

**RESOLUTION**  
of the  
**BOROUGH OF NEW PROVIDENCE**  
Resolution No. 2017-178

Council Meeting Date: 06-26-2017

Date Adopted: 06-26-2017

TITLE: RESOLUTION AUTHORIZING AGREEMENT BETWEEN THE BOROUGH OF NEW PROVIDENCE AND CROSS RIVER FIBER, LLC. FOR RIGHTS-OF-WAY- USE AGREEMENT

Councilperson Galluccio 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 Cross River Fiber, 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 26<sup>th</sup> day of June, 2017.

## 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 26<sup>th</sup> day of June, 2017.

Wendi B. Barry, Borough Clerk

## **RIGHTS-OF-WAY USE AGREEMENT**

THIS RIGHTS-OF-WAY USE AGREEMENT ("Use Agreement") is dated \_\_\_\_\_(the "Effective Date"), and entered into by and between the Borough of New Providence ("Borough"), a New Jersey municipal corporation, having its address at 360 Elkwood Avenue, New Providence, NJ 07974-1838 and Cross River Fiber LLC ("Cross River Fiber") with offices located at 461 Headquarters Plaza, Morristown, NJ 07960.

### **RECITALS**

**WHEREAS**, Cross River Fiber 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 of Approval in Docket No. TE11050320 on July 14, 2011, Docket No. TE12040297 on June 18, 2012 and Docket No. TM14080906 and intends to provide telecommunication services in accordance with that Order and the rules and regulations of the Federal Communications Commission and the New Jersey Board of Public Utilities; and

**WHEREAS**, Cross River Fiber proposes to place its telecommunication facilities aerially on existing utility poles or in existing underground conduits in the Municipal Rights-of-Way within the Borough for the purpose of owning, constructing, installing, operating, repairing and maintaining a telecommunications system; and

**WHEREAS**, it is in the best interests of the Borough and its citizenry for the Borough to grant consent to Cross River Fiber to occupy said Municipal Rights-of-Way within the Borough for this purpose; and

**WHEREAS**, the consent granted herein is for the non-exclusive use of the Municipal Rights-of-Way within the Borough for the purpose of owning, constructing, installing, operating, and maintaining a telecommunications system; and

**NOW THEREFORE**, in consideration of the mutual covenants and obligations hereinafter set forth, the Borough and Cross River Fiber hereby agree to and with each other as follows:

#### **Section 1. Definitions.**

- a. "BPU" is the New Jersey Board of Public Utilities.
- b. "Cross River Fiber" is the grantee of rights under this Use Agreement and is known as Cross River Fiber, their successors and assigns.
- c. "Borough" is the grantor of rights under this Use Agreement and is known as the Borough of New Providence, State of New Jersey.

- d. "Public Utility" means any public utility defined in N.J.S.A. 48:2-13.
- e. "Municipal Rights-of-Way" means the space in, upon, above, along, across, over, and through any road, street or highway of the Borough. This term shall not include state, or federal rights-of-way or any property owned by any person or agency other than the Borough, except as provided by applicable Laws or pursuant to an agreement between the Borough and any such person or agency.
- f. "Utility Pole" means, in addition to its commonly accepted meaning, any wires or cable connected thereto and any replacement thereof which are similar in construction and use.
- g. Equipment. "Equipment" shall mean the optical repeaters, DWDM and CWDM multiplexers, fiber optic cables, wires and related equipment, whether referred to singly or collectively, to be installed and operated by Cross River Fiber hereunder. Such equipment shall not include Wireless Facilities.
- h. Fee. "Fee" shall mean the cost of services, administrative costs and professional costs incurred by the Borough in the exercise of this agreement. Such fees may be recovered pursuant to N.J.S.A. 54:30A-124.
- i. ILEC. "ILEC" means the Incumbent Local Exchange Carrier that provides basic telephone services, among other telecommunications services, to residents of the Borough.
- j. Laws. "Laws" shall mean any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders or other requirements of the Borough or other governmental agency having joint or several jurisdiction over the parties to this Use Agreement.
- k. Installation Date. "Installation Date" shall mean the date that the first Equipment is installed by Cross River Fiber pursuant to this Use Agreement.
- l. Network. "Network" or collectively "Networks" means one or more of the neutral-host, protocol-agnostic, fiber-based optical repeater networks operated by Cross River Fiber to serve its wireless carrier customers in the Borough.
- m. Services. "Services" means the RF transport and other telecommunications services provided through the Network by Cross River Fiber to its wireless carrier customers pursuant to one or more tariffs filed with and regulated by the BPU.
- n. Wireless Facilities. "Wireless Facilities" means wireless microwave or other wireless broadband transmission equipment.

