

**WHOLESALE AGREEMENT**  
**NEXT GENERATION KENTUCKY INFORMATION HIGHWAY**

**The Commonwealth of Kentucky**  
**(the "Authority")**

**and**

**OpenFiber Kentucky Company, LLC**  
**(the "Wholesaler")**

**and**

**KentuckyWired Operations Company, LLC**  
**("Operations Co")**

**Dated: October 13, 2017**

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**SCHEDULES**

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## WHOLESALE AGREEMENT

**THIS WHOLESALE AGREEMENT** dated as of October 13, 2017 (the **"Effective Date"**) is entered into:

**BETWEEN:**

**The Commonwealth of Kentucky**

(the **"Authority"**)

**AND:**

**OpenFiber Kentucky Company, LLC**

(the **"Wholesaler"**)

**AND:**

**KentuckyWired Operations Company, LLC**

(**"Operations Co"**)

**WHEREAS:**

- A. Pursuant to RFP 758 1500000003-5 issued July 11, 2014 (as amended from time to time, the **"RFP"**), the Authority selected Macquarie Infrastructure Developments LLC (**"Macquarie"**) to design, build, finance, operate and maintain the NG-KIH System.
- B. On December 22, 2014, the Authority and Macquarie entered into a master agreement (as amended from time to time, the **"Master Agreement"**) in respect of the Project.
- C. The Authority has concluded that the provision of communications services to the Authority through the Project and the commercialization of the Additional Capacity for third party Users should be organized under separate contracts and through separate companies.
- D. Macquarie assigned all of its rights and obligations under the Master Agreement related to the commercialization of the Additional Capacity to the Wholesaler and all of its other rights and obligations under the Master Agreement to KentuckyWired Infrastructure Company, Inc. (**"Project Co"**).
- E. The Authority and Project Co have entered into the Project Agreement whereby Project Co will design, build, finance, operate and maintain the NG-KIH System, all as more particularly described in the Project Agreement.
- F. Project Co has, in turn, entered into the Project Implementation Agreement with Operations Co whereby Operations Co will design, build, operate and maintain the NG-KIH System, all as more particularly described in the Project Implementation Agreement.

G. The Authority, the Wholesaler and Operations Co have agreed to enter into this Wholesaler Agreement to set out their respective rights and obligations related to the commercialization of the Additional Capacity.

H. The rights and obligations of the parties will be governed by the terms and conditions set out in this Wholesaler Agreement.

**NOW THEREFORE THIS WHOLESALER AGREEMENT WITNESSES THAT**, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged by each of the parties hereto, the parties hereto agree as follows:

## 1. INTERPRETATION

### 1.1 Definitions

In this Wholesaler Agreement capitalized terms will have the meanings set out in this Section 1.1.

Certain words and expressions are defined within the schedules hereto, and such definitions will apply in all parts of this Wholesaler Agreement whether or not this Section 1.1 contains a cross-reference to such definitions.

**"Additional Capacity"** means the capacity of the PPP Network Assets to provide communication services not otherwise reserved or required for the PPP Services in accordance with the Project Implementation Agreement, where the capacity reserved or required for the PPP Services shall be subject to review and modification on an annual basis in accordance with Section 5.2(b);

**"Affiliate"** in respect of a Person means any other Person that, directly or indirectly, through one or more intermediaries, Controls, is Controlled by, or is under common Control with, such first Person;

**"Ancillary Dark Fiber IRU"** means an IRU between the Wholesaler and a User in respect of both Ancillary PPP Network Assets and Wholesaler Assets within the same IRU without provision of any Managed Services;

**"Ancillary PPP Network Assets"** means PPP Network Assets that provide Additional Capacity;

**"Ancillary Revenues"** means Gross Ancillary Revenues or Net Ancillary Revenues, as the context requires;

**"Authority"** means the Commonwealth of Kentucky;

**"Authority Event of Default"** has the meaning set out in Section 13.1;

**"Authority Indemnified Person"** means:

- (a) any contractor or subcontractor (of any tier) of the Authority, other than Project Co or any Project Co Person (as defined in the Project Agreement);
- (b) any representative or advisor (including any legal, financial and technical advisor) of the Authority or any Person referred to in (a) above, in each case acting in such capacity; and

- (c) any director, officer, employee or agent of the Authority or of any Person referred to in (a) or (b) above, in each case acting in such capacity;

**"Authority Person"** means:

- (a) any Site;
- (b) any director, officer, employee or agent of the Authority or any Site;
- (c) any representative, advisor (including any legal, financial and technical advisor), contractor or subcontractor (of any tier) of the Authority or any Site in any such Person's capacity as a provider of services directly or indirectly to the Authority or any Site in connection with the NG-KIH System, other than Project Co, Operations Co, the Project Contractors or the Sub-Contractors; or
- (d) any invitee of the Authority or any of the Authority Persons referred to above who enters upon the Lands;

**"Avoidable Costs"**, when used in relation to an event or circumstance, means all costs and expenditures which:

- (a) are saved or avoided as a result of the event or circumstance or its effects; or
- (b) if the relevant party acted reasonably and in accordance with this Wholesaler Agreement, would have been saved or avoided as a result of the event or circumstance or its effects;

**"Bankruptcy Law"** means the United States Bankruptcy Code, 11 U.S.C. 101 et seq., as amended from time to time and any successor statute thereto, and any similar state law relating to bankruptcy, insolvency, the rights and remedies of creditors, the appointment of receivers or the liquidation of companies and estates that are unable to pay their debts when due;

**"Base Date"** means June 30, 2016;

**"Beneficiary"** has the meaning set out in Section 11.4;

**"Business Day"** means a day other than a Saturday, Sunday or federal or state statutory holiday in the Commonwealth of Kentucky;

**"Business Development Agreement"** means the business development agreement dated as of September 3, 2015 between the Authority, Macquarie, the Wholesaler and Operations Co, including any recitals, schedules, appendices and attachments to thereto, as amended or restated from time to time;

**"Capital Expenditure"** means an expenditure which is treated as a capital expenditure in accordance with GAAP;

**"Capital Return"** means, with respect to any revenues derived from Wholesaler Services, recovery of the aggregate Capital Expenditures made by the Wholesaler in respect of Wholesaler Assets used by the Wholesaler to earn such revenues on the basis of a 5 year amortization of such Wholesaler Assets (provided that, if at any time the average of the terms of the User

Agreements entered into by the Wholesaler materially exceeds five [5] years, the Wholesaler and the Authority, each acting reasonably, will renegotiate the number of years over which such Capital Expenditures are amortized) together with an annual return on such Capital Expenditures equal to 8% and otherwise in accordance with GAAP.

**"Change"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Change Certificate"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Change Mark-Up"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Change Report"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Change Report Costs"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Confidential Information"** means:

- (a) information obtained or developed by the Wholesaler in the course of performing the Wholesaler Services, including, without limitation, all information concerning Users or potential Users, market data, market studies and analyses, sales leads, offers, negotiations, contracts or Intellectual Property; and/or
- (b) information of a party that the party has designated as confidential at the time of disclosure and which is supplied, or to which access is granted, to or on behalf of another party (whether before or after the Effective Date), either in writing, or in any other form, directly or indirectly pursuant to discussions with the other party and includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party which contain or otherwise reflect or are derived from such designated information;

**"Contract Year"** means each of:

- (a) the period from the Effective Date to the next June 30;
- (b) each subsequent period of 12 calendar months commencing on July 1; and
- (c) the period from the July 1 immediately prior to the Termination Date to and including the Termination Date;

**"Control"** means, with respect to the relationship between or among two or more Persons, the possession, directly or indirectly, or as trustee, personal representative or executor, of the power to direct or cause the direction of the affairs or management of a Person, whether through the ownership of voting securities, as trustee, personal representative or executor, by statute, contract, credit arrangement or otherwise, including the ownership, directly or indirectly, of securities having the power to elect a majority of the board of directors or similar body governing the affairs of such Person, and **"Controlled"** has a corresponding meaning;

**"Controlling Party"** with respect to a Person, means a Person, or a group of Persons acting jointly or in concert, who Control such first mentioned Person;



**"Core Dark Fiber IRU"** means an IRU between the Wholesaler and a User in respect of Ancillary PPP Network Assets only without provision of any Managed Services;

**"Dark Fiber"** means optical fiber that has been constructed/installed but is not currently being used for fiber-optic communications;

**"Deduction"** means a payment deduction incurred by Project Co under the Project Agreement for which Operations Co is liable pursuant to Section 10.7 of the Project Implementation Agreement;

**"Default Rate"** means the penalty for late payment prescribed by KRS 45.454;

**"Direct Losses"** means in respect of a condition, event or omission for which Direct Losses are payable by one party to another party or parties under this Wholesaler Agreement, all damages, losses, liabilities, penalties, fines, assessments, claims (including by third parties), actions, costs (including increased Capital Expenditures), expenses (including the reasonable cost of legal or professional services), demands and charges, whether arising under statute, contract or at common law, which result directly from such condition, event or omission:

- (a) excluding any Indirect Losses, except to the extent included in a third party claim or, in the case of Operations Co, described in clause (b) below; and
- (b) in the case of Operations Co, without limiting the foregoing, including the full amount of any Deductions or other economic losses (including, for greater certainty, amounts that would otherwise have been distributed to Operations Co's equityholders), net of Avoidable Costs, related to such condition, event or omission,

and, in calculating any amount of any additional Capital Expenditure, labor or similar cost claimed by Operations Co under this definition of "Direct Losses", Operations Co will be entitled to add to such amounts the mark-ups referred to in Section 2.10 of Schedule 1 [Changes and Minor Works];

**"Dispute"** means any disagreement, failure to agree or other dispute between two or more of the parties arising out of or in connection with this Wholesaler Agreement, including, without limitation, any disagreement in respect of the interpretation, breach, performance, validity or termination of this Wholesaler Agreement;

**"Dispute Notice"** has the meaning set out in Schedule 2 [Dispute Resolution Procedure];

**"Dispute Resolution Procedure"** has the meaning set out in Schedule 2 [Dispute Resolution Procedure];

**"Economic Development Initiatives"** has the meaning set out in Section 3.5;

**"Effective Date"** means the date of this Wholesaler Agreement, as set forth in the preamble above;

**"Expiration Date"** means September 3, 2045;

**"Fair Market Value of the Wholesaler Assets"** means the sum of (a) the amount at which the Wholesaler Assets, as a whole, would be exchanged in an arm's length transaction between

informed and willing parties, other than in a forced or liquidation sale, based on the assumptions that the sale is on a going concern basis and the purchaser of such assets has the same rights of use and access to the PPP Network Assets as the Wholesaler prior to the termination of this Wholesaler Agreement, and (b) all Direct Losses incurred by the Wholesaler as a result of the termination of this Wholesaler Agreement;

