

Recorded: 10/18/2023 04:22:44 PM
BY: CLAUDIA HARRINGTON
Cheryl L. House, Register of Deeds
Dare County, NC
Fee Amt: \$26.00 NC Excise Tax: \$0.00
Land Transfer Fee: \$0.00

BOOK 2704 PAGE 1 (10)

700133680



EXEMPT
DARE COUNTY
LAND TRANSFER TAX

NO. 3098-23/80

STATE OF NORTH CAROLINA
COUNTY OF DARE

MASTER ENCROACHMENT AGREEMENT
[TOWN OF SOUTHERN SHORES] RIGHT OF
WAY

THIS ENCROACHMENT AGREEMENT ("Agreement") is made and entered into as of this 21 day of September, 2023 by and between **Open Fiber USA, LLC** a North Carolina limited liability company, hereinafter referred to as "Grantee," and the Town of Southern Shores, hereinafter referred to as the "Town."

RECITALS:

WHEREAS, Grantee desires to encroach on certain public street(s) and/or street right(s) of way (hereinafter collectively "ROW") under the Town's jurisdiction for the purpose of constructing and installing a fiber-to-the-premises infrastructure network (hereinafter "FTTP Network") and the parties wish to memorialize any such permission and conditions through this Agreement rather than individual permits or approvals; and

WHEREAS, the Town is willing to exercise its authority in accordance with N.C.G.S. 160A-296 to grant the Grantee non-exclusive, revocable (subject to applicable law) permission to encroach on the ROW in the locations approved by the Town pursuant to plans approved for the purposes described in this Agreement.

NOW, THEREFORE, the parties agree as follows:

1. Permission to Encroach. Upon the approval of specific construction plans by the Town, the Town hereby grants the Grantee permission to encroach at the locations described in construction plans in accordance with this Agreement. Encroachments are for the purpose of constructing and/or erecting, installing, maintaining, operating and if necessary, removing an FTTP Network and related facilities. The FTTP Network will consist of underground fiber optic cables, lines, or strands; underground conduits, vaults, access manholes and handholes; electronic equipment; power generators; batteries; pedestals; boxes; cabinets; huts; and other similar facilities (hereinafter "Network Facilities"). A general route and proposed design of Grantee's FTTP Network is attached as Exhibit A.

Return to: Town of Southern Shores
5375 N. Virginia Dare Trl.
Southern Shores, NC 27949

- a. All Network Facilities and structures, including not but limited to poles, wiring, conduit, cables, lines, cabinets, pedestals, vaults, boxes, panels, and related appurtenances shall be installed underground.

Construction plans that are approved by the Town and show an encroachment shall be added as exhibits to this Agreement and shall be governed by the terms and conditions of this Agreement. Each such approved plan shall have a sequential Exhibit number included on the plan. All such construction plans that show an encroachment shall reference this Agreement and provide that any such installation, operation, or maintenance shall be governed by and incorporated into this Agreement.

2. Pre-Existing Interest. This Agreement and the rights granted hereto are subordinate and subject to the Town's continuing right to use and control the ROW in accordance with North Carolina law. Nothing in this Agreement shall be interpreted to restrict, impair, or affect the Town's right to construct, install, operate, maintain, repair, or remove roadways, sewers, water pipes, storm drains, gas pipes, utility poles, overhead and underground electric lines, and any other associated facilities or utility and municipal uses. Grantee's rights are subject to all pre-existing easements, restrictions, conditions, covenants, claims of title and other property interests in the ROW. Grantee shall obtain any permission or rights necessary to accommodate such pre-existing property interests.

3. Grantee's Obligations. The Grantee, its contractors, employees, agents, successors, and assigns shall:

- a. Adhere to the following requirements:

- i. Have all employees, contractors, and subcontractors wearing professional uniforms with identifying name and company, contractor or subcontractor.
- ii. Have all licensed vehicles properly identified with company, contractor or subcontractor name no less than 12"x12" containing letters of at least 2" height.
- iii. Grantee shall maintain a field superintendent stationed in Dare County during FTTP network expansion that will have daily knowledge of all contractor and subcontractor work plans and locations.
- iv. Grantee shall use contractors and subcontractors with appropriate experience and skills with horizontal directional drilling and FTTP network installation. Equipment shall be kept in good condition free from hydraulic or other fluid leaks and of appropriate size for the required task.