**Section 2. Grant of Consent.** The Borough hereby grants Cross River Fiber its Borough consent for the non-exclusive use of the Municipal Rights-of-Way within the Borough for the purpose of own-

ing, constructing, installing, operating, and maintaining a telecommunications system.

**Section 3. Public Purpose.** It is deemed to be in the best interests of the Borough and its citizenry, particularly including commercial and industrial citizens, for the Borough to grant consent to Cross River Fiber to occupy said Municipal Rights-of-Way within the Borough for this purpose.

**Section 4. Scope of Use Agreement.** Any and all rights expressly granted to Cross River Fiber under this Use Agreement, which shall be exercised at Cross River Fiber's sole cost and expense, shall be subject to the prior and continuing right of the Borough under applicable laws to use any and all parts of the Municipal Rights-of-Way exclusively or concurrently with any other person or entity, and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect such Municipal Rights-of-Way. Nothing in this Use Agreement shall be deemed to grant, convey, create or vest in Cross River Fiber a real property interest in land, including any fee, leasehold interest, easement, or any other form of interest or ownership. Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the Borough except that it is agreed that no zoning or planning board permit, code or law shall be required for the installation of Cross River Fiber's Equipment installed in the Municipal Right-of-Way, unless such process has been required for the replacement of all similar communications facilities and equipment in the Municipal Rights-of-Way by all other telecommunications providers, including but not limited to the ILEC and local cable provider(s), and otherwise permitted by law. The Borough hereby authorizes and permits Cross River Fiber to enter upon the Municipal Rights-of-Way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate and replace its telecommunications facilities, in or on Utility Poles or other structures owned by public utility companies, or others.

4.1 Attachment to Third Party Property. Subject to obtaining the permission of the owner(s) of the affected property, the Borough hereby authorizes and permits Cross River Fiber to enter upon the Municipal Rights-of-Way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate and replace such number of Equipment in or on poles or other structures owned by public utility companies or other property owners located within the Public Way as may be permitted by the public utility company or property owner, as the case may be. Upon request, Cross River Fiber shall furnish evidence of Cross River Fiber's pole-attachment agreement made pursuant to N.J.A.C. 14:18-2.9, et seq. Where third-party property is not available for attachment of Equipment, Cross River Fiber may install its own utility poles in the Public Way, consistent with the requirements that the Borough imposes on similar installations made by other utilities that use and occupy the Public Way, consistent with the requirements that the Borough asks of other utilities pursuant to N.J.S.A. 48:3-17(a).

4.2 No Interference. Cross River Fiber, in the performance and exercise of its rights and obligations under this Use Agreement, shall not interfere in any manner with the existence and operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television and other telecommunications, utility or municipal property, without the express written approval of the owner or owners of the affected property or properties, except

as permitted by applicable Laws or this Use Agreement. The Borough agrees to require the inclusion of the same or a similar prohibition on interference as that stated above in all agreements and franchises the Borough may enter into after the Effective Date with other information or communications providers and carriers.

**Section 5. Compensation; Utility Charges.** Cross River Fiber shall be solely responsible for the payment of all lawful Fees in connection with Cross River Fiber's performance under this Use Agreement, including those set forth below.

5.1 Fee. Pursuant to N.J.S.A. 54:30A-124, the Borough shall recover reasonable fees for actual services incurred in the exercise of this agreement. Cross River Fiber shall promptly pay such a fee upon receiving an invoice from the Borough.

5.2 Electricity Charges. Cross River Fiber shall be solely responsible for the payment of all electrical utility charges to the applicable utility company based upon the Equipment usage of electricity and applicable tariffs.

