

**ORDINANCE NO. 3800**

**AN ORDINANCE AMENDING THE CODE OF THE TOWNSHIP OF FRANKLIN, COUNTY OF SOMERSET, STATE OF NEW JERSEY, MORE PARTICULARLY APPENDIX CHAPTER A401, TELECOMMUNICATIONS FRANCHISE, NEW APPENDIX ARTICLE VIII, FIBER TECHNOLOGIES NETWORKS, LLC.**

**SUMMARY**

An ordinance amending the Code Appendix Chapter A401, Telecommunications Franchises by adding new Appendix Article VIII, Fiber Technologies Networks, LLC.

**BE IT AND IT IS HEREBY RESOLVED** that the Code of the Township of Franklin, County of Somerset and state of New Jersey is hereby amended as follows:

**SECTION I**

Appendix Chapter A401, Telecommunications Franchises, is amended by adding thereto a new Appendix Article VIII, Fiber Technologies Networks, LLC as follows:

**APPENDIX CHAPTER A401  
FRANCHISE – FIBER TECHNOLOGIES NETWORKS, LLC**

**A401-135. Definitions.**

For the purpose of this Ordinance, the following terms, phrases and words shall have the meaning given herein:

- a. "Township" means the Township of Franklin, County of Somerset, State of New Jersey, and its government, including the Township Council and its administrative personnel.
- b. "Fiber Technologies Networks, LLC" is the grantee of rights under this Ordinance and is known as Fiber Technologies Networks, LLC, its servants, employees, agents, officers, directors and contractors.
- c. "Telecommunications Service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
- d. "Scope Offering" means any business or service offering, that Fiber Technologies Networks, LLC currently or in the future may provide to any business or resident, whether or not currently contemplated.

**A401-136. Findings and Conclusions.**

The Township has reviewed all documentation regarding Fiber Technologies Networks, LLC's request for use of the municipality's public road rights-of-way and feels that it is in the best interest of the residents of Franklin Township to grant said request.

**A401-137. Grant of Permission.**

The Township hereby grants to the Provider the right, privilege and authority to enter upon the Township's right-of-way to attach, install, operate, maintain, remove, reattach, reinstall, relocate, maintain and replace its telecommunications system in or on utility poles or other structures located within the Township's right-of-way. Nothing in this Agreement shall be deemed to grant, convey or vest a real property interest in land, including any fee, leasehold interest, easement, or any other form of interest or ownership, to the Provider.

**A401-138. Non-Exclusive Grant**

This Agreement shall not in any manner prevent the Township from entering into other similar agreements or granting other or further franchises or uses in, under, on, across, over, through, along or below any of the Township's right-of-ways, streets, avenues or all other public lands or properties of every type and description. This Agreement shall in no way prevent or prohibit the Township from using any of its roads, streets or other public properties or affect its jurisdiction over them or any part of them, and the Township shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, and/or dedication of same as the Township may deem fit, including the dedication, establishment, maintenance, and improvement of all new right-of-ways, thoroughfares and other public properties of every type and description.

**A401-139. Location of Facilities.**

The facilities to be attached and/or installed on existing utility poles and/or in underground conduit in the public right-of-way shall be installed at the sole cost and expense of the Provider.

**A401-140. Work in the Right-of-Way.**

(a) Prior to the commencement of any work in the public right-of-way, for the purpose of installation, construction, repair, maintenance or relocation of its facilities or equipment, the Provider shall obtain all applicable permits and approvals as may be required by the Township and shall pay all duly established permit and inspection fees associated with the processing of permits and approvals. During any work performed or conducted by or on behalf of the Provider within the public right-of-way and other public properties, such work shall be conducted so as to minimally interfere with the free passage of traffic and the free use of adjoining property. Further, the Provider shall at all times during such period of work, post and maintain proper barricades and comply with all applicable safety regulations as required by the ordinances of the Township and the laws of the State of New Jersey.

(b) The Provider shall be responsible for the repair of any and all damage to paving, existing utility lines, or any surface or subsurface installations, caused by or from the construction, installation or maintenance of said facilities. Such repair shall return the paving or surface to the condition it was in immediately prior to any work conducted by or on behalf of the Provider. The Provider shall promptly complete all repair work at its sole cost and expense.

**A401-141. Legal Requirements.**

The Provider shall adhere to all applicable Federal, State, County and Township laws, ordinances, rules and regulations for use and safety of the public right-of-way, and shall comply with all Federal, State, County and Township laws, ordinances, rules and regulations requiring permits, inspections, and certificates prior to, during, and at the completion of construction.