- b. Grantee acknowledges that expansion projects could unduly disrupt the public, pedestrians, and the free flow of vehicles, and will plan and coordinate with the Town to minimize impacts of FTTP work on pedestrian and vehicular traffic, with a focus on promoting FTTP expansion work between the months of October through April, when possible. Any repair, maintenance or connecting customers to an existing FTTP network is permissible year round.

- c. It is acknowledged by the parties to this agreement that the Dare County Water Department has limited staff to locate its facilities and maintain the 811 locate requests. As such the Grantee agrees to:
- i. Limit the number of encroachment agreement requests to maximum of five street miles.
 - ii. Limit the number of contractors and subcontractors to no more than three at a time working within the Town's ROW to allow the Field Superintendent to maintain proper oversight and control.
 - iii. Limit the work hours from 7:00 a.m. to 5:00 p.m. Monday through Friday for the expansion of the FTTP network. Repair, maintenance and connection of individual premises may be completed outside of this requirement if not prohibited.
- d. Grantee shall work with the Town at least 30 days prior to any FTTP network expansion to provide information to the public regarding planned service areas, phasing, what to expect during construction, general information about the service and local telephone numbers for questions and concerns. Grantee further agrees to provide monthly updates on progress and changes in schedule to the Town. Grantee further agrees to develop in coordination with the Town an efficient method to handle any property owner concerns;
- e. Grantee shall take all necessary steps, including but not limited to, contacting North Carolina 811 at least three days prior to any digging or excavation to ensure that any activity or operation by Grantee will not interfere with, damage, disrupt, or interrupt any utility located in the ROW, above or below ground;
- f. Grantee shall notify the Town at least five (5) business days before commencing work at a Town ROW location and, before work begins, notify surrounding property owners and residents of buildings in the area of the affected ROW that work will be performed in the following manner: At least fourteen (14) days prior to work beginning, Grantee shall notify property owners by U.S. Mail. Grantee shall not begin work until approval has been provided by the Town; such approval may be provided via e-mail and shall not be unreasonably withheld.
- g. Grantee shall follow all requirements existing in North Carolina law for excavation within a Tolerance Zone, if Grantee will be placing Network Facilities in the ROW within the Tolerance Zone as defined in N.C.G.S. § 87-117(22);
- h. Grantee shall provide proper traffic control devices in conformance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"), including but not limited to signs, signal lights, and flagmen for the protection of traffic and amendments or supplements thereto during any installation or maintenance of the Network Facilities pursuant to this Agreement; Grantee shall provide at least five (5) business days' notice to the Town of any work that will require lane closure or traffic control measures lasting more than twenty-four hours; Grantee shall follow all federal, state, and local accessibility regulations, including the MUTCD and the Americans with Disabilities Act;

