

**ORDINANCE NO. 3727**

**AN ORDINANCE OF THE MAYOR AND CITY COUNCIL OF CUMBERLAND, MARYLAND, ENTITLED "AN ORDINANCE GRANTING A NONEXCLUSIVE FRANCHISE TO LUMOS NETWORKS OF WEST VIRGINIA, INC., D/B/A LUMOS, ITS SUCCESSORS AND ASSIGNS, TO USE THE PUBLIC RIGHTS-OF-WAY OF THE CITY FOR ITS POLES, WIRES, CONDUITS, CABLES AND APPURTENANT FACILITIES FOR THE DELIVERY OF TELECOMMUNICATION SERVICES WITHIN THE CITY."**

**RECITALS**

WHEREAS, pursuant to Md. Code Ann., Article 23A, Section 13, the City, Maryland (the "City") is authorized to grant one or more nonexclusive franchises for the use of its public rights-of-way; and

WHEREAS, LUMOS NETWORKS OF WEST VIRGINIA, INC., d/b/a LUMOS (hereinafter "LUMOS"), is a foreign corporation registered to do business in the State of Maryland and has been authorized by the Maryland Public Service Commission to provide all forms of telephone service in the State of Maryland; and

WHEREAS, LUMOS desires to construct, install and maintain network facilities for telecommunications service within the City using the public rights-of-way.

NOW, THEREFORE, in consideration of the recitals and the mutual covenants contained herein:

**SECTION 1 - Definitions: BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF CUMBERLAND, That the following definitions apply to the franchise granted herein:**

1.1 "Fiber Optic Network Facilities" or "Facilities" means fiber optic cables, conduits, converters, splice boxes, poles, down guys/anchors, cabinets, handholds, manholes, vaults, equipment, drains, surface location markers, appurtenances, and related facilities located or to be located by LUMOS in the Public Rights-of-Way of the City and used or useful for the transmission of Telecommunications Services.

1.2 "Applicable Law" means any local (municipal), state or federal legislative, judicial, or administrative order, certificate, decision, statute, constitution, ordinance, resolution, regulation, rule, tariff, guideline, or other requirement, as amended, now in effect or subsequently enacted or issued during the term of this franchise, including, but not limited to, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub.L.No. 104-104 § 101(a), 110 Stat. 70 codified at 47 U.S.C., and all orders, rules, tariffs, guidelines, and regulations issued by the Federal Communications Commission or the governing state authority pursuant thereto.

1.3 "Public Rights-of-Way" means the surface of and all rights-of-way and the space above and below any public street, road highway, freeway, lane, path, public way or place, sidewalk, alley, court, boulevard, parkway, drive or easement now or hereafter held by the City for the purpose of public travel and shall include other similar easements or rights-of-way as shall be now held or hereafter held by the City which shall, within their proper use and meaning, entitle a franchisee to the use thereof for the purposes of installing poles, wires, cable, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to Telecommunications Services.

1.4 "Telecommunications Services" means all telecommunications services that LUMOS may provide under Applicable Law.

SECTION 2 - Grant of Access: BE IT FURTHER ORDAINED, That, subject to the terms of this franchise, the City hereby grants to LUMOS the nonexclusive right to construct, install, maintain, locate, move, operate, place, protect, reconstruct, reinstall, relocate, remove, and replace Fiber Optic Network Facilities within the Public Rights-of-Way of the City. LUMOS shall be solely responsible for obtaining any and all required approvals and consents from State or Allegany County agencies or private parties, to the extent that its operations affect State, Allegany County or private property.

SECTION 3 - No Property Interest: BE IT FURTHER ORDAINED, That this franchise is not a grant by the City of any fee simple property interest and is made subject and subordinate to the prior and continuing right of the City to use the Public Rights-of-Way as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing and removing sanitary sewers, water mains, storm drains, gas mains, poles and for other municipal uses and with right of ingress and egress, along, over, across and in said Public Rights-of-Way.

