, Lighttower shall comply with all applicable statutes, ordinances and regulations now existing or hereinafter promulgated. All restorations shall be completed within thirty (30) working days from the occurrence of the disturbance.

13. **Permit Required** – Prior to the commencement of any work pursuant to this Agreement, Lighttower shall apply to the Municipal Engineer for a street opening permit in accordance with the Code of the Borough of New Providence. The Municipal Engineer's grant of the permit shall not be unreasonably withheld.

14. **Deposit** – In connection with the application for a street opening permit and in addition to other permit application requirements, Lighttower shall be required to make a deposit with the Municipality for the purpose of reimbursing the Municipality for the cost of any work and/or materials furnished by the Municipality in connection with the work authorized by the permit and to cover the cost of all necessary inspections, replacements and repairs of said work in accordance Code of the Borough of New Providence.

15. **Miscellaneous:**

- a. **No Agency/Partnership** – This Agreement neither makes nor appoints Lighttower as an agent of the Municipality, nor does it create a partnership or joint venture between the parties. Neither party shall act or represent itself as an agent of the other or purport to bind or obligate the other in any manner.
- b. **Severability** – If any provision of this Agreement is declared invalid under applicable law, the affected provision will be considered omitted or modified to conform to applicable law, and all other provisions will remain in full force and effect.

- c. No Waiver – No failure or delay on the part of any party in exercising any right, power or remedy under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any such right, power or remedy hereunder. The rights and remedies provided in this Agreement are cumulative and are not exclusive of any other rights, powers or remedies existing at law, in equity or otherwise.
- d. Execution – This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which will constitute one and the same Agreement. A signature affixed by a party to a counterpart of this Agreement and delivered by electronic transmission is valid, binding and enforceable against such party.
- e. Integration – This Agreement sets forth the entire Agreement between the parties hereto, and there are no covenants or agreements to be implied against either party.
- f. Amendments – This Agreement will not be amended or modified, except in writing signed by the parties.
- g. Assignment – Lightower shall not assign or transfer any of its rights under this Agreement without prior written consent from the Municipality, which may not unreasonably withhold such consent. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns.
- h. Governing Law – This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.
- i. Neutral Construction – In the event of any dispute concerning the construction or interpretation of this Agreement, this Agreement shall be construed neutrally and without regard to events of authorship or negotiation, each party having been represented by independent counsel of its own choosing.
- j. Official Copy – An official copy of this Agreement shall be on file in the office of the Clerk of the Borough of New Providence, and shall be available for public inspection upon request.

LIGHTOWER FIBER NETWORKS I, LLC

BOROUGH OF NEW PROVIDENCE

By: _____

By: _____
Douglas Marvin, Administrator

Attest: _____

Attest: _____
Wendi Barry, Clerk