**"First System Refresh"** has the meaning set out in the Project Implementation Agreement;

**"Force Majeure Event"** means an event that cannot be anticipated by the parties and/or is beyond their reasonable control, including without limitation fire, flood, explosion, war, terrorism, strike, embargo, governmental restrictions, military action, vandalism, sabotage, or act of God, that delays or prevents either party's performance of a material obligation under the Wholesaler Agreement;

**"GAAP"** means generally accepted accounting principles in effect in the United States as set by the American Institute of Certified Public Accountants;

**"Governmental Authority"** means any federal, state, territorial, regional, county, municipal or local governmental authority, quasi-governmental authority, court, commission, board, tribunal, organization, or any regulatory, administrative or other agency, or any political or other subdivision, department or branch of any of the foregoing, having jurisdiction in any way over or in respect of any aspect of the performance of this Wholesaler Agreement or the Project;

**"Gross Ancillary Revenues"** for any period means, with respect to any Wholesaler Services that rely in whole or in part on access to Ancillary PPP Network Assets, all revenue, as determined in accordance with GAAP, derived from the sale or provision of such Wholesaler Services during such period;

**"Has Knowledge", "Have Knowledge" or "Having Knowledge"** means:

- (a) for an individual, when information is acquired by the individual;
- (b) for a corporation, when information has come to the attention of:
  - (1) a director or officer of the corporation; or
  - (2) a senior employee of the corporation with responsibility for matters to which the information relates,
- (c) for a partnership other than a limited partnership, when any partner Has Knowledge under the other Sections of this definition or under this Section (c) or Section (d) below for any partner that is itself a partnership or when any member of a director-level or officer-level or similar position of the partnerships or a senior employee of the partnership with responsibility for matters to which the information relates;
- (d) for a limited partnership, when any general partner Has Knowledge under the other Sections of this definition or under this Section (d) or Section (c) above for any partner that is itself a partnership or when any member of a director-level or officer-level or similar position of the partnerships or a senior employee of the partnership with responsibility for matters to which the information relates; or

- (e) for the Authority, when information has come to the attention of:
- (1) a director or officer of the Authority; or
  - (2) a senior employee of the Authority with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it;

**"Indemnifier"** has the meaning set out in Section 11.4;

**"Index Linked"** means that, with respect to an amount at any time, the amount is adjusted as of each July 1st commencing as of July 1, 2017 by:

- (a) multiplying it by the Materials Inflation Index effective on the immediately preceding July; and
- (b) dividing it by the Materials Inflation Index effective on the Base Date;

**"Indirect Losses"** means any loss of revenue, loss of profits, loss of use, loss of contract, loss of goodwill, loss of production, loss of business, loss of business opportunity or any exemplary, punitive or special damages or any consequential or indirect loss or damages of any nature claimed, suffered or allegedly suffered by:

- (a) the Wholesaler or any Wholesaler Person (other than a Person who is a Wholesaler Person solely by virtue of being an invitee of the Wholesaler or any Wholesaler Person);
- (b) Operations Co or any Operations Co Person (other than a Person who is an Operations Co Person solely by virtue of being an invitee of Operations Co or any Operations Co Person); or
- (c) the Authority or any Authority Person (other than a Person who is an Authority Person solely by virtue of being an invitee of the Authority or any of Authority Persons) or an Authority Indemnified Person,

and shall be deemed not to include any loss of any amounts expressly payable by one party to the other party under this Wholesaler Agreement and, in the case of Operations Co, the amount of any Deductions or other economic losses, net of Avoidable Costs;

**"Intellectual Property"** means any or all of the following and all rights arising out of or associated therewith:

- (a) national, international and foreign patents, utility models, mask works, and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof;
- (b) inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know-how, technology, technical data and customer lists, product formulations and specifications, and all documentation relating to any of the foregoing throughout the world;

- (c) copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto throughout the world;
- (d) industrial designs and any registrations and applications therefor throughout the world;
- (e) rights in any internet uniform resource locators (URLs), domain names, trade names, logos, slogans, designs, common law trade-marks and service marks, trade-mark and service mark registrations and applications therefor throughout the world;
- (f) data bases and data collections and all rights therein throughout the world;
- (g) moral and economic rights of authors and inventors, however denominated, throughout the world; and
- (h) any similar or equivalent rights to any of the foregoing anywhere in the world;

**"IRU"** means an indefeasible right of use agreement between the Wholesaler and a User granting the User the exclusive and indefeasible right to use one or more strands of fiber for a fixed period of time;

**"IRU Fees"** has the meaning set out in Section 3.1(f);

**"Lands"** has the meaning set out in the Project Implementation Agreement;

**"Laws"** means all validly enacted laws (including the common law), statutes, regulations, ordinances, treaties, judgments and decrees and all official directives, by-laws, rules, consents, approvals, authorizations, guidelines, orders and policies of any Governmental Authority having the force of law from time to time within the Commonwealth of Kentucky and the United States of America;

**"Liability Payment"** has the meaning set out in Section 11.5;

**"Lit Fiber Service"** means the Wholesaler's provision of Managed Services to a User in respect of Ancillary PPP Network Assets and/or Wholesaler Assets;

**"Macquarie"** has the meaning set out in Recital A of this Wholesaler Agreement;

**"Managed Services"** means any services provided to a User by the Wholesaler other than rights provided to a User under an IRU;

**"Master Agreement"** has the meaning set out in Recital B of this Wholesaler Agreement;

**"Materials Inflation Index"** means the Consumer Price Index for All Urban Consumers (CPI-U), as published by the U.S. Bureau of Labor Statistics, base period of 1982-84 = 100, or, if such index in its present form becomes unavailable, such similar index as may be agreed by the parties, acting reasonably, or failing agreement as determined by the Dispute Resolution Procedure. The change percentage in the Materials Inflation Index for each Fiscal Year after the Base Date will be calculated from the average of the monthly published values, rounded to three decimal places, for the twelve months ending March prior to the start of the relevant Fiscal Year, divided by the

average of the monthly published values, rounded to three decimal places, for the twelve months ending in March of the preceding Fiscal Year, and expressed as an annual percentage change, rounded to one decimal place;

**"Minor Works"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Minor Works Rates"** has the meaning set out in the Project Implementation Agreement;

**"Net Ancillary Revenues"** for any period means, with respect to any Wholesaler Services which rely in whole or in part on access to Ancillary PPP Network Assets, all revenue, as determined in accordance with GAAP, derived from providing such Wholesaler Services during such period, less any Operating Costs incurred by the Wholesaler, directly or indirectly, to earn such revenue and any Capital Return allocated to such period;

**"Net Change Value"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"NG-KIH System"** means all of the electronic equipment, fiber cable, outside plant installations, building facilities, interface equipment, network services and customer services required to provide the fully functional and operating telecommunications carrier system contemplated by the Project Implementation Agreement;

**"NG-KIH System Change"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Node"** means one of the 31 core backbone nodes listed in Appendix 7A of the Project Agreement;

**"Open Records Act"** means KRS 61.870 through KRS 61.884;

**"Operating Costs"** means, with respect to any revenues derived from Wholesaler Services, any costs and expenses reasonably incurred, documented, and duly recorded by the Wholesaler to provide such Wholesaler Services, including, without limitation, equipment and inside plant maintenance costs, outside plant maintenance costs, interconnection fees and related expenses, but excluding any applicable Capital Return and the Wholesaler's income taxes;

**"Operating Period"** has the meaning set out in the Project Implementation Agreement;

**"Operations Co"** means KentuckyWired Operations Company, LLC;

**"Operations Co Person"** has the meaning set out in the Project Implementation Agreement;

**"Operations Co's Representative"** has the meaning set out in the Project Implementation Agreement;

**"Operations Co Services"** means services provided to the Wholesaler as set out in Change Certificates;

**"Operations Co Services Change"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Outside Ring Completion Date"** has the meaning set out in the Project Implementation Agreement;

**"Paying Party"** has the meaning set out in Section 11.5;

**"Performance Standards"** has the meaning set out in Section 5.1;

**"Permits"** means all permissions, consents, approvals, certificates, permits, licenses, statutory agreements, zoning and by-law amendments and variances, and authorizations required from any Governmental Authority, and all necessary consents and agreements from any third parties, needed to carry out the Wholesaler Services in accordance with this Wholesaler Agreement;

**"Person"** means an individual, legal personal representative, corporation, body corporate, firm, partnership, trust, trustee, syndicate, joint venture, limited liability company, association, unincorporated organization, union or Governmental Authority;

**"PPP Change"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"PPP Change Certificate"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"PPP Network Assets"** means all cable, colocation space, conduits, inner ducts, inside wiring, manholes, nodes, optical fiber strands, patch panels, splices, switches, transmitters, junctions, terminals, internal power sources, access portals, battery backups, fault alarm systems, structures, shelters, poles or pole line attachments, similar equipment, business and operations support systems and all articles of personal property owned, leased or used by Operations Co, directly or indirectly, in connection with the NG-KIH System, excluding Wholesaler Assets;

**"PPP Services"** means the Services (as defined in the Project Implementation Agreement);

**"Preliminary Change Instruction"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Preliminary Estimate"** has the meaning set out in Schedule 1 [Changes and Minor Works];

**"Project"** means the design, construction, financing, testing, commissioning, provisioning, operation, maintenance and refresh of the NG-KIH System and all other works and ancillary services in accordance with the Project Agreement;

**"Project Agreement"** means the project agreement dated as of September 3, 2015 between Project Co and the Authority in respect of the Project, including any recitals, schedules, appendices and attachments to thereto, as amended or restated from time to time;

**"Project Co"** means KentuckyWired Infrastructure Company, Inc.;

**"Project Contractors"** has the meaning set out in the Project Agreement;

**"Project Implementation Agreement"** means the project implementation agreement dated as of September 3, 2015 between Project Co and Operations Co in respect of the Project, including any recitals, schedules, appendices and attachments to thereto, as amended or restated from time to time;

**"Project Schedule"** has the meaning set out in the Project Implementation Agreement;

**"Protected Personal Information"** means an individual's personal information that is considered confidential and privileged in accordance with applicable Law;

**"Purchase Price"** means the Fair Market Value of the Wholesaler Assets;

**"Receiving Party"** has the meaning set out in Section 11.5;

**"Referee"** has the meaning set out in Schedule 2 [Dispute Resolution Procedure];

**"Referee Agreement"** has the meaning set out in Schedule 2 [Dispute Resolution Procedure];

**"Referee Notice"** has the meaning set out in Schedule 2 [Dispute Resolution Procedure];

**"Restricted Person"** means (i) any Person who, or (ii) any member of a group of Persons acting together, any one of whom:

- (a) has, directly or indirectly, its/his/her principal or controlling office in a country or state that is a Restricted State;
- (b) has as any part of its business the illegal manufacture, sale, distribution or promotion of narcotic substances or arms;
- (c) is or has been involved in the promotion, support, financing or carrying out of terrorism;
- (d) In the case of an individual, he or she (or in the case of a legal entity, any of the members of the board of directors or its senior executive managers) has been sentenced to imprisonment or otherwise given a custodial sentence (other than a suspended sentence) for any criminal offence (other than minor traffic offences or misdemeanors) less than 5 years prior to the date at which the determination of whether the Person falls within this definition is being made;
- (e) has as its primary business the acquisition of distressed assets or investments in companies or organizations which are or are believed to be insolvent or in a financial standstill situation or potentially insolvent or are in financial distress;
- (f) is subject to any claim of the Authority in any proceedings (including regulatory proceedings) which have been concluded or are pending at the time at which the determination of whether the Person falls within this definition is being made and which (In respect of any such pending claim, if it were to be successful) would, in the Authority's view, in either case, be reasonably likely to materially affect the ability of the Wholesaler to perform its obligations under this Wholesaler Agreement;
- (g) has been suspended or debarred by the United States Government or under the Kentucky Revised Statutes Chapter 45A and the applicable administrative regulations; or
- (h) is prohibited from holding a contract with the Commonwealth of Kentucky under Kentucky Revised Statutes Chapter 45A and the applicable administrative regulations; and

Includes the Controlling Party of, and any Person Controlled by, a Person described in this definition;



**"Restricted State"** means any country or state subject to any economic or political sanctions imposed by the United States of America for reasons other than its trade or economic policies;

**"RFP"** has the meaning set out in Recital A of this Wholesaler Agreement;

**"Ring"** means each of Ring 1A, Ring 1B, Ring 2, Ring 3, Ring 4 and Ring 5, as represented in Appendix 3E of the Project Agreement;

**"Second System Refresh"** has the meaning set out in the Project Implementation Agreement;

**"Segment"** means the fiber between any two Nodes;

**"Senior Executive"** has the meaning set out in Schedule 2 [Dispute Resolution Procedure];

**"Senior Financing Agreements"** has the meaning set out in the Project Implementation Agreement;

**"Site"** has the meaning set out in the Project Implementation Agreement;

**"Sub-Contractors"** has the meaning set out in the Project Implementation Agreement;

**"System Completion Date"** has the meaning set out in the Project Implementation Agreement;

**"System Refresh"** has the meaning set out in the Project Implementation Agreement;

**"Target Site Completion Date"** has the meaning set out in the Project Implementation Agreement;

**"Target System Completion Date"** has the meaning set out in the Project Implementation Agreement;

**"Target Ring Completion Date"** has the meaning set out in the Project Implementation Agreement;

**"Term"** means the term of this Wholesaler Agreement, as set out in Section 2.1;

**"Termination Date"** means the earlier of the Expiration Date or the date of earlier termination referred to in Section 2.1;

**"Third Party Infrastructure Agreement"** has the meaning set out in the Project Implementation Agreement;

**"Third Party Infrastructure Provider"** has the meaning set out in the Project Implementation Agreement;

**"Transport Fees"** has the meaning set out in Section 3.1(e);

**"User Agreement"** means any agreement between the Wholesaler and a User whereby the Wholesaler agrees to provide Wholesaler Services to such User;

**"Users"** means purchasers of Wholesaler Services;



**"Valuator"** means an independent financial advisor having experience valuing businesses in the telecommunications industry;

**"Wholesaler"** means OpenFiber Kentucky Company, LLC;

**"Wholesaler Assets"** means all cable, colocation space, conduits, inner ducts, inside wiring, manholes, nodes, optical fiber strands, patch panels, splices, switches, transmitters, junctions, terminals, internal power sources, access portals, battery backups, fault alarm systems, structures, shelters, poles or pole line attachments, similar equipment, business and operations support systems and all articles of personal property owned or leased by the Wholesaler, directly or indirectly, in connection with the Wholesaler Services, but excluding PPP Network Assets;

**"Wholesaler Event of Default"** has the meaning set out in Section 12.1;

**"Wholesaler Insolvency Event"** means any of the following events:

- (a) a receiver, receiver manager or other encumbrance holder taking possession of or being appointed over, or any distress, execution or other process being levied or enforced upon, the whole or any material part of the assets of the Wholesaler and, if such proceedings are commenced against the Wholesaler and are disputed by the Wholesaler, such proceedings are not discontinued, withdrawn, dismissed or otherwise remedied within 90 days of such proceedings being instituted;
- (b) any voluntary or involuntary proceedings with respect to the Wholesaler being commenced under the Bankruptcy Law and, if such proceedings are commenced against the Wholesaler and are disputed by the Wholesaler, such proceedings are not discontinued, withdrawn, dismissed or otherwise remedied within 90 days of such proceedings being instituted;
- (c) the Wholesaler making an assignment for the benefit of its creditors, being declared bankrupt or committing an act of bankruptcy, becoming insolvent, making a proposal or otherwise taking advantage of provisions for relief under the Bankruptcy Law or similar legislation in any jurisdiction, or any other type of insolvency proceedings being commenced by or against the Wholesaler under the Bankruptcy Law or otherwise and, if proceedings are commenced against the Wholesaler and are disputed by the Wholesaler, such proceedings are not stayed, dismissed or otherwise remedied within 90 days of such proceedings being instituted;
- (d) in any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to the Wholesaler or its debts under any Bankruptcy Law or foreign bankruptcy, insolvency or other similar law now or hereafter in effect, this Wholesaler Agreement is rejected, including a rejection pursuant to 11 USC § 365 or any successor statute; or
- (e) the Wholesaler voluntarily or involuntarily ceasing to carry on business;

**"Wholesaler Person"** means:

- (a) any director, officer, employee or agent of the Wholesaler in each case acting as such;

- (b) any representative, advisor (including any legal and financial advisor) or contractor of the Wholesaler, in any such Person's capacity as a provider of services, work or materials, directly or indirectly to the Wholesaler in connection with Wholesaler Services, but excluding Operations Co, the Project Contractors (except to the extent any such Project Contractor is acting in its capacity as a contractor of the Wholesaler) and any Sub-Contractor (except to the extent any such Sub-Contractor is acting in its capacity as a contractor of the Wholesaler); or
- (c) any invitee of the Wholesaler or any of the Wholesaler Persons referred to in (a) or (b) above who enters upon the Lands;

**"Wholesaler Put Right"** has the meaning set out in Section 14(a); and

**"Wholesaler Services"** means communication and/or maintenance services provided by the Wholesaler to third parties using, in whole or in part, the Ancillary PPP Network Assets and/or the Wholesaler Assets in accordance with the provisions of this Wholesaler Agreement, and includes Core Dark Fiber IRUs, Ancillary Dark Fiber IRUs and Lit Fiber Services.

## **1.2 Interpretation**

Unless the context otherwise requires, this Wholesaler Agreement will be interpreted and construed in accordance with the following provisions:

- (a) the parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Wholesaler Agreement that ambiguous or conflicting terms or provisions should be construed against the party who (or whose counsel) prepared the executed agreement or any earlier draft of the same;
- (b) the table of contents, headings and sub-headings, marginal notes and references to them in this Wholesaler Agreement are for convenience of reference only, do not constitute a part of this Wholesaler Agreement, and will not be taken into consideration in the interpretation or construction of, or affect the meaning of, this Wholesaler Agreement;
- (c) each reference to a Section, Schedule, Appendix or Attachment is a reference to a Section of, Schedule to, Appendix to a Schedule to this Wholesaler Agreement; or each Attachment to an Appendix, and each Appendix is uniquely designated by using the number of the Schedule to which the Appendix is attached following by an alphabetical designator in sequence (for example, Appendix 2A [Reference Agreement] means the first Appendix attached to Schedule 2 [Dispute Resolution Procedure]). A Schedule includes all of the Appendices attached to that Schedule. An Appendix includes all the Attachments attached to that Appendix;
- (d) each reference to an agreement, document, standard, principle or other instrument includes (subject to all relevant approvals and any other provision of this Wholesaler Agreement expressly concerning such agreement, document, standard, principle or other instrument) a reference to that agreement, document, standard, principle or instrument as amended, replaced, novated or assigned, and a reference to an "amendment" and similar terms (including "amend" and

- "amended") include a reference to supplement, alteration, substitute, variation, change and any other modification and similar terms;**
- (e) each reference to a statute or statutory provision (including any subordinate legislation) includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision;**
  - (f) each reference to time of day is a reference to Eastern Standard Time or Eastern Daylight Time, as the case may be;**
  - (g) words importing the singular include the plural and vice versa;**
  - (h) words importing a particular gender include all genders;**
  - (i) each reference to a public organization is deemed to include a reference to any successor(s) to such public organization or any organization or entity or organizations or entities which has or have taken over the functions or responsibilities of such public organization;**
  - (j) unless the context otherwise requires, each reference to "parties" means the parties to this Wholesaler Agreement and each reference to a "party" means any one of the parties to this Wholesaler Agreement, provided however that a reference to a third party does not mean a party to this Wholesaler Agreement;**
  - (k) all monetary amounts are expressed in U.S. Dollars;**
  - (l) each requirement for a thing or action to be "in accordance with" or "in compliance with" any standard, code or specification or other requirement or stipulation means that such thing or action is to exceed or at least equal that standard, code, specification or other requirement or stipulation;**
  - (m) the words "include", "includes" and "including" are to be construed as meaning "include without limitation", "includes without limitation" and "including without limitation", respectively;**
  - (n) whenever the terms "will" or "shall" are used in this Wholesaler Agreement in relation to the Wholesaler, the Authority or Operations Co they shall be construed and interpreted as synonymous and to read "the Wholesaler shall", "the Authority shall" or "Operations Co shall", as the case may be;**
  - (o) when a party has "discretion", it means that party has the sole, absolute and unfettered discretion, with no requirement to provide reasons unless specifically required under the provisions of this Wholesaler Agreement;**
  - (p) any consent contemplated to be given under this Wholesaler Agreement must be in writing;**
  - (q) general words are not given a restrictive meaning;**