- i. Grantee shall install, operate, repair and maintain the Network Facilities at Grantee's sole cost and expense and in accordance with federal, state, and local law, and the Town Standard Specifications and Standard Details, as may be amended from time to time. Construction, installation, operation, and maintenance of Network Facilities shall not endanger, inhibit, prevent, or interfere (i) with use of a ROW as a way of passage, (ii) with traffic on any ROW, (iii) with the maintenance of any ROW, (iv) with operation or maintenance of any Town-owned infrastructure located within or adjacent to the ROW, including but not limited to electric lines or poles, underground fiber, and water or sewer lines, or (v) with operation or maintenance of any other infrastructure or equipment lawfully located within the ROW;
- j. In the event Grantee damages any existing gas, electric, communications, water, sewer, or other utility facilities, Grantee shall immediately cease work and notify the Town and the affected utility company of the damage. Grantee will not resume work where damage has occurred until the Town determines that the danger to the public and the utility facilities has been eliminated;
- k. Grantee shall immediately notify the Town and promptly repair any damage (within a reasonable time not to exceed five (5) days) to the ROW, all Town-Owned infrastructure, and all other areas disturbed during installation, operation, repair and maintenance of the Network Facilities, including but not limited to pavement, sidewalk, curb and gutter, drainage systems, signs, pavement markings, underground fiber, utility poles, electric lines, and water or sewer lines, and shall restore same to the condition existing prior to Grantee's disturbance, re-establishing grass cover with seeding and spreading of straw for finishing, all to the Town's satisfaction, which shall be based on the industry standards for such activity;
- l. Grantee shall comply with all Town ordinances, rules, and regulations regarding stormwater discharge and soil erosion and sedimentation control as well as the Town's Standard Specifications and Standard Details for roadway and utility construction;
- m. Grantee shall reimburse Town for any reasonable costs or expenses of Town for any repairs or maintenance to the ROW, any Town-owned infrastructure, or other Town-owned structures resulting from or related to Grantee's negligence or willful misconduct in performing the installation, operation, maintenance, repair, or existence of the Network Facilities following receipt of invoices from the Town detailing those costs and/or expenses, including supporting documentation evidencing them, if requested and available. The Town shall provide Grantee with a statement of costs for any such repairs, and Grantee shall pay the Town for these costs within 30 days. Interest at 9% per annum shall accrue on these costs beginning on the 31st day following the date that the Town mails notice of such costs or the date that the Town hand delivers such notice to Grantee;
- n. In the event that Town, its employees, agents, or contractors, in Town's sole discretion, need to conduct work in the ROW for a legitimate governmental purpose that will conflict with the Network Facilities, Grantee shall within a commercially reasonable time, remove or alter the Network Facilities at its cost, unless applicable

law provides otherwise. In the event of a public emergency that creates an imminent threat to the health, safety, or property of the Town or its residents, the Town may remove or relocate any applicable Network Facilities without notice to Grantee, provided, however, that Town will make best efforts to provide prior notice to Grantee before making an emergency removal or relocation. Town will provide Grantee a detailed description of any emergency removals or relocations of Network Facilities. If Grantee abandons any portion of its Network Facilities, Grantee shall notify the Town and remove the Network Facilities at Grantee's expense, provided, however, that Town and Grantee shall discuss whether underground facilities may be abandoned in place or transferred to Town at the mutual agreement of Grantee and Town;

- o. Grantee understands and agrees that damage or destruction may occur to Network Facilities and other property of Grantee in the course of Town's operations and that Town has no obligation to take extraordinary measures to protect Grantee, Grantee's property, or Network Facilities or to minimize, mitigate, or avoid any such damage; and release, waive, and discharge any legal rights or claims to seek payment or relief of any kind from the Town, its elected officials, boards, commissions, and employees, for any damages resulting from Town's operations, maintenance, or other use of the ROW under its prior and continuing right to use the ROW;
- p. Grantee understands and agrees that permission provided by this Agreement is non-exclusive; that additional encroachments by others may currently exist and be permitted in the future in the ROW ("Third-Party Encroachments"); that Town is not liable for any damage to Network Facilities that arise from the installation, operation, maintenance, or existence of Third-Party Encroachments; and that any recourse for such damage must be from the Third-Party Encroacher;
- q. Grantee agrees to release, waive, and discharge any legal rights to seek payment or relief of any kind from the Town, its elected officials, boards, commissions, and employees, for any damages due to or resulting from Third-Party Encroachments;
- r. Grantee shall hold the Town, its officers, employees, and elected officials harmless from any and all liability arising out of the construction, installation, maintenance, repair, or existence of the Network Facilities and associated restoration activities in the ROW; that it will defend the Town, its officers, employees, and elected officials, and pay reasonable attorney fees in any and all actions brought as a result of such; and that it will indemnify the Town, its officers, employees, and elected officials against any and all loss sustained by reason of negligence, recklessness, or intentional wrongful conduct of Grantee arising out of the installation, maintenance, operation, repair, removal, location, or existence of Network Facilities, provided, however, that indemnification relating to personal injury of employees will not apply to any claims made by Town's employees that are covered under applicable workers' compensation laws, and provided, further, that Grantee's indemnification obligations shall not extend to liability to the extent caused by the negligence or willful misconduct of any indemnitee; and