SECTION 4 - No Interference: BE IT FURTHER ORDAINED, That in the performance and exercise of its rights and obligations under this franchise, LUMOS 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, overhead and underground electric and telephone wires, television cables, and other telecommunications utilities and City property without the approval of the owner(s) of the affected property or properties; provided, however, that LUMOS is granted the right of ingress and egress to and from such Public Rights-of-Way over and across the adjacent properties of the City as LUMOS may need to exercise its rights under this franchise. All poles erected by LUMOS shall be neat and symmetrical, and shall, together with fixtures, be located so as not to interfere with the safety or convenience of persons traveling on or over the City's streets, alleys, highways, and other public places. In the installation and maintenance of any underground system, LUMOS shall not open or encumber more of any street, alley, highway, or other public place than will be necessary to enable it to perform the work. The City reserves the right to establish by ordinance or resolution, and LUMOS hereby agrees to comply with, any reasonable regulation for the convenience, safety, and protection of its citizens as now in effect or as may be adopted in the future, including, without limitation, requiring substitution of underground cable for overhead cable or vice-versa, or requiring transfer of cable from the front or rear of property.

SECTION 5 - Relocation of Facilities: BE IT FURTHER ORDAINED, That LUMOS shall relocate, in cooperation with the City, any Facilities installed, used, and maintained under this franchise if, and when, made necessary by any lawful change of grade, alignment, or width of any street, including the construction, maintenance, or operation of any underground subway or viaduct by the City and/or the construction, maintenance, or operation of any other of the City

underground or above-ground facilities or any of the City's capital improvement projects; provided, however, that all utilities located in the area in which such change or alignment occurs shall also be required, if necessary, to relocate their respective facilities. For aerial attachments, LUMOS shall cooperate with the pole owner(s) to perform such relocation. LUMOS shall accomplish any necessary relocation of its facilities expeditiously and so as to avoid any delay to City construction activities. If it is determined during construction, maintenance, or operation of a City street, underground subway or viaduct, or any other of the City underground or above ground facilities, or during any of the City's capital improvements projects it is determined the a LUMOS owned facility was improperly installed in accordance with the Ordinances, construction requirements of the City (including: standards and specifications for construction, policies and guidelines enacted by the City, and the conditions of permits the may be issued); LUMOS shall accomplish any necessary relocation of the portion of its improperly installed facility expeditiously and so as to avoid any delay to City activities, and the relocations shall be done at no cost or expense to the City, and furthermore this work shall be subject to and done in accordance with the Ordinances, construction requirements of the City (including: standards and specifications for construction, policies and guidelines enacted by the City, and the conditions of permits the may be issued); to the satisfaction of the City Engineer or his authorized representative or representatives, and in accordance with other appropriate county, state and federal regulations. The City and or its contractors will not be responsible for damage done to improperly installed facilities. Upon the termination of this franchise by expiration of the period for which it is granted and any renewals thereof, it shall be the duty of LUMOS to remove, at its own cost, all of its structures which the City at the time of such termination may require to be removed.

SECTION 6 - Term: BE IT FURTHER ORDAINED, That the period of this franchise shall be for an initial term of five (5) years commencing on the effective date of this Ordinance. Unless either party gives ninety (90) days written notice of its intention to terminate the franchise prior to the end of the term, the franchise shall thereafter automatically renew and continue on an annual basis from year to year. Either party may, upon giving ninety (90) days written notice prior to the end of the yearly renewal period, terminate the franchise. Upon termination of the franchise as herein provided, LUMOS shall be prohibited from further access to the Public Rights-of Way in the City.

SECTION 7 - Permits: BE IT FURTHER ORDAINED, That as required by Applicable Law, LUMOS shall apply for a permit(s) for all work and each job within the Public Rights-of-Way, and shall comply with all terms and conditions of any such permit. LUMOS shall furnish detailed plans of the work and other such information as required by Applicable Law, prior to the issuance of a permit. And shall pay all standard processing, field marketing, engineering and inspection fees once the job is completed in accordance with the rates in effect at the time of permit. Improvements shall be constructed and installed in accordance with the City Standards and Specification for Utility Permitting or as approved by the City Engineer.