- (1) if they are introduced by the word "other", by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
  - (2) by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- (r) words or abbreviations which have well-known trade meanings are used in accordance with those meanings;
- (s) the expression "all commercially reasonable efforts" and expressions of like import, when used in connection with an obligation of either party, means taking all commercially reasonable steps, in good faith and with due diligence, to achieve the objective and to perform the obligation, including doing all that can reasonably be done in the circumstances taking into account each party's obligations hereunder to mitigate delays and additional costs to the other party, and in any event taking no less steps and efforts than those that would be taken by a commercially reasonable and prudent Person in comparable circumstances but where the whole of the benefit of the obligation and where all the results of taking such steps and efforts accrued solely to that Person's own benefit, provided that the foregoing will not require the Authority to:
- (1) take any action which is contrary to the public interest, as determined by the Authority in its discretion; or
  - (2) undertake any mitigation measure that is or might be available arising out of its status as a public body that would not normally be available to a private commercial party;
- (t) the expressions "by Operations Co" and "by or through Operations Co" and expressions of like import are synonymous and mean by Operations Co or by anyone employed by or through Operations Co, including Operations Co and all contractors, sub-contractors and suppliers of any tier and their respective officers, employees, consultants and agents;
- (u) all accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with GAAP, consistently applied;
- (v) if the time for doing an act falls or expires on a day that is not a Business Day, the time for doing such act will be extended to the next Business Day;
- (w) in the event that any provision of this Wholesaler Agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable for any reason, unless severance of such provision would materially alter the essence of this Wholesaler Agreement for either party, the provision shall be fully severable and shall not affect the remaining provisions of this Wholesaler Agreement, and this Wholesaler Agreement shall be construed and enforced as if the illegal, invalid or unenforceable provision had not been included therein. The parties shall promptly meet and endeavor in good faith to negotiate new provisions to eliminate such illegality, invalidity or unenforceability as much as possible and to restore this Wholesaler Agreement as nearly as possible to its original intent and effect; and

- (x) to the extent permitted by applicable Law, each release, waiver of liability and indemnity in this Wholesaler Agreement expressed to be given in favor of a party is and will be interpreted as having been given in favor of and may be enforced by that party and, in the case of the Wholesaler, by Wholesaler Persons, in the case of the Authority, by the Authority Indemnified Persons, and, in the case of Operations Co, by Operations Co Persons.

### **1.3 Schedules**

The schedules hereto and the terms set out therein will be deemed fully a part of this Wholesaler Agreement.

### **1.4 Order of Precedence**

In the event of ambiguities, conflicts or inconsistencies between or among any of the provisions of this Wholesaler Agreement, the provisions will prevail in the following order of precedence with each taking precedence over those listed subsequently:

- (a) the provisions establishing the higher quality, manner or method of performing the Wholesaler Services, using the more stringent standards, will prevail, with the intent that the provisions which produce the higher quality with the higher levels of safety, reliability, durability, performance and service will prevail;
- (b) the provisions of the main body of this Wholesaler Agreement will prevail over any of the Schedules hereto; and
- (c) if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of the Wholesaler Services, the provision that applies to the specific part of the Wholesaler Services shall prevail for that specific part of the Wholesaler Services.

## **2. GENERAL TERMS**

### **2.1 Term and Termination**

The term of this Wholesaler Agreement (the "Term") will commence on the Effective Date and will continue to the Expiration Date unless earlier terminated:

- (a) by the Authority at any time in its discretion, and at the convenience of the Authority, by notice stating that termination is for convenience pursuant to this Section 2.1(a);
- (b) by Operations Co or the Authority pursuant to Section 12.3 in connection with a Wholesaler Event of Default;
- (c) by the Wholesaler pursuant to Section 13.3 in connection with an Authority Event of Default;
- (d) by the Authority at any time following the termination of the Project Implementation Agreement due to an Operations Co Event of Default (as defined in the Project Implementation Agreement); or

- (e) by either party if a Force Majeure Event occurs and the Wholesaler is prevented from providing Wholesaler Services across a majority of the Rings for a period of 180 days or more as a result.

Unless otherwise specified, the Termination Date for such earlier terminations will be the date notice of termination is given by one party to the other parties in accordance with this Wholesaler Agreement. Except as provided for in this Section 2.1, no party will have the right to otherwise terminate this Wholesaler Agreement within the Term.

## **2.2 General Duty of the Wholesaler to Mitigate**

The Wholesaler is under a general duty to the Authority and Operations Co to mitigate costs and delays and to act in a commercially reasonable manner throughout the Term of this Wholesaler Agreement and, with respect to any obligations of the Wholesaler that survive beyond such Term, for the entire period of time of such survival. Upon request from the Authority or Operations Co, as applicable, the Wholesaler will promptly submit a detailed description, supported by all such documentation as the Authority or Operations Co may reasonably require, of the measures and steps taken by the Wholesaler to mitigate and meet its obligations under this Section 2.2.

## **2.3 General Duty of Operations Co to Mitigate**

Operations Co is under a general duty to the Authority and the Wholesaler to mitigate costs and delays and to act in a commercially reasonable manner throughout the Term of this Wholesaler Agreement and, with respect to any obligations of Operations Co that survive beyond such Term, for the entire period of time of such survival. Upon request from the Authority or the Wholesaler, Operations Co will promptly submit a detailed description, supported by all such documentation as the Authority or the Wholesaler may reasonably require, of the measures and steps taken by Operations Co to mitigate and meet its obligations under this Section 2.3.

## **2.4 Tax-Exempt Bonds**

- (a) The Wholesaler agrees that it will use commercially reasonable efforts to provide the Authority and Project Co with financial and other information within the Wholesaler's control required for them to comply with the tax compliance and monitoring covenants contained in the Project Agreement. The Wholesaler will, acting reasonably, cooperate with the Authority and Project Co with respect to Project Co's compliance with such tax compliance and monitoring covenants, provided, however, that the Wholesaler will not be responsible for Project Co's compliance with such tax compliance and monitoring covenants and this Section 2.4(a) will not restrict the Wholesaler from carrying out its business (including the Wholesaler Services) or pursuing new business in its discretion.
- (b) The parties acknowledge and agree that, except for the specific obligations undertaken by Wholesaler in accordance with Section 2.4(a), Project Co will remain responsible for compliance with the covenant set out in Section 4.14 of the Project Agreement.



### **3. WHOLESALER SERVICES**

#### **3.1 Wholesaler Services Generally**

- (a) Subject to the terms of this Wholesaler Agreement, the Authority hereby grants to the Wholesaler the exclusive right to use the Additional Capacity for the provision of Wholesaler Services during the Term.
- (b) In addition, the Authority shall provide the Wholesaler with access to the PPP Network Assets to the extent required for the provision of Wholesaler Services in accordance with the terms of this Wholesaler Agreement.
- (c) The parties acknowledge that the NG-KIH System has been sized, in respect of the fiber strand count, at approximately double the capacity necessary to support the requirements of the PPP Services, but that, at any time during the Term, and, in particular, to satisfy third party transactions, pole attachment agreements and temporary fiber restorations, Operations Co may require more than 50% of the fiber strand count in order to provide the PPP Services in accordance with the Project Implementation Agreement. The Wholesaler agrees that none of this Additional Capacity will be reserved for Wholesaler Services; provided that once the Wholesaler has entered into a User Agreement to provide Wholesaler Services that depend upon the Additional Capacity, such Additional Capacity will be reserved for such Wholesaler Services for the term of such User Agreement.
- (d) The Wholesaler will assess opportunities to generate Ancillary Revenues on a case-by-case basis through User Agreements. The Wholesaler shall not enter into any User Agreement that is discriminatory in favor of any Affiliate of the Wholesaler.
- (e) The Wholesaler shall charge transport fees to Users for the provision of Managed Services that rely on Ancillary PPP Network Assets and/or Wholesaler Assets ("Transport Fees"). The Wholesaler will manage its contracting for Managed Services so as to mitigate the risk of stranded fiber within the NG-KIH System.
- (f) The Wholesaler shall charge an upfront fee and maintenance fees to Users for the provision of IRUs that rely on Ancillary PPP Network Assets and/or Wholesaler Assets ("IRU Fees").
- (g) Transport Fees and IRU Fees shall be determined by the Wholesaler based on the size, scope, duration and other case-specific features of the relevant User Agreement. Terms and conditions offered by the Wholesaler to each User in a User Agreement will be substantially similar to the terms and conditions offered to similarly situated (based on the aforementioned factors) Users of similar Wholesaler Services.
- (h) The Wholesaler will not enter into any User Agreement providing for a Core Dark Fiber IRU for a term in excess of 30 years or for more than 2 strands of fiber to any single party on a single Ring. The Wholesaler will not enter into User Agreements providing for Core Dark Fiber IRUs for more than 18 strands of fiber in the aggregate for all such User Agreements on any single Ring. The Wholesaler will

manage the granting of IRUs so as to mitigate the risk of stranded fiber within the NG-KIH System.

- (l) The Wholesaler shall at all times comply with applicable Laws in providing Wholesaler Services.

### 3.2 Core Network Principles

The parties shall adhere to the following principles in providing Wholesaler Services:

- (a) an open access network will be provided that separates physical network access from the delivery of services by multiple competing service providers;
- (b) the NG-KIH System will be available to all Users seeking access, subject to capacity constraints and reasonable evidence of financial and technical capacity;
- (c) Transport Fees and IRU Fees will be generally comparable for similarly situated Users seeking the same service for an equivalent term at the same general point in time; provided, however, that the Wholesaler may, in consultation with the Authority, provide alternative Transport Fee terms to entities that provide in-kind payment to the Wholesaler through discounted pole or conduit access;
- (d) Wholesaler Services shall be provided and operated in accordance with all Laws, and there will be no unlawful prioritization of traffic for any User;
- (e) Wholesaler Services shall be provided using standards-based architecture that operates at reliability standards consistent with industry standards;
- (f) there will be interoperability across the NG-KIH System;
- (g) the NG-KIH System will have scalable infrastructure with the flexibility to accommodate future bandwidth demands of Users;
- (h) none of the provision, operation or utilization of the Wholesaler Services by the Wholesaler hereunder shall relieve, limit, reduce or otherwise modify Operations Co's obligations under the Project Implementation Agreement, including Operations Co's obligations to provide the PPP Services in accordance with the Project Implementation Agreement; and
- (i) the Wholesaler shall use commercially reasonable efforts to not interfere with the PPP Services and ensure that no Wholesaler Services interfere with, limit or impair PPP Services.