**Section 6. Construction.** Cross River Fiber shall comply with all applicable Federal, State and Borough codes, specifications and requirements, if any, related to the construction, installation, operation, maintenance and control of Cross River Fiber's Equipment installed in the Public Way and on Public Facilities in the Borough. This includes, but is not limited to, compliance with the New Jersey One Call System. Cross River Fiber shall not attach, install, maintain or operate any Equipment in or on the Municipal Rights-of-Way without the prior approval of the Borough for each location.

6.1 Obtaining Required Permits. If the attachment, installation, operation, maintenance or location of the Equipment in the Municipal Rights-of-Way shall require any permits, including road opening permits, Cross River Fiber shall, if required under applicable Borough ordinances, apply for the appropriate permits and pay any standard and customary permit fees. In the case of Third Party attachments (to existing utility infrastructure), Cross River Fiber agrees to provide the Borough with a list of proposed attachments in advance of its deployment to the Borough and the Borough agrees to use reasonable efforts to review and approve Cross River Fiber's list of proposed attachments to Third Party utility infrastructure within thirty (30) days of submission, and if no comment is received within thirty (30) days, the application will be presumed to be acceptable and no further action will be required prior to Cross River Fiber's installation.

6.2 Location of Equipment. The proposed locations of Cross River Fiber's planned initial installation of Equipment shall be provided to the Borough promptly after Cross River Fiber's review of available street light maps (if applicable), and prior to deployment of the Equipment. Upon the completion of installation, Cross River Fiber promptly shall furnish to the Borough a pole list showing the exact location of the Equipment in the Municipal Rights-of-Way.

6.3 Relocation and Displacement of Equipment. Cross River Fiber understands and acknowledges that the Borough may require Cross River Fiber to relocate one or more of its Equipment installations for good cause shown. Cross River Fiber shall, at the Borough's direction, relocate such Equipment at Cross River Fiber's sole cost and expense, whenever the Borough reasonably, and for good cause shown, determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation or maintenance of a Borough project; (b) because the Equipment is interfering with or adversely affecting proper operation of Borough-owned light poles, traffic signals or other Public Facilities; or (c) to protect or preserve the public health or safety. In any such case, the Borough shall use its best efforts to afford Cross River Fiber a reasonably equivalent alternate location. If Cross River Fiber shall fail to relocate any Equipment as requested by the Borough within a reasonable time under the circumstances in accordance with the foregoing provision, the Borough shall be entitled to relocate the Equipment at Cross River Fiber's sole cost and expense, without further notice to Cross River Fiber. To the extent the Borough has actual knowledge thereof, the Borough will attempt promptly to inform Cross River Fiber of the displacement or removal of any pole on which any Equipment is located.

6.4 Damage to Public Way. Whenever the removal or relocation of Equipment is required or permitted under this use Agreement, and such removal or relocation shall cause the Public Way to be damaged, Cross River Fiber, at its sole cost and expense, shall promptly repair and return the public Way in which the Equipment is located to a safe and satisfactory condition in accordance with applicable Laws, normal wear and tear excepted. If Cross River Fiber does not repair the site as just described, then the Borough shall have the option, upon fifteen (15) days prior written notice to Cross River Fiber, to perform or cause to be performed such reasonable and necessary work on behalf of Cross River Fiber and to charge Cross River Fiber for the reasonable proposed costs to be incurred or the reasonable actual costs incurred by the Borough at the Borough's standard rates. Upon the receipt of a demand for payment by the Borough, Cross River Fiber shall promptly reimburse the Borough for such reasonably incurred costs.

**Section 7. Compliance with Ordinance.** Cross River Fiber shall comply with all applicable existing ordinances of the Borough as may be amended from time to time and with all future ordinances as may be enacted to the extent such ordinances are consistent with state and federal law.

**Section 8. Duration of Consent.** This Use Agreement shall be effective as of the Effective Date and shall extend for a term of ten (10) years commencing on the Installation Date, unless it is earlier terminated by either party in accordance with the provisions herein. The term of this Use Agreement may be renewed by Resolution of the Borough Council for three (3) consecutive terms of five (5) years each on the same term and conditions as set forth herein, unless either party notified the other of its intention not to renew not less than thirty (30) calendar days prior to commencement of the renewal term.