SECTION 8 - Undergrounding of Facilities: BE IT FURTHER ORDAINED, That LUMOS shall place its Facilities underground if required by the City pursuant to Applicable Law; provided, however, that all utilities located in areas in which the City shall require the Facilities to be placed underground shall also be required, if the City, in its sole discretion, deems it necessary, to bury all fiber, wire, or conduit at the same time and under the same terms and conditions. LUMOS may be required to install underground service if such is in keeping with a City approved plan of development, re-subdivision, revitalization, or redevelopment. The location of any poles erected by virtue of this Ordinance shall be subject to the supervision of the

Mayor of the City, as delegated to the City Engineer or his successor in function. So far as may be practicable, the City may require the joint use of such poles now standing as to avoid multiple poles.

SECTION 9 - Restoration of Public Rights-of-Way: BE IT FURTHER ORDAINED, That after the removal, relocation, or construction of the Fiber Optic Network Facilities, LUMOS shall, at its own cost, repair, and return the Public Rights-of-Way to the same or better condition existing before such removal, relocation, or construction. All work shall be completed in accordance with the Ordinances, construction requirements of the City (including: standards and specifications for construction, policies and guidelines enacted by the City, and the conditions of permits the may be issued), to the satisfaction of the City Engineer or his authorized representative or representatives, and in accordance with other appropriate county, state and federal regulations. LUMOS shall be responsible for damage to the City's street pavements, existing utilities, curbs, gutters, and sidewalks due to LUMOS' installation, maintenance, repair, or removal of its Fiber Optic Network Facilities in Public Rights-of-Way, and shall repair, replace, and restore in kind to the satisfaction of the City Engineer or his authorized representative or representatives, the said damaged property at its sole expense. If LUMOS fails to restore Public Rights-of-Way after twenty (20) day notice from the City, the City may repair such portions of the Public Rights-of-Way that may have been disturbed by LUMOS and collect the costs so incurred from LUMOS.

SECTION 10 - Manner of Construction: BE IT FURTHER ORDAINED, That the construction, installation, operation, maintenance, and removal of LUMOS' Facilities shall be accomplished without cost or expense to the City and in such a manner so as not to endanger persons or property, or unreasonably obstruct travel on any road, walk or, other access thereon within the Public Rights-of-Way. LUMOS shall be responsible to provide inspection of all construction of their facilities and the restoration of the public right-of-way to insure that their employees and /or contractors are in compliance with the Ordinances, construction requirements of the City (including: standards and specifications for construction, policies and guidelines enacted by the City, and the conditions of permits the may be issued), to the satisfaction of the City Engineer or his authorized representative or representatives, and in accordance with other appropriate county, state and federal regulations; however, the City reserves the right to inspect all construction to insure compliance and for the protection of its facilities. If it is determined that LUMOS is not in compliance, or has caused damage to City Facilities, then the City may elect to provide full time inspection of the construction and restoration, with by means of its own personnel or by hiring a third party, and all costs and expenses of the full time inspection shall be the responsibility of LUMOS.

SECTION 11 - Reservation of Police Powers: BE IT FURTHER ORDAINED, That the City reserves the right, by ordinance or resolution, to establish any reasonable regulations for the convenience, safety, and protection of its inhabitants under its police powers. The rights herein granted are subject to the exercise of such police powers as the same now are, or may hereafter be, conferred upon the City. Without limitation as to the generality of the foregoing, the City reserves the full scope of its power to require, by ordinance, substitution of underground service for overhead service and vice-versa, or the transfer of overhead service from the front to the rear of property whenever reasonable in all areas in the City and with such contributions or at such

rates and charges as may then be in effect under the procedures of the Maryland Public Service Commission ("PSC") or its successor in function or other appropriate regulatory body. The City further reserves the full scope of its police power to require by ordinance the location, construction, and maintenance of overhead service at the rear of property or underground service wherever reasonable in all new service installations in the City with such contributions or at such rates and charges as may then be in effect under the procedures of the PSC or other appropriate regulatory body or its successor in function.