### 3.3 Access to PPP Network Assets

- (a) The Wholesaler's sole rights of access to, and use of, Ancillary PPP Network Assets shall be through a Change requested by the Wholesaler made in accordance with Schedule 1 [Changes and Minor Works]. **NO CHANGE THAT WOULD RESULT IN A PPP CHANGE SHALL COME INTO EFFECT UNLESS AND UNTIL THE AUTHORITY ISSUES A PPP CHANGE CERTIFICATE IN**



**RESPECT OF SUCH PPP CHANGE IN ACCORDANCE WITH SCHEDULE 6 TO THE PROJECT AGREEMENT.**

- (b) Unless otherwise approved by the Authority and Operations Co, each in its sole discretion, any Wholesaler Services relying on Ancillary PPP Network Assets will be provided to Users through a dedicated circuit on the NG-KIH System, to which the User may connect through one or redundant entry points. Wholesaler Services shall not use the same circuits as PPP Services. The Wholesaler will not use or attempt to use or gain, or permit third parties to use or gain, unauthorized access to the network, equipment or locations used to provide the PPP Services and the Authority agrees that it will not authorize the Wholesaler or any Wholesaler Person to access the network, equipment or locations used to provide the PPP Services without the prior written consent of Operations Co, such consent not to be unreasonably withheld, conditioned or delayed. The Wholesaler will be responsible for all costs and expenses required to implement a dedicated circuit on the NG-KIH System for Wholesaler Services, including, without limitation, interconnection costs, colocation space, rack space and other interfacing costs.

**3.4 Revenue Sharing**

- (a) The Wholesaler will pay to the Authority a portion of the revenue generated by Wholesaler Services that rely in whole or in part on access to, or otherwise utilize, Ancillary PPP Network Assets as follows:
- (1) the Wholesaler shall pay to the Authority **90%** of all Gross Ancillary Revenues generated from Core Dark Fiber IRUs;
  - (2) the Wholesaler shall pay to the Authority **80%** of all Net Ancillary Revenues generated from Ancillary Dark Fiber IRUs; and
  - (3) the Wholesaler shall pay to the Authority **75%** of all Net Ancillary Revenues generated from Lit Fiber Services.
- (b) The Wholesaler shall make lump sum quarterly payments to the Authority not later than 30 days following the end of each calendar quarter, in the amounts calculated in accordance with Section 3.4(a). The Wholesaler will provide along with each quarterly payment detailed information concerning the revenue sources, calculations and any overdue billings relating to such payment.
- (c) The parties anticipate that "last mile" services may be developed by Governmental Authorities other than the Authority and connected to the NG-KIH System. The Wholesaler, Operations Co and/or, in the case of opportunities having a scale and/or scope that is beyond the capacity of the Wholesaler to develop, their respective equityholders, may participate in such opportunities and the Wholesaler and the Authority shall agree on a case-by-case basis, each acting reasonably, on the sharing of revenues derived from such opportunities.

**3.5 Economic Development Initiatives**

The Authority may request from time to time that the Wholesaler provide Wholesaler Services to support economic development initiatives undertaken by the Authority ("Economic Development

**Initiatives**”). The Wholesaler shall use commercially reasonable efforts to provide such Wholesaler Services upon the request of the Authority, unless the Wholesaler determines, in its discretion, that the expected costs and benefits to the Wholesaler associated with the particular Economic Development Initiative do not present a reasonable business case. The Wholesaler will provide its cost-benefit analysis with respect to the particular Economic Development Initiative to the Authority.

In the event that the Wholesaler determines, in its discretion, that the Authority's request for the provision of Wholesaler Services in respect of an Economic Development Initiative does not present a reasonable business case, the Authority may, in its discretion, alter certain initiative terms, such as:

- (a) an alternative revenue sharing mechanism in respect of Ancillary Revenues derived from such Wholesaler Services;
- (b) a lump sum payment to the Wholesaler as a contribution towards the Capital Expenditures required for the Wholesaler to provide such Wholesaler Services;
- (c) periodic payments to the Wholesaler as contributions towards the Wholesaler's Operating Costs to provide such Wholesaler Services; and/or
- (d) an alternative allocation of the risks in relation to the provision by the Wholesaler of such Wholesaler Services.

The Wholesaler shall determine, in its discretion based on its cost-benefit analysis and any additional or responsive analysis provided by the Authority, whether the Authority's proposal or proposals in respect of matters described in clauses (a) through (d) of this Section 3.5 are sufficient to demonstrate a reasonable business case for the provision of Wholesaler Services in respect of the relevant Economic Development Initiative. If the Wholesaler so determines that a reasonable business case has been made, the Wholesaler shall use commercially reasonable efforts to provide the Wholesaler Services requested by the Authority.

Economic Development Initiatives which rely on PPP Network Assets shall be implemented through a Change requested by the Wholesaler in accordance with Schedule 1 [Changes and Minor Works], and the implementation of such Economic Development Initiatives shall be subject to the provisions of Schedule 1 [Changes and Minor Works].

#### **4. WHOLESALER ASSETS**

##### **4.1 Wholesaler Assets Generally**

The Wholesaler may, from time to time, by requesting a Change in accordance with Schedule 1 [Changes and Minor Works] or otherwise, purchase, invest in or procure the design and construction of Wholesaler Assets.

##### **4.2 Ownership of Wholesaler Assets**

Unless otherwise agreed by the parties, legal ownership of Wholesaler Assets shall, as between the parties, remain with the Wholesaler, and Wholesaler Assets shall not form part of the NG-KIH System.

The Wholesaler shall be entitled to encumber Wholesaler Assets to secure financing obligations or for any other commercial purpose in its discretion, provided that any such security or other encumbrance created by the Wholesaler shall not extend to any PPP Network Assets and any action of the Wholesaler in furtherance of the foregoing shall not negatively affect the PPP Network Assets.

## **5. PERFORMANCE STANDARDS**

### **5.1 Performance Standards**

The Wholesaler will comply with the performance standards set forth in Schedule 3 [Performance Standards]. Subject to the terms of this Wholesaler Agreement, the Wholesaler and the Authority may periodically revise or adjust any established Performance Standards by mutual agreement.

### **5.2 Annual Review of Performance Standards and Additional Capacity**

The Wholesaler and the Authority shall meet not less than annually (in person or by means of conference telephone, video conference or similar communications equipment through which all Persons participating in the meeting can hear and speak to each other) to:

- (a) review and evaluate the Wholesaler's performance against the agreed upon Performance Standards; and
- (b) review the current and expected future utilization of the PPP Network Assets and, if required, agree upon any modification of the Additional Capacity available for the provision of Wholesaler Services.

The Wholesaler and the Authority may also review and discuss at such meetings, as required, the business activities of the Wholesaler, any Economic Development Initiatives proposed by the Authority, strategies for resolving any complaints from Users regarding Wholesaler Services and any major new business initiatives by the Wholesaler.

The Wholesaler shall make progress reports available regularly to the Authority, the frequency and contents of which will be determined by the Wholesaler and the Authority in accordance with Schedule 3 [Performance Standards Implementation Plan].

### **5.3 Advisory Board**

The Authority may establish an advisory board for purposes of conducting the reviews described in Section 5.2 and otherwise overseeing the provision of the Wholesaler Services by the Wholesaler in accordance with this Wholesaler Agreement.

## **6. KENTUCKY EMERGENCY WARNING SYSTEM TOWERS**

### **6.1 Agreement to Investigate Commercialization of the Kentucky Emergency Warning System Towers**

The Authority owns and operates a statewide network of wireless communications towers used exclusively by the public safety community (the "KEWS Towers"). The Wholesaler and the Authority will investigate the feasibility, including but not limited to the potential capital expenditures, revenue profile and legal considerations, of commercializing the KEWS Towers to

make network bandwidth available for use by commercial third party users; provided, however, that the Authority shall have no obligation whatsoever to commercialize or permit the commercialization of the KEWS Towers pursuant to this Wholesaler Agreement, regardless of the outcome of such investigation. Any terms relating to the commercialization of the KEWS Towers shall be implemented through an amendment to this Wholesaler Agreement and are subject to the approval of the Authority, in its sole discretion.

## **7. SYSTEM REFRESH**

The Authority shall use commercially reasonable efforts to ensure that the First System Refresh and the Second System Refresh are undertaken and completed in a timely manner so as to satisfy commercial demand for Wholesaler Services based on changes in technology and platform capabilities and, in any event, not later than the date that is 11 years from the Effective Date (if for the First System Refresh), or the date that is 21 years from the Effective Date (if for the Second System Refresh).

The Wholesaler may, at any time but not more often than once every 3 years, request a System Refresh by demonstrating to the Authority a business need for undertaking such System Refresh supported by evidence of User demand and economic feasibility.

The parties acknowledge and agree that any System Refresh will be completed in accordance with the terms of the Project Agreement and the Project Implementation Agreement.

## **8. AUTHORITY'S GENERAL OBLIGATIONS**

### **8.1 Authority's Representations and Warranties**

The Authority represents and warrants to the Wholesaler, as of the Effective Date, that:

- (a) the Authority has full power and capacity to enter into, carry out the transactions contemplated by and duly perform all its obligations contained in this Wholesaler Agreement;
- (b) the execution and delivery of this Wholesaler Agreement, and the completion of the transactions contemplated by this Wholesaler Agreement, have been duly authorized by all necessary action on the part of the Authority, and this Wholesaler Agreement has been duly executed and delivered by the Authority and constitutes a legal, valid and binding obligation of the Authority enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application;
- (c) all required third party consents to the execution by the Authority of, and performance of its obligations under, this Wholesaler Agreement have been received; and
- (d) the procurement process pursuant to which the Wholesaler was selected to enter into this Wholesaler Agreement was conducted in accordance with the RFP and all applicable Laws, including KRS Chapter 45A of the Kentucky Model Procurement Code.

## **8.2 Procurement Protest or Challenge**

The Authority will defend any protest or other challenge to the procurement process pursuant to which the Wholesaler was selected to enter into this Wholesaler Agreement or to the Wholesaler's right to provide Wholesaler Services or any aspect thereof in connection with the procurement, to the extent that such protest or other challenge was denied following an initial review by the Secretary of the Finance and Administration Cabinet and the protester or challenger is seeking an injunction or other order of a court of competent jurisdiction resulting therefrom. The Authority will pay any costs incurred in defending the actions of the Authority related to the procurement process and the determination of the Secretary of the Finance and Administration Cabinet. The Wholesaler agrees to assist in the defense of the protest or challenge to the procurement process and will pay any costs incurred in defending the actions of the Wholesaler related to the procurement process or to its interests in this Wholesaler Agreement. In connection with any legal proceedings related to a protest or other challenge to the procurement process as contemplated hereby, the Wholesaler and the Authority, acting reasonably, will consider requesting that the protester or challenger be required to post an injunction bond.