**Section 9. Indemnification.** Cross River Fiber, its successors, assigns, sub-contractors, agents, servants, officers, employees, designees, guests and invitees, hereby indemnify, defend and hold harmless the Borough, 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 Cross River Fiber actions under this Use Agreement and costs in connection therewith. This indemnification shall specifically include, but not be limited to, any and all costs, reasonable attorneys fees, court costs and any other expenses that may be incurred by the Borough in connection with any and all claims, demands, suits, actions at law or equity or otherwise and/or arbitration proceedings which may arise in connection with Cross River Fiber activities pursuant to the rights granted in this Use Agreement.

Section 9.1 Waiver of Claims. Cross River Fiber waives any and all claims, damages, causes of action and rights it may assert against the Borough on account of any loss, damage or injury to any Equipment or any loss or degradation of the Services as a result of any event or occurrence which is beyond the reasonable control of the Borough.

## **Section 10. LIMITATION OF LIABILITY.**

### **10.1 Limitation on Borough Enforceability**

The Borough shall be liable only for the cost of repair to damaged equipment arising from the willful act or misconduct of the Borough, its employees, agents or contractors and shall in no event be liable to indirect, special, punitive or consequential damages.

**Section 11. Notices.** All notices or other correspondence required or permitted to be given in connection with this Use Agreement shall be in writing and delivered personally, by telecopy, by overnight carrier service or by registered or certified mail to the parties at the following addresses:

To Cross River Fiber at:

Cross River Fiber LLC  
461 Headquarters Plaza  
Morristown, NJ 07960.  
Attn: Robert Sokota,  
Chief Administrative Officer and  
General Counsel

To the Borough at:

The Borough of New Providence  
Attn: Borough Clerk  
Borough Hall  
360 Elkwood Ave.  
New Providence, New Jersey 07974-1838

11.1 Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business

day in the case of facsimile or overnight delivery. Either party may, from time to time, designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

**Section 12. Liability Insurance.** Cross River Fiber shall at all times maintain a comprehensive liability insurance policy with a single amount of at least One Million Dollars (\$1,000,000.00) covering liability for any death, personal injury, property damage or other liability arising out of the construction and operation contemplated herein, and an excess liability policy (or "umbrella") policy amount in the amount of Five Million Dollars (\$5,000,000.00). Cross River Fiber agrees to waive subrogation against the Borough.

Prior to the commencement of any work pursuant to this Use Agreement, Cross River Fiber shall file with the Borough Certificates of Insurance with endorsements evidencing the coverage provided by said liability and excess liability policies.

The Borough shall notify Cross River Fiber within thirty (30) days after the presentation of any claim or demand to the Borough, either by suit or otherwise, made against the Borough on account of any of Cross River Fiber or its sub-contractors, agents, employees, officers, servants, designees, guests and invitees, activities pursuant to the rights granted in this Use Agreement.

12.1. Filing of Certificates and Endorsements. Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Use Agreement, Cross River Fiber shall file with the Borough the required original certificate(s) of insurance with endorsements, which shall state the following:

- a. the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts;
- b. that the Borough shall receive thirty (30) days prior notice of cancellation;
- c. that Cross River Fiber Commercial General Liability insurance policy is primary as respect to any other valid or collectible insurance that the Borough may possess, including any self-insured retentions the Borough may have; and any other insurance the Borough does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
- d. that Cross River Fiber's Commercial General Liability insurance policy waives any rights of recovery the insurance company may have against the Borough.

The certificate(s) of insurance with endorsements and notices shall be mailed to the Borough at the address specified in § 10 above.

12.2. Workers' Compensation Insurance. Cross River Fiber shall obtain and maintain at all times during the term of this Use Agreement statutory workers' compensation and employer's liability insurance in an amount not less than One Million (\$1,000,000.00) Dollars, and shall furnish the Borough with a certificate showing proof of such coverage.

12.3. Insurer Criteria. Any insurance provider of Cross River Fiber shall be admitted and authorized to do business in the State of New Jersey and shall carry a minimum rating assigned by A.M. Best & Company's Key Rating Guide of "A" Overall and Financial Size Category of "X" (i.e., a size of \$500,000,000.00 to \$750,000,000.00 based on capital, surplus and conditional reserves). Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

12.4. Severability of Interest. Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the Borough. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.