- s. Grantee shall maintain valid general liability insurance in the combined single limit (bodily injury and property damage) amount of \$2,000,000 general aggregate, commercial automobile liability insurance in the minimum amount of \$1,000,000, and provide certificates of such insurance naming the Town as an additional insured by endorsement to the policies. Additionally, Grantee shall maintain and show proof of workers' compensation within the NC statutory limits and employer's liability insurance. Grantee shall provide notice of cancellation, non-renewal or material change in coverage to the Town within 10 business days of their receipt of notice from the insurance company. All required certificates of insurance, endorsements, and blanket additional insured policy provisions are attached and considered part of this document. Notwithstanding the foregoing, neither the requirement of Grantee to have sufficient insurance nor the requirement that the Town is named as an additional insured, shall constitute waiver of the Town's governmental immunity in any respect, under North Carolina law. All insurance certificates, endorsements, coverage verifications and any other items required pursuant to this Agreement will be mailed directly to:

Town of Southern Shores
Attn: Wes Haskett
5375 N. Virginia Trail
Southern Shores, NC 27949

4. As-Built Maps. Grantee will maintain accurate as-built drawings and maps of its Network Facilities located in the Town and provide them to the Town upon request and subject to applicable confidentiality protections under North Carolina law.

5. Required Relocation. In the event Grantee's Network Facilities would interfere with the Town's use of the ROW for a legitimate governmental purpose, including but not limited to, construction or installation of water, sewer, or electric lines, or construction/relocation of a public road, Grantee will, upon written notice from the Town, relocate its Network Facilities at Grantee's expense to another location in the public ROW as may be agreed upon by the Parties. Relocation shall occur within a commercially reasonable time period after receiving notice from the Town, taking into account the urgency of the need for relocation, the difficulty of the relocation, and other relevant facts and circumstances. Notwithstanding the foregoing, the Town may not require Licensee to relocate or remove its Network Facilities with less than one hundred and eighty (180) days' notice except in the event of an emergency as described in this Agreement.

6. Contractors and Subcontractors. Grantee may retain contractors and subcontractors to perform the work contemplated by this Agreement on behalf of Grantee. Grantee will notify the Town in writing of the identity of and contact information for each contractor and subcontractor performing any work for the Grantee in the Town prior to commencement of the work by the contractor or subcontractor. The contact information to be provided to the Town shall include the contractor's state license information and the name and telephone number of the contractor/subcontractor representative with supervisory authority of the work.

7. Work Stoppage Allowance. The Grantee agrees that the Town may require a Stop Work for any and all unanticipated or unforeseen circumstances and/or items of concern such as (the following shall not be an exhaustive list of said items):

- a. Failure to maintain traffic control for lane closures.
- b. Working without an active locate ticket.
- c. Unsafe working conditions such as lack of shoring or failing to protect a roadway from undermining.
- d. Equipment leaking fluid.

8. Breach by Grantee. The Town may terminate this agreement upon the failure of the Grantee to remedy any breach of the terms of this Agreement within 30 days after receiving written notice of such breach from the Town. If said breach cannot reasonably be cured within 30 days, the Grantee must begin the cure within the 30-day period and thereafter proceed to complete the cure with due diligence.

9. Pole Attachment Agreements. The Town agrees that, to the extent allowed by North Carolina Law, it will not allow existing providers of Broadband service to lash FTTP infrastructure to existing pole infrastructure for the purposes of providing FTTP services to residents of the Town.

10. Performance Guarantee. Grantee agrees to provide a performance bond in the amount of \$5,000.00 per mile or similar performance guarantee to ensure that repairs to the Town's infrastructure are completed in an efficient and full manner.