## **9. WHOLESALER'S GENERAL OBLIGATIONS**

### **9.1 General Obligations Re: Wholesaler Services**

The Wholesaler shall provide Wholesaler Services in accordance with the provisions of this Wholesaler Agreement and applicable Law. The Wholesaler will obtain and maintain, or cause to be obtained and maintained, at its cost, any policies of insurance required by Law or which a prudent service provider providing services of similar scope and magnitude to the Wholesaler Services would maintain and obtain, including general liability insurance, and will ensure that any Wholesaler Person obtains and maintains appropriate insurance for the works or services being performed by such Wholesaler Person. All such policies of insurance will name the Authority and Operations Co as additional insureds or loss payees, as applicable. The Wholesaler will provide evidence of insurance satisfactory to the Authority and Operations Co on an annual basis.

### **9.2 Payments**

The Wholesaler will pay to the Authority and Operations Co amounts expressly provided for in this Wholesaler Agreement, including, without limitation:

- (a) to the Authority, amounts calculated in accordance with Section 3.4; and
- (b) to Operations Co, amounts set out in all Change Certificates,

In accordance with the provisions of this Wholesaler Agreement, the relevant Change Certificate (as applicable) and all applicable Laws.

### **9.3 Records and Reports; Audit**

The Wholesaler will, at its own cost and expense, retain, maintain and provide to the Authority such records and reports relating to the Wholesaler Services as may be agreed from time to time between the Wholesaler and the Authority at least quarterly and at such other times as the Authority may reasonably request.

The Wholesaler will, at its own cost and expense, provide quarterly reports to Operations Co summarizing the Wholesaler Services provided in the period since the previous report and the Wholesaler Services expected to be provided in the following quarter and such other information as may be agreed from time to time between the Wholesaler and Operations Co.

The parties acknowledge and agree that the Wholesaler may pursue business activities other than the Wholesaler Services or business activities similar to the Wholesaler Services outside of the Commonwealth of Kentucky. The Wholesaler generally shall not be required to disclose to the Authority or Operations Co its records, reports or financial accounts pertaining to such other business activities; provided, however, that to the extent such activities outside the Commonwealth of Kentucky affect or benefit from the Wholesaler Services within the Commonwealth of Kentucky, the Wholesaler shall be required to disclose to the Authority its records, reports or financial accounts pertaining to such business activities. The Authority shall be entitled to an equitable share of any revenues from the Wholesaler's activities outside the Commonwealth of Kentucky that rely on the provision of Wholesaler Services within the Commonwealth of Kentucky.

In addition to all other rights and obligations imposed under this Wholesaler Agreement, the Authority shall have the right, upon reasonable notice but not more often than once per year, to conduct, or cause to be conducted, an audit of all records and property of the Wholesaler related to the Wholesaler Services to ensure that the Wholesaler is in compliance with this Wholesaler Agreement. This right to audit shall continue for three (3) years following the Termination Date.

#### **9.4 User Agreements**

All User Agreements shall be on arm's length terms and shall clearly state that the Wholesaler is not acting as an agent for Operations Co or the Authority.

All User Agreements shall be consistent with applicable Law and comply with and otherwise be consistent with the terms and conditions of this Wholesaler Agreement, including, without limitation, the applicable core network principles set forth in Section 3.2 above.

#### **9.5 Responses to Authority Inquiries**

Unless otherwise specified in this Wholesaler Agreement, the Wholesaler will respond in writing to all written inquiries received from the Authority as soon as reasonably practicable and in any event within 10 Business Days of receipt of such inquiry.

#### **9.6 Wholesaler's Representations and Warranties**

The Wholesaler represents and warrants that:

- (a) the Wholesaler is a limited liability company duly created and validly existing under the laws of Delaware and has full power and capacity to enter into, carry out the transactions contemplated by and duly perform all its obligations contained in this Wholesaler Agreement;
- (b) to the Wholesaler's knowledge, none of the Wholesaler or Persons who control the Wholesaler are Restricted Persons;



- (c) the execution and delivery of this Wholesaler Agreement and all other documents, instruments and agreements required to be executed and delivered by the Wholesaler pursuant to this Wholesaler Agreement, and the completion of the transactions contemplated by this Wholesaler Agreement, have been duly authorized by all necessary action on the part of the Wholesaler, and this Wholesaler Agreement has been duly executed and delivered by the Wholesaler and constitutes a legal, valid and binding obligation of the Wholesaler enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application; and
- (d) all required third party consents to the execution by the Wholesaler of, and performance of its obligations under, this Wholesaler Agreement have been received.

## **10. OPERATIONS CO'S GENERAL OBLIGATIONS**

### **10.1 Operations Co's General Obligations**

Operations Co shall be responsible for the Wholesaler Assets and shall provide the Operations Co Services, in each case, in accordance with the provisions of any relevant Change Certificate.

### **10.2 Notice of Certain Events or Activities**

Operations Co shall provide notice to the Wholesaler and the Authority as soon as practicable, and in any event in a timely manner so as to permit the Wholesaler to comply with its notice obligations under the User Agreements, as set out in the applicable Preliminary Change Instruction, of any event or activity in respect of the NG-KIH System that could reasonably be expected to materially impair any Wholesaler Services.

### **10.3 Notice of Capacity Usage**

Operations Co shall provide notice to the Wholesaler and the Authority at any time when:

- (a) the following percentages of the overall capacity of any Ring or any Segment within the NG-KIH System are either in use or reserved for use: (i) 50%, (ii) 75% and (iii) 90%; and
- (b) the following percentages of the Additional Capacity in any Ring or any Segment within the NG-KIH System are either in use or reserved for use by a User or Users: (i) 50%, (ii) 75% and (iii) 90%.

### **10.4 Repairs and Maintenance**

Operations Co shall, to the extent provided for in any Change Certificate, be responsible for maintaining the Wholesaler Assets in accordance with the relevant Change Certificate. The Wholesaler will otherwise be responsible for maintaining the Wholesaler Assets at its sole cost and expense.

## **10.5 Operations Co's Representations and Warranties**

Operations Co represents and warrants that:

- (a) Operations Co is a limited liability company duly created and validly existing under the laws of Delaware and has full power and capacity to enter into, carry out the transactions contemplated by and duly perform all its obligations contained in this Wholesaler Agreement;
- (b) the execution and delivery of this Wholesaler Agreement, and the completion of the transactions contemplated by this Wholesaler Agreement, have been duly authorized by all necessary action on the part of Operations Co, and this Wholesaler Agreement has been duly executed and delivered by Operations Co and constitutes a legal, valid and binding obligation of Operations Co enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application; and
- (c) all required third party consents to the execution by Operations Co of, and performance of its obligations under, this Wholesaler Agreement have been received.

## **11. INDEMNITIES AND REMEDIES**

### **11.1 Wholesaler's Obligation to Indemnify the Authority**

The Wholesaler will indemnify and keep the Authority and each Authority Indemnified Person indemnified at all times from and against all Direct Losses that any such Person may sustain in connection with any claim made by one or more third parties (including for loss of or physical damage to property or assets), or any claim for, or in respect of, the death, personal injury, disease or illness of any Person, including any Authority Indemnified Person, arising by reason of any negligent act or omission or other tortious conduct of the Wholesaler or any Wholesaler Person, except to the extent caused, or contributed to, by any negligent act or omission or other tortious conduct of the Authority or any Authority Person.

This Section 11.1 may be relied upon by the Authority and/or any Authority Indemnified Persons and may be enforced directly by any of them against the Wholesaler in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and the Wholesaler.

### **11.2 Wholesaler's Obligation to Indemnify Operations Co**

The Wholesaler will indemnify and keep Operations Co and each Operations Co Person indemnified at all times from and against all Direct Losses that any such Person may sustain in connection with:

- (a) any claim made by one or more third parties (including for loss of or physical damage to property or assets), or any claim for, or arising out of, the death, personal injury, disease or illness of any Person, including any Operations Co Person, arising by reason of any negligent act or omission or other tortious conduct of the Wholesaler, any Wholesaler Person, any User or any third party utilizing the



Wholesaler Assets or the Wholesaler Services; and

- (b) any damage to the NG-KIH System or the Wholesaler Assets, or any interference with the performance of Operations Co's obligations under the Project Implementation Agreement, caused by the Wholesaler, any Wholesaler Person or any User;

except, in each case, to the extent caused, or contributed to, by any negligent act or omission or other tortious conduct of Operations Co or any Operations Co Person.

This Section 11.2 may be relied upon by Operations Co and/or any Operations Co Persons and may be enforced directly by any of them against the Wholesaler in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and the Wholesaler.

### **11.3 Operations Co's Obligation to Indemnify the Wholesaler**

Operations Co will indemnify and keep the Wholesaler and each Wholesaler Person indemnified at all times from and against all Direct Losses that any such Person may sustain in connection with any claim made by one or more third parties (including for loss of or physical damage to property or assets), or any claim for, or arising out of, the death, personal injury, disease or illness of any Person, including any Wholesaler Person, arising by reason of any negligent act or omission or other tortious conduct of any Operations Co Person, except to the extent caused, or contributed to, by any negligent act or omission or other tortious conduct of the Wholesaler or any Wholesaler Person, and provided that Operations Co's liability under this indemnity will be limited to the amount Operations Co can recover from the relevant Operations Co Person.

This Section 11.3 may be relied upon by the Wholesaler Persons and may be enforced directly by any of them against Operations Co in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and the Wholesaler.