**A401-142. Indemnification.**

(a) The Provider hereby releases and agrees to indemnify, defend and hold harmless the Township, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person or entity, including claims by the Provider's own employees, whether from injury, sickness or death of any person or damage to property, arising from the negligent acts or omissions of the Provider, its agents, servants, officers or employees. The Provider further releases, and agrees to indemnify, defend and hold harmless the Township, its officers and employees from any and all claims, costs, judgments, awards or liability to any person or entity, including claims by the Provider's own employees, arising against the Township solely by virtue of the Township's ownership or control of the right-of-

way or other public properties, by virtue of the Provider's exercise of the rights granted herein, or by virtue of the Township's permitting the Provider's use of the Borough's right-of-way or other public property, or based upon the Township's inspection or lack of inspection of work performed by the Provider, its agents and servants, officers or employees in connection with work authorized on the Township's property or property over which the Township has control, pursuant to this Agreement or pursuant to any other permit or approval issued in connection with this Agreement excluding in all instances, claims arising out of gross negligence or willful misconduct on the part of the Township, its officers, agents, employees and contractors. This covenant of indemnification shall include, but not be limited by this reference, to claims against the Township arising as a result of negligent acts or omissions of the Provider, its agents, servants, officers and employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work in any public right-of-way or other public place in performance of work or services permitted under this Agreement. In the event that the Provider's transmission technology or facilities emit electromagnetic impulses (EMF), the Provider expressly agrees that this indemnity provision extends to any and all claims for injury, sickness or death of any person or entity, including employees of the Provider, arising out of or caused by said emissions.

(b) Inspection or acceptance by the Township of any work performed by the Provider at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. The indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation, provided that the Provider has been given prompt written notice by the Township of any such claim, has the right to defend or participate in the defense of such claim, and has the right to approve any settlement or other compromise of any such claim.

(c) In the event that the Provider refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the Parties shall agree to decide the matter), to have been a wrongful refusal on the part of the Provider, then the Provider shall pay all of the Township's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the Township, including reasonable attorneys' fees of recovering under this indemnification clause.

(d) The provisions of this Section shall survive the expiration, revocation or termination of this Agreement.

**A401-143. Insurance.**

In addition to the foregoing indemnity provisions, the Provider shall, at its own cost and expense, procure and maintain at all times during the term of this Agreement, in full force and effect, paid policies for Comprehensive Commercial General Liability Insurance in favor of the Township, in the amount of at least \$5,000,000.00, covering bodily injury and property damage arising out of any one accident. The Provider shall also maintain Automobile Liability Insurance with limits of no less than \$1,000,000.00 combined single limit per accident for bodily injury and property damage and workers compensation insurance in an amount as required by law. Proof of said coverage, naming the Township, its officers, elected officials, agents, employees, engineers and consultants as additional names insureds, and including the indemnification provisions in Section 6, shall be filed with the Township Clerk prior to commencement of any work pursuant to this Agreement. The Township shall have the right to require reasonable increases in the amount of Comprehensive General Liability Insurance and to alter the terms of insurance called for under this Section. The insurance shall not be subject to cancellation or change until thirty (30) days after the Township Clerk has received written notice thereof as evidenced by return receipt of certified or registered letter.

**A401-144. Limitation of Liability.**

Notwithstanding any provision contained herein, neither the Township nor the Provider shall be liable to the other for consequential, incidental, exemplary or punitive damages on account of any activity pursuant to this Agreement.

**A401-145. Abandonment and Removal of the Provider's Telecommunication Facilities.**

No telecommunication facility laid in the right-of-way by the Provider may be abandoned by the Provider without the express written consent of the Township. Any plan for abandonment or removal of the Provider's facilities must be first approved by the Township, and all necessary permits must be obtained prior to such work. The provisions of this Section shall survive the expiration, revocation or termination of this Agreement. In the event that the Township allows the Provider to abandon any portion of its facilities, the Township shall be responsible for such facilities and the Provider shall have no further obligation to maintain, relocate or remove such facilities.

**A401-146. Term.**

The permission and authority hereby granted to the Provider shall be for a period of fifty (50) years from the effective date of this Agreement, so long as the Provider remains in compliance with the terms and conditions set forth herein, and such grant of permission and authority is in accordance with law.

**A401-147. Modification.**

The Parties hereby reserve the right to alter, amend or modify the terms and conditions of this Agreement upon written agreement of both Parties to such alteration, amendment or modification, which agreement shall not be unreasonably withheld by either Party.