11. Term. This Agreement is effective on the date the last party to sign executes this Agreement ("Effective Date"). The initial term will be ten (10) years from the Effective Date. At the end of the initial term, the Agreement shall automatically renew for successive five-year terms unless terminated by either party in accordance with this Agreement or unless superseded by a new or amended agreement. Either party may terminate this Agreement for convenience upon one hundred eighty (180) days written notice to the other party. In the event of termination of this Agreement, the Agreement will nevertheless continue to govern any construction plans approved by the Town and that are Exhibits to this Agreement prior to the effective date of termination. Notwithstanding the foregoing, a grant of permission to encroach shall become void, and this Agreement terminated, as to any individual Town-approved construction plans if the Grantee does not begin installation of the Facilities covered by that permit application in the relevant ROW within one (1) year of the date the plans are approved, unless the approval is updated in writing by the Town, and thereafter diligently pursue installation to completion

12. Notice. Notices related to this Agreement shall be sent to Grantee at the following email address: mark@openfiberusa.com. Mailed Notices, if required, will be sent to Grantee at:

Open Fiber USA, LLC
100 W. John St.
Matthews, NC, 28105

Notices related to this Agreement shall be sent to the Town at the following e-mail address: cogburn@southernshores-nc.gov. Mailed notices, if required, will be sent to the Town at:

Town of Southern Shores
5375 N. Virginia Trail

Southern Shores, NC 27949

Notices are effective when delivered in person, upon confirmation of receipt when sent by facsimile or electronic mail, on the next business day if transmitted by registered or certified mail, postage prepaid (with confirmation of delivery), on the next business day if transmitted by overnight courier (with confirmation of delivery), or three (3) days after the date of mailing, whichever is earlier.

13. Recitals. The Recitals of this Agreement are incorporated herein and made a part of this Agreement.

14. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina. Grantee and the Town agree that any dispute arising out of this Agreement shall be adjudicated by a court of competent jurisdiction located in Dare County, North Carolina.

15. Miscellaneous.

- a. Neither Party waives any rights it may have under North Carolina law with respect to the subject matter in this Agreement, and no breach or non-performance of this Agreement shall be deemed to be waived by either party unless said breach or non-performance is waived in writing and signed by the parties.
- b. There are no third-party beneficiaries to this Agreement.
- c. This Agreement contains the entire understanding between the parties and supersedes any prior understanding or oral agreement between them respecting the subject matter of this Agreement.
- d. There are no representations, agreements or understandings relating to the subject matter hereof that are not fully expressed or incorporated herein.
- e. If legal action is initiated by either party for the purpose of enforcing or interpreting this Agreement, each party shall be responsible for its own expenses and attorney's fees.
- f. This Agreement may be executed in counterparts, and each party agrees that signatures on separate documents shall be considered valid and enforceable.
- g. This Agreement may not be amended or modified except by written agreement signed by all of the parties hereto.
- h. In the event that any provision of this Agreement shall be held to be invalid, the same shall not affect in any respect the validity of the remainder of this Agreement.

[Signatures appear on following pages]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

OPEN FIBER USA, LLC

By: [Signature]
Name: Mark Woytisek
Its:

[SEAL]

STATE OF NORTH CAROLINA)
) DARE
COUNTY OF MECKLENBURG)

The foregoing instrument was acknowledged before me this 21st day of September, 2023, by [Name], Manager of Open Fiber USA, LLC, a North Carolina limited liability company, on behalf of the company. Mark Woytisek

[Signature] [SEAL]
Notary Public for North Carolina
My commission expires: 03/08/2025



Town of Southern Shores

By: [Signature]

Name: [Signatory name]

Its:

[SEAL]

STATE OF NORTH CAROLINA)

COUNTY OF DARE)

The foregoing instrument was acknowledged before me this 21st day of September, 2023, by [Signatory Name] of the [City/Town] of [Name], a municipality duly incorporated under the laws of the State of North Carolina. Cliff Ogburn

[Signature] [SEAL]
Notary Public for North Carolina
My commission expires: 03/08/2025