### **11.4 Conduct of Third Person Claims**

Subject to the Laws of the Commonwealth of Kentucky that prohibit the Authority from indemnifying any Person, this Section 11.4 will apply to the conduct of claims made by a third Person against a party having or claiming to have with respect to such third Person claim, the benefit of an indemnity or a right to compensation under this Wholesaler Agreement. The party having, or claiming to have, the benefit of the indemnity or right to compensation is referred to as the "Beneficiary" and the party from whom the indemnity or compensation is sought is referred to as the "Indemnifier". Accordingly, subject to the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Wholesaler Agreement:

- (a) if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification or compensation under this Wholesaler Agreement in respect of the entire claim, the Beneficiary will give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within 10 Business Days of receipt thereof;
- (b) the Indemnifier will be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take control of any defense, dispute,

compromise, or appeal of the claim and of any incidental negotiations and the Beneficiary will give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;

- (c) in defending any claim described in Section 11.4(b) in which there is a conflict of interest between the Indemnifier and the Beneficiary, the Beneficiary may appoint independent legal counsel in respect of such claim and, if it is determined that the Beneficiary is entitled to indemnification by or compensation from the Indemnifier, all reasonable costs and expenses incurred by the Beneficiary in so doing will be included in the indemnity or compensation from the Indemnifier;
- (d) with respect to any claim disputed by the Indemnifier pursuant to Section 11.4(b), the Indemnifier will:
  - (1) keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
  - (2) demonstrate to the Beneficiary, at the reasonable request of the Beneficiary, that the Indemnifier has sufficient means to pay all costs and expenses that it may incur by reason of disputing the claim; and
  - (3) not pay or settle such claims without the consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (e) the Beneficiary may take control of any defense, dispute, compromise or appeal of the claim and of any incidental negotiations if:
  - (1) the Indemnifier is not entitled to take control of the claim in accordance with Section 11.4(b); or
  - (2) the Indemnifier fails to notify the Beneficiary of its intention to take control of the relevant claim within 10 Business Days of the notice from the Beneficiary under Section 11.4(a) or notifies the Beneficiary that it does not intend to take control of the claim; or
  - (3) the Indemnifier fails to comply in any material respect with Section 11.4(d) above,

and, in the case of (3) above, the Beneficiary may pay or settle any claim on such terms as it thinks fit (provided such settlement is in monetary terms only) and without prejudice to its rights and remedies under this Wholesaler Agreement. Otherwise the Beneficiary will not pay or settle such claims without the consent of the Indemnifier, such consent not to be unreasonably withheld or delayed;

- (f) the Beneficiary may at any time give notice to the Indemnifier that it is retaining or taking over, as the case may be, the conduct of any defense, dispute, compromise, settlement or appeal of any claim, or of any incidental negotiations, to which Section 11.4(b) above applies. On receipt of such notice, the Indemnifier will promptly take all steps necessary to transfer the control of the defense to such claim to the Beneficiary, and will provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting

such claim. If the Beneficiary gives any notice pursuant to this Section 11.4(f) (for the sake of clarity, for reasons other than as provided in Sections 11.4(e)(2) or 11.4(e)(3)), then the Indemnifier will be released from any liability under its indemnity under Section 11.1, 11.2 or 11.3, or its obligation to provide compensation, as the case may be; and

- (g) In response to any claim of infringement or misappropriation or alleged infringement or misappropriation of the Intellectual Property rights of any Person, the Indemnifier may replace such infringing or allegedly infringing item provided that the replacement:
  - (1) is performed without additional cost to the Beneficiary;
  - (2) has at least equal quality performance capabilities when used in conjunction with the NG-KIH System; and
  - (3) will not relieve the Indemnifier of any liability accrued prior to the replacement.

#### **11.5 General Obligation to Pursue Third Person Recovery**

Subject to the Laws of the Commonwealth of Kentucky that prohibit the Authority from indemnifying any Person, if a party (the "Paying Party") has paid to the other party (the "Receiving Party") an amount in respect of any indemnity or other liability hereunder (a "Liability Payment"), and the Receiving Party has a *bona fide* claim for recovery of any such Liability Payment from a third Person, the Receiving Party will:

- (a) as directed by the Paying Party either:
  - (1) promptly make commercially reasonable efforts to pursue and recover such claim and provide evidence of such efforts to the Paying Party; or
  - (2) assign to the Paying Party the right to pursue and recover such claim and provide reasonable cooperation in connection with the pursuit and recovery of such claim, all at the Paying Party's cost; and
- (b) if it subsequently recovers, or the Paying Party makes recovery on its behalf, (whether by payment, discount, credit, saving, relief or other benefit or otherwise) an amount which is directly referable to the fact, matter, event or circumstances giving rise to the payment of the Liability Payment, forthwith repay to the Paying Party an amount equal to the lesser of:
  - (1) an amount equal to the sum recovered (or of the value of the recovery whether by discount, credit, saving, relief or otherwise) less any out of pocket costs and expenses properly incurred by the Receiving Party in recovering such sum; and
  - (2) the Liability Payment,

provided that the Paying Party will be repaid only to the extent that the amount of such recovery plus the Liability Payment exceeds the total loss or liability of the

Receiving Party in respect of the fact, matter or circumstance giving rise to the Liability Payment.

For greater certainty, the above reference to a "third Person" will not include, in the case where the Wholesaler is the Paying Party, the Authority, Authority Indemnified Persons, Operations Co or Operations Co Persons and their respective employees, directors, officers and agents and will not include, in the case where Operations Co is the Paying Party, the Wholesaler and the Wholesaler Persons.

#### **11.6 Waiver of Remedies**

Except as otherwise expressly provided in this Wholesaler Agreement, no failure to exercise, and no delay in exercising, any right or remedy under this Wholesaler Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Wholesaler Agreement will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.

#### **11.7 Remedies Cumulative**

Subject to Section 11.8:

- (a) the rights and remedies of the parties under this Wholesaler Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise;
- (b) a party will not be prevented from enforcing a right or remedy on the basis that another right or remedy hereunder deals with the same or similar subject matter; and
- (c) no single or partial exercise by a party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that party may be entitled.

#### **11.8 Limits on Monetary Compensation**

Every right to claim compensation or indemnification or reimbursement under this Wholesaler Agreement will be construed so that recovery is without duplication to any other amount recoverable under this Wholesaler Agreement.

#### **11.9 No Liability for Indirect Losses**

Unless specifically allowed in this Wholesaler Agreement, none of the parties to this Wholesaler Agreement will be liable to any other party, whether in contract or in tort or on any other basis whatsoever, for any Indirect Losses suffered or incurred by that other party.

#### **11.10 Authority's Right of Set Off**

The Authority may set off any amounts owing by the Wholesaler to the Authority under this Wholesaler Agreement (excluding any Disputed amounts that are withheld by the Wholesaler pending resolution of such Dispute) against any payments due by the Authority to the Wholesaler under this Wholesaler Agreement.

### **11.11 Wholesaler's Right of Set Off**

- (a) The Wholesaler may set off any amounts owing by the Authority to the Wholesaler under this Wholesaler Agreement (excluding any Disputed amounts that are withheld by the Authority pending resolution of such Dispute) against any payments due by the Wholesaler to the Authority under this Wholesaler Agreement.
- (b) The Wholesaler may set off any amounts owing by Operations Co to the Wholesaler under this Wholesaler Agreement (excluding any Disputed amounts that are withheld by Operations Co pending resolution of such Dispute) against any payments due by the Wholesaler to Operations Co under this Wholesaler Agreement.

### **11.12 Operations Co's Right of Set Off**

Operations Co may set off any amounts owing by the Wholesaler to Operations Co under this Wholesaler Agreement (excluding any Disputed amounts that are withheld by the Wholesaler pending resolution of such Dispute) against any payments due by Operations Co to the Wholesaler under this Wholesaler Agreement.

### **11.13 Undisputed Amounts and Interest on Disputed Amounts**

A party will pay any undisputed portion of any disputed amount payable to the relevant party in accordance with this Wholesaler Agreement, but any disputed portion or amount will not be payable until the Dispute is resolved in accordance with the Dispute Resolution Procedure. If payment of any amount payable under this Wholesaler Agreement is delayed while the matter is in Dispute, upon resolution of the Dispute, interest will be payable on any amount determined payable pursuant to the Dispute Resolution Procedure at the Default Rate, compounded monthly, from the time such amount became payable under this Wholesaler Agreement until paid.

### **11.14 Interest on Overdue Amounts**

If payment of any amount payable under this Wholesaler Agreement is not made when due, interest will be payable on such amount at the Default Rate, compounded monthly, from the time such amount became payable under this Wholesaler Agreement until paid.

## **12. WHOLESALER EVENTS OF DEFAULT**

### **12.1 Wholesaler Events of Default**

For the purposes of this Wholesaler Agreement, "Wholesaler Event of Default" means any of the following events or circumstances:

- (a) a failure by the Wholesaler to pay any amount due and owing to the Authority or Operations Co under this Wholesaler Agreement on the due date (which amount is not being disputed in good faith) and the Wholesaler has not remedied such failure to pay within 15 Business Days of notice from the Authority or Operations Co, as the case may be; or
- (b) a breach, or a series of breaches, by the Wholesaler of any material term, covenant

or undertaking to the Authority or Operations Co, or any representation or warranty made by the Wholesaler to the Authority or Operations Co in this Wholesaler Agreement that was incorrect when made, and the Wholesaler has failed to remedy such breach or series of breaches within 15 Business Days of notice from the Authority or Operations Co, as the case may be (or such longer period as may be agreed to by the Authority or Operations Co, as the case may be); or

- (c) the occurrence of a Wholesaler Insolvency Event,

unless caused by non-compliance by the Authority or Operations Co with any material provision of this Wholesaler Agreement or any negligent act or omission, or any willful misconduct of the Authority, any Authority Person, Operations Co or any Operations Co Person.

## **12.2 Notification**

The Wholesaler will notify the Authority and Operations Co of the occurrence, and details, of any Wholesaler Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Wholesaler Event of Default, in either case, promptly and in any event within 3 Business Days from the date that the Wholesaler Has Knowledge of its occurrence.

## **12.3 Termination Rights**

If a Wholesaler Event of Default occurs, then either the Authority or Operations Co may (if the Wholesaler Event of Default continues unwaived and unremedied) terminate this Wholesaler Agreement by notice to the other parties. The right of the Authority and Operations Co to terminate this Wholesaler Agreement under this Section 12.3 is in addition, and without prejudice, to any other right which such party may have in connection with the Wholesaler's defaults hereunder.

Termination of this Wholesaler Agreement pursuant to this Section 12.3 shall not affect the rights and obligations of the relevant parties under the Project Agreement or the Project Implementation Agreement, nor shall it result in any termination of, or default under, the Project Implementation Agreement or the Project Agreement.

## **12.4 Costs**

The Wholesaler will reimburse the Authority and Operations Co for any and all reasonable costs incurred by such party in exercising any of its rights (including, but not limited to, any relevant increased administrative expenses and actual legal expenses) under this Section 12 (Wholesaler Events of Default).

## **13. AUTHORITY EVENTS OF DEFAULT**

### **13.1 Authority Events of Default**

For the purposes of this Wholesaler Agreement, "Authority Event of Default" means any of the following events or circumstances:

- (a) any material breach by the Authority of its obligations under Section 3.1(a);

(b) a breach, or series of breaches, by the Authority of any material term, covenant or undertaking to the Wholesaler, or any representation or warranty made by the Authority to the Wholesaler in this Wholesaler Agreement was incorrect when made, the consequence of which:

- (1) has a material adverse effect on the Wholesaler's ability to provide Wholesaler Services; or
- (2) results in any material provision of this Wholesaler Agreement being unenforceable against the Authority,

and, as a result, the Wholesaler is reasonably likely to be materially deprived of the benefit of this Wholesaler Agreement, and the Authority has failed to remedy such breach or series of breaches within 15 Business Days of notice from the Wholesaler (or such longer period as may be agreed to by the Wholesaler);

(c) if any material part of the NG-KIH System or the portion of the Lands on which the NG-KIH System is situated is expropriated by any Governmental Authority and as result thereof the Wholesaler is reasonably likely to be materially deprived of the benefit of this Wholesaler Agreement; or

(d) the Authority breaches Section 17.3,

unless caused by non-compliance by the Wholesaler with any material provision of this Wholesaler Agreement or any negligent act or omission, or any willful misconduct, of the Wholesaler or any Wholesaler Person.