**A401-148. Payment of Reasonable Costs.**

In consideration of the rights herein conveyed to the Provider, the Provider shall compensate the Township for its reasonable costs incurred for its professional legal and engineering work and review, and other reasonable costs and services rendered by the Township in connection with the Provider's request pursuant to N.J.S.A. 54:30A-124.

**A401-149. Performance Bond.**

The Provider shall provide the Township with a performance surety bond in the amount of twenty-five thousand dollars (\$25,000.00) to ensure the faithful performance of its undertakings, at its sole cost and expense. The bond shall be submitted to the Township at the time of application for a building permit, before commencement of any construction under this Agreement, or within thirty (30) days of the date of this Agreement, whichever occurs first. The performance bond shall remain in effect during the entire course of the work to be performed under this Agreement and for a period of one (1) year after completion of all such work.

**A401-150. Forfeiture and Revocation.**

If the Provider willfully violates or fails to comply with any of the material provisions of this Agreement, or through willful misconduct or gross negligence fails to comply with any notice given by the Township under the provisions of this Agreement, then the Provider shall, at the election of the Township, forfeit all rights conferred hereunder and this Agreement may be revoked, terminated or annulled by the Township after a hearing held upon reasonable notice to the Provider. The Township may decide, after consideration of the reasons for the Provider's failure to comply with the Agreement, to allow the Provider additional time to cure before such termination or revocation. The Township may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the

Superior Court having jurisdiction, compelling the Provider to comply with the provisions of this Agreement and to recover damages and costs incurred by the Borough by reason of the Provider's failure to comply.

**A401-151. Remedies to Enforce Compliance.**

In addition to any other remedy provided herein, the Township reserves the right to pursue any remedy to compel or force the Provider to comply with the terms hereof, and the pursuit of any right or remedy by the Township shall not prevent the Township from thereafter declaring a forfeiture or revocation for breach of conditions herein.

**A401-152. Change of Law.**

The Provider shall be subject to any ordinance or resolution now or hereafter adopted by the Township, and shall be subject to any State or Federal statute applicable to this Agreement or the rights conveyed herein .

**A401-153. Assignment.**

This Agreement may not be assigned or transferred without written approval of the Township, which approval shall not be unreasonably withheld or delayed, except the Provider may freely assign this Agreement in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. The Provider shall provide prompt, written notice to the Borough of any such assignment.

**A401-154. Governing Law.**

This Agreement shall be governed by and interpreted in accordance with the laws of the State of New Jersey.

**A401-155 Notice**

All notices or other correspondence in connection with this Agreement should be mailed to:

FOR THE TOWNSHIP:

Kenneth Daly, Township Manager  
Township of Franklin  
475 DeMott Lane  
Somerset, New Jersey 08873

with a copy to:

Leslie G. London, Esq.  
Township Attorney  
McManimon & Scotland, LLC  
One Riverfront Plaza, 4<sup>th</sup> Floor  
Newark, New Jersey 07102

FOR THE PROVIDER:

Fiber Technologies Networks, LLC  
300 Meridian Centre  
Rochester, New York 14618  
Attn: General Counsel

With a copy to:

Richard P. DeAngelis, Jr., Esq.  
Stryker, Tams & Dill, LLP  
Two Penn Plaza East  
Newark, New Jersey 07105

**A401-156 Entire Agreement.**

This Agreement constitutes the entire understanding and agreement between the Parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the Parties upon execution of this Agreement.

**A401-157 Severability.**

If any one or more of the provision or provisions of this Agreement is determined 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 Agreement and shall not affect the validity of the remaining portions of this Agreement.

**A401-158 Binding Agreement.**

This Agreement shall be binding upon the Parties and their successors and assigns.

**A401-159 Effective Date.**

This Ordinance shall take effect immediately upon final passage and publication according to law and upon receipt by the Township of Fiber Technologies Networks, LLC's written acceptance of the terms hereof. If such acceptance is not received by the Township Clerk within thirty (30) days of the final passage of the Ordinance, the same will automatically expire and be of no further effect.

**ORDINANCE NO. 3800**

THIS IS A TRUE COPY OF AN ORDINANCE ADOPTED BY THE TOWNSHIP COUNCIL,  
TOWNSHIP OF FRANKLIN, SOMERSET, NJ

INTRODUCED: November 10, 2008  
PUBLIC HEARING: December 9, 2008  
ADOPTION: December 9, 2008  
PUBLISHED: December 17, 2008  
EFFECTIVE: December 29, 2008

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Ann Marie McCarthy, Township Clerk