SECTION 12 - Condition of Fiber Optic Network & Facilities: BE IT FURTHER ORDAINED, That LUMOS will maintain its poles, wires, conduits, lines, manholes, facilities, and equipment within the City in good order and operating condition throughout the term of this franchise, and LUMOS, by accepting this franchise, agrees that the PSC or its successor in function has jurisdiction to the full extent and in the manner now or hereafter provided by law, during the term of this franchise, to require LUMOS to render efficient telephone service at reasonable rates.

SECTION 13 - Use of Poles: BE IT FURTHER ORDAINED, That in consideration of the rights and privileges herein granted, LUMOS shall, on demand, during the life of this franchise, where available, provide space on each pole, or space in each conduit, on, or in which, the City may desire to attach its own network facilities and telecommunications facilities which facilities, shall be limited to use by the City for fire, police and/or emergency services, but without cost to the City. Should existing space not readily be available, the City would reimburse LUMOS for actual material and labor costs to make the desired space available to the City. All such use of LUMOS' facilities by the City shall be in accordance with the National Electric Code, National Electric Safety Code, and other federal and state regulations. Prior approval by LUMOS is required before the City utilizes any of LUMOS' Facilities. All material and labor used for any approved attachments and/or use must have prior approval from LUMOS. The requirements of this section shall not extend to conduit, poles, or fixtures used by LUMOS but owned by others. To the extent allowable by law, the City agrees to indemnify and hold harmless LUMOS, its officers, employees, and agents from, and against, any and all claims, demands, losses, damages, liabilities, fines, and penalties, and all costs and expenses incurred in connection therewith, (collectively, the "Losses") arising out of the City's use of LUMOS' conduit, poles, or fixtures.

SECTION 14 - Preservation of Trees: BE IT FURTHER ORDAINED, That in placing or maintaining its structures, upon and along the streets, alleys, and/or public places of the City or otherwise, LUMOS shall not injure, or in any manner, cut or trim the trees, branches of trees along and in such streets, alleys, and/or public places without the previous permission of the Mayor or his designee. All such trimmings shall be performed in a safe and orderly manner and, to the extent practicable for the proper maintenance and use of LUMOS' lines or other Facilities, in compliance with the guidelines set forth by the PSC, as in effect from time to time, and the local tree ordinance, if any. LUMOS shall be solely responsible for obtaining any required consents from private parties, other utilities, State or Allegany County agencies to the extent that its trimming activities may require such consent(s).

SECTION 15 - Facilities Map: BE IT FURTHER ORDAINED, That LUMOS shall maintain an accurate map showing the location and depth of its Facilities. As-built drawings of any new construction of Facilities shall be furnished to the City within sixty (60) days of completion of

such construction as requested. Said map shall be provided in a format mutually agreed upon by the parties, which may include an acceptable GIS format. As-Built information shall include but not be limited to, horizontal locations, vertical locations (especially for underground), size and type.

SECTION 16 - Costs in Processing this Franchise: BE IT FURTHER ORDAINED, That within thirty (30) days of the effective date of this Ordinance, LUMOS shall pay to the City, the greater of Five Thousand Dollars (\$5,000.00) or actual documented costs incurred by the City as reimbursement for City administrative costs and legal fees in processing this franchise.

SECTION 17 - Right-of-Way Fee: BE IT FURTHER ORDAINED, That the City and LUMOS hereto recognize that the City is responsible for the Public Rights-of-Way and further agree that commercial use of public property for private profit requires equitable, fair, and reasonable compensation for its use. New technologies and competition foster more intensive use of the Public Rights-of-Way by multiple users. This, in turn, requires more intensive management of the rights-of-way to ensure orderly use, maintenance of public safety, reliable delivery of essential services, and equitable treatment of all users. The City has both an obligation and a duty to exact a fee for the private use of Public Rights-of-Way. The City and LUMOS understand and acknowledge that (i) federal law prohibits discrimination against competitive local exchange carriers in favor of incumbent local exchange carriers, and (ii) that when the incumbent franchise agreement expires the City may impose, and LUMOS agrees to be bound by, a fair and reasonable franchise fee applied on a non-discriminatory, competitively-neutral basis to all telecommunication service providers using the City's public rights-of-way.