**Section 13. Assignment.** Cross River Fiber may not assign this Use Agreement without the written consent of the Borough, which consent shall not be unreasonably withheld or delayed, except that Cross River Fiber shall have the right, upon notice to the Borough, to assign this Use Agreement without the Borough's consent if such assignment is approved by the BPU.

**Section 14. Termination.** This Use Agreement may be terminated by either party upon forty-five (45) days prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or if such default is not curable within forty-five days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice. Except as expressly provided herein, the rights granted under this Use Agreement are irrevocable during the term.

**Section 15. Successors and Assigns.** The terms and conditions herein contained shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

**Section 16: Miscellaneous Provisions.** The provisions which follow shall apply generally to the obligations of the parties under this Use Agreement.

16.1 Environmental Review. Cross River Fiber agrees to comply with any applicable rules pertaining to environmental quality review promulgated by the New Jersey Department of Environmental Protection and to submit any required environmental forms for the Borough's review and approval, so long as the review that the Borough requires is the same that the Borough requires of all other telecommunications providers, including, but not limited to the ILEC and the cable provider(s), for their installation of any facilities or equipment in the municipal Right-of-Way.

16.2 Nonexclusive Use. Cross River Fiber understands that this Use Agreement does not provide Cross River Fiber with exclusive use of the municipal Right-of-Way and that the Borough shall have the right to permit other providers of communications services to install equipment or devices in the Municipal Right-of-Way. The Borough agrees, upon request from Cross River Fiber, to notify of the receipt of a proposal for installation of communications equipment or devices in the Municipal Right-of-Way.

16.3 Waiver of Breach. The waiver by either party of any breach or violation of any provision of this use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Use Agreement.

16.4 Severability of Provisions. If any one or more of the provisions of this Use Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Use Agreement. Each party hereby declares that it would have entered into this Use Agreement and each provision hereof regardless of whether any one or more provisions may be declared illegal, invalid or unconstitutional.

16.5 Contacting Cross River Fiber. Cross River Fiber shall make its staff available to the Borough department having jurisdiction over Cross River Fiber's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance or removal of the Equipment. The Borough may contact by telephone the network control center operate regarding such problems or complaints.

16.6 Governing Law; Jurisdiction. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of New Jersey and of the United States, without reference to its conflicts of law principles. If suit is brought by a party to this Use Agreement, the parties agree that trial of such action shall be vested exclusively in the State courts of New Jersey, in the county where the Borough is located, or in any federal court of competent jurisdiction.

16.7 Attorneys Fees. Should any dispute arising out of this Use Agreement lead to litigation, each party shall pay its own costs of suit and attorney's fees.

16.8 Content Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Use Agreement, such party shall not unreasonably delay, condition or withhold its approval or consent.

16.9 Representations and Warranties. Each of the parties to this Use Agreement represents and warrants that it has the full right, power, legal capacity and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith.

**Section 17. Incorporation of Prior Agreements.** This Agreement contains the entire understand-

ing of the parties hereto with respect to the subject matter hereof, and no prior other written or oral agreement or undertaking pertaining to any such matter shall be effective for any purpose.

**Section 18. Modification of Agreement.** This Agreement may not be amended or modified, nor may any obligation hereunder be waived orally, and no such amendment, modification or waiver shall be effective for any purpose unless it is in writing and signed by the party against whom enforcement thereof is sought.

**Section 19. Invalidity.** If any provision hereof shall be declared invalid by any court or in any administrative proceedings, then the provisions of this Agreement shall be construed in such manner so as to preserve the validity hereof and the substance of the transaction herein contemplated to the extent possible. The headings are provided for purposes of convenience of reference only and are not intended to limit, define the scope of or aid in interpretation of any of the provisions hereof.

**Section 20. Counterparts.** This Agreement may be executed and delivered in several counterparts, each of which, when so executed and delivered, shall constitute an original, fully enforceable counterpart for all purposes.

IN WITNESS WHEREOF, this Use Agreement has been executed as of the date set forth below.

Cross River Fiber LLC

\_\_\_\_\_

Robert Sokota, Chief Administrative Officer and General Counsel

Dated: \_\_\_\_\_

The Borough of New Providence

Attest:

By: \_\_\_\_\_  
Al Morgan, Mayor

By: \_\_\_\_\_  
Wendi B. Barry, Borough Clerk

Dated: June \_\_\_\_, 2017