SECTION 18 - Annual Payment to City: BE IT FURTHER ORDAINED, That upon commencement of Telecommunications Services using its Facilities constructed in the Public Rights-of-Way, LUMOS shall pay to the City, for its share of the City's costs of managing and maintaining the Public Rights-of-Way, the following, compensation for Facilities placed aerial and/or underground in the Public Rights-of-Way:

**\$0.25 per linear foot of underground fiber optic cable per annum.**

SECTION 19 - Other Fees and Taxes: BE IT FURTHER ORDAINED, That LUMOS shall pay all standard, nominal permit and user fees to the City and all taxes in accordance with Applicable Law.

SECTION 20 - Indemnification: BE IT FURTHER ORDAINED, That LUMOS agrees to indemnify, defend (with counsel reasonably acceptable to the City) and hold harmless the City its officers, employees, and agents from and against any and all claims, demands, losses, damages, liabilities, fines, and penalties, and all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense (collectively, the "Losses") arising out of any breach by LUMOS of its obligations provided in this franchise, the City's approval of this franchise and LUMOS' activities associated with the installation, operation, maintenance, removal, or replacement of LUMOS' Facilities, except to the extent any Losses arise from the willful misconduct or negligent acts or omissions of the City, its officers, employees, or agents.



surety bond, up to its full face amount, for any loss or damage to the Public Rights-of-Way utilized by LUMOS during construction of the initial Facilities to the extent the City previously has not been otherwise compensated through a withdrawal from the surety bond or by LUMOS.

SECTION 23 - Notices: BE IT FURTHER ORDAINED, That notices pursuant to this franchise shall be in writing and addressed as follows:

To the City:                   City  
                                      57 North Liberty Street  
                                      Cumberland, Maryland 21502  
                                      Attn: City Administrator

To LUMOS:                   Lumos Networks of West Virginia. Inc.  
                                      c/o Construction Office  
                                      1200 Greenbrier Street  
                                      Charleston, West Virginia 25311  
                                      Attn: Director OSPC

Either the City or LUMOS may change the address at which it will receive notices related to this franchise by providing written notice of the change to the other party.

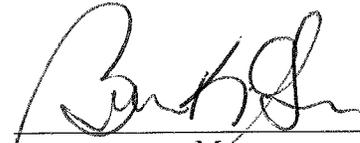
SECTION 24 - Assignment: BE IT FURTHER ORDAINED, That notwithstanding any provision of this franchise, LUMOS may assign or collaterally assign, in whole or in part, its rights, interests, and obligations hereunder without limitation to any of its affiliates, any party providing financing to LUMOS and any successors and assigns of the foregoing without the consent of the City. LUMOS shall provide the City with notice of any such assignment. Any assignee or lessee shall be bound by the terms of this franchise to the same extent as LUMOS.

SECTION 25 - Severability: BE IT FURTHER ORDAINED, That the invalidity or unenforceability of any provision of any one or more of the provisions of this Ordinance shall not impair or affect the validity or enforceability of any of the other provisions of this Ordinance.

SECTION 26 - Acceptance of Franchise: BE IT FURTHER ORDAINED, That after the passage of this Ordinance, and within thirty (30) after such passage, this franchise, if accepted, shall be accepted by LUMOS by filing with the City Administrator, an unconditional written acceptance thereof, to be duly executed, and a failure of LUMOS to so accept this franchise with said period of time shall be deemed a rejection hereof by LUMOS, and the right and privileges herein granted shall after the expiration of said 30-day period, if not so accepted, absolutely cease, unless said period of time for acceptance shall be extended by the City.

SECTION 27 - Effective Date: BE IT FURTHER ORDAINED, That this Ordinance and franchise shall be in full force and effect from and after the 23 day of October, 2012, provided it be duly accepted by LUMOS as herein provided.

Passed this 23 day of October, 2012.



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Mayor

Attest:  


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City Clerk