### **13.2 Notification**

The Authority will notify the Wholesaler and Operations Co of the occurrence, and details, of any Authority Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to an Authority Event of Default, in either case, promptly and in any event within 3 Business Days from the date that the Authority Has Knowledge of its occurrence.

### **13.3 Termination Rights**

If an Authority Event of Default occurs, then the Wholesaler may (if the Authority Event of Default continues unwaived and unremedied) terminate this Wholesaler Agreement by notice to the other parties. The right of the Wholesaler to terminate this Wholesaler Agreement under this Section 13.3 is in addition, and without prejudice, to any other right which the Wholesaler may have in connection with the Authority's defaults hereunder.

Termination of this Wholesaler Agreement pursuant to this Section 13.2 shall not affect the rights and obligations of the relevant parties under the Project Agreement or the Project Implementation Agreement, nor shall it result in any termination of, or default under, the Project Implementation Agreement or the Project Agreement.



#### **14. WHOLESALER PUT RIGHT**

- (a) Upon any termination of this Wholesaler Agreement pursuant to Section 2.1(a) or 2.1(c), the Wholesaler shall have the right, but not the obligation, to require the Authority to purchase all of the Wholesaler Assets for a purchase price equal to the Fair Market Value of the Wholesaler Assets (the "Wholesaler Put Right").
- (b) The Wholesaler shall be entitled to exercise the Wholesaler Put Right at any time within 60 calendar days following the termination of this Wholesaler Agreement pursuant to Section 2.1(a) or 2.1(c) by providing notice in writing of the same to the Authority, together with the Wholesaler's determination of the Purchase Price of the Wholesaler Assets. The Wholesaler will provide to the Authority all such documentation and information as may be reasonably required by the Authority to evaluate the Wholesaler's determination of the Purchase Price of the Wholesaler Assets.
- (c) If the Wholesaler and the Authority cannot agree on the Purchase Price of the Wholesaler Assets within 30 calendar days after receipt by the Authority of the notice referred to in Section 14(b), then either party may require, by notice to the other party, that the Purchase Price be determined by a Valuator. If the parties cannot agree on the appointment of a Valuator within 5 Business Days of such notice, the appointment of a Valuator will be a Dispute and resolved, with a Valuator appointed, pursuant to the Dispute Resolution Procedure. The Wholesaler and the Authority will each pay one-half of the fees of, and any costs and expenses incurred by, the Valuator. The parties will cooperate with, and provide all documentation and information as may reasonably be required by, the Valuator to assist in the Valuator's determination of the Purchase Price.
- (d) Within 30 calendar days following agreement between the parties on the Purchase Price, or the determination thereof by the Valuator and/or the Dispute Resolution Procedure, the Authority will purchase from the Wholesaler, and the Wholesaler will sell to the Authority, pursuant to a customary purchase and sale agreement based on similar transactions, all of the Wholesaler Assets in consideration for the Purchase Price. The Purchase Price shall be paid by the Authority to the Wholesaler in full in cash concurrently with the completion of such purchase and sale of the Wholesaler Assets.

#### **15. AUTHORITY FAILURE TO PROVIDE ACCESS**

If at any time during the Term or following the termination of this Wholesaler Agreement the Authority breaches its obligation under Section 3.1(b), the Authority shall pay to the Wholesaler the aggregate amount of all Direct Losses and Indirect Losses incurred by the Wholesaler as a result of such breach. Subject to the Dispute Resolution Procedures in respect of any Disputed portion of such payment, the payment date for such payment shall be not later than 30 calendar days following the date on which the Wholesaler notifies the Authority of the payment claimed by the Wholesaler and the details and calculation thereof.



## **16. DISPUTE RESOLUTION**

Except as otherwise provided in this Wholesaler Agreement, any Dispute will be resolved in accordance with, and the parties will comply with, the Dispute Resolution Procedure set out in Schedule 2 [Dispute Resolution Procedure].

## **17. ASSIGNMENT/CHANGE IN CONTROL**

### **17.1 Limitations on Assignment by Wholesaler**

The Wholesaler may, upon the prior written consent of the Authority and Operations Co, assign or transfer Wholesaler's rights and obligations under this Wholesaler Agreement (including an assignment or transfer to an entity that is the successor to substantially all of the Wholesaler's assets or business), provided that the assignee or transferee at a minimum (a) is not a Restricted Person and (b) assumes all the obligations of the Wholesaler under this Wholesaler Agreement. Upon due consideration of a request for consent to an assignment or transfer, or in any event within 15 Business Days of such request, the Authority's or Operations Co's consent, as applicable, will not be unreasonably withheld.

### **17.2 Limitations on Assignment by Authority**

The Authority will not assign, transfer or otherwise dispose of any interest in this Wholesaler Agreement unless:

- (a) the assignment, transfer or other disposition is to a department or agency of the Commonwealth of Kentucky having the legal capacity, power, authority and ability to become a party to and to perform the obligations of the Authority under this Wholesaler Agreement; and
- (b) the assignee assumes all the obligations of the Authority under this Wholesaler Agreement.

### **17.3 Limitations on Assignment by Operations Co**

Operations Co will not assign, transfer or otherwise dispose of any interest in this Wholesaler Agreement except:

- (a) with the written consent of the Authority and the Wholesaler, which may be given or withheld in such party's discretion; or
- (b) in connection with an assignment by Operations Co of its rights and obligations under the Project Implementation Agreement.

## **18. GENERAL**

### **18.1 Confidentiality**

- (a) Subject to Section 18.1(b), each party will hold in confidence any Confidential Information received from any other party, except that this Section 18.1 will not restrict:

- (1) the Wholesaler or Operations Co from disclosing or granting access to such information to their respective professional advisers and consultants, to the extent necessary, to enable it to perform (or to cause to be performed) or to enforce its rights or obligations under this Wholesaler Agreement, provided further that, subject to obtaining confidentiality restrictions similar to those set out in this Wholesaler Agreement:
    - (A) the Wholesaler may provide to potential lenders, equity providers, underwriters, arrangers, investment dealers, monoline insurers and their respective advisors such documents and other information as are reasonably required by them in connection with raising financing for Wholesaler Assets or in connection with Wholesaler Services; and
    - (B) the Wholesaler and Operations Co may provide to a Project Contractor and its advisors, or cause to be provided to other third parties, Confidential Information which is necessary to enable the Wholesaler or Operations Co, as applicable, to perform (or to cause to be performed) its obligations under this Wholesaler Agreement but which Confidential Information is not used by the Project Contractor, its advisors, or other third parties, as applicable, for any other purpose; and
  - (2) the Authority from disclosing or granting access to such information to any department of the Commonwealth of Kentucky or any other Governmental Authority which requires the information in relation to the NG-KIH System.
- (b) Subject to any restrictions on the Confidential Information which are imposed by a third party that may own any Confidential Information, the obligation to maintain the confidentiality of the Confidential Information does not apply to Confidential Information:
- (1) which the party that disclosed the Confidential Information confirms in writing is not required to be treated as Confidential Information;
  - (2) which is or comes into the public domain, other than through any disclosure prohibited by this Wholesaler Agreement or through unlawful means;
  - (3) to the extent any Person is required to disclose such Confidential Information by Law, including, without limitation, pursuant to the Kentucky Open Records Act;
  - (4) to the extent consistent with the Authority's policy concerning the Authority's Confidential Information, the details of which have been provided to the Wholesaler and Operations Co in writing prior to the disclosure; or
  - (5) that is known to the recipient of the Confidential Information prior to disclosure to the recipient by the other party or becomes known to the recipient thereafter by way of disclosure to the recipient by any other

Person who, to the knowledge of the recipient, is not under any obligation of confidentiality with respect thereto.

- (c) Without prejudice to any other rights and remedies that the other parties may have, a party may be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 18.1(a).
- (d) Each of the Wholesaler and Operations Co will be fully liable for any breach of confidentiality under this Section 18.1 by any Person to whom it has disclosed or granted access to Confidential Information under this Section 18.1 to the same extent as if such party itself breached confidentiality under this Section 18.1.

### **18.2 Public Communications**

Unless expressly provided in this Wholesaler Agreement or otherwise required by any Law, including the Kentucky Open Records Act (but only to that extent), no party will make or permit to be made any public announcement or disclosure, whether for publication in the press, radio, television or any other medium, of any Confidential Information or any matters relating thereto, without the consent of the other parties (which will not be unreasonably withheld or delayed).

### **18.3 Law of Agreement**

This Wholesaler Agreement is subject to the laws of the Commonwealth of Kentucky and any applicable federal laws and will be governed by and construed in accordance with such laws.

### **18.4 Venue**

Any legal actions or proceedings brought by a party to this Wholesaler Agreement against any other party hereto shall be brought in state court in Franklin County, Kentucky in accordance with KRS 45A.245. Each party acknowledges the competence of such court and the convenience and propriety of the venue.

### **18.5 Entire Agreement, Waivers and Consents in Writing**

This Wholesaler Agreement constitutes the entire agreement between the parties, expressly superseding the Master Agreement (as it relates to the commercialization of the Additional Capacity), the Business Development Agreement and all prior agreements and communications (both oral and written) between the parties hereto with respect to all matters contained herein or therein and, except as stated herein, contains all the representations and warranties of the respective parties. In addition, no waiver of any provision of this Wholesaler Agreement and no consent required pursuant to the terms of this Wholesaler Agreement is binding or effective unless it is in writing and signed by the party providing such waiver or consent.

### **18.6 Notices**

Any notice or communication required or permitted to be given under this Wholesaler Agreement will be in writing and will be considered to have been sufficiently given if delivered by hand or transmitted by electronic transmission to the address or electronic mail address of each party set out below:

**If to the Authority:**

The Commonwealth of Kentucky  
Office of the Secretary  
Finance and Administration Cabinet  
702 Capitol Avenue  
Capitol Annex Room 383  
Frankfort, KY 40601

**Attention: Secretary of the Finance and Administration Cabinet**

**With copies to:**

Office of Procurement Services  
Finance and Administration Cabinet  
702 Capitol Avenue  
Capitol Annex Room 096  
Frankfort, KY 40601

**Attention: Kathy Robinson, Buyer**  
**Email: Kathy.Robinson@ky.gov**

and

Kentucky Communications Network Authority  
209 St. Clair Street, 4th Floor  
Frankfort, KY 40601

**Attention: Doug Hendrix, General Counsel**  
**Email: Doug.Hendrix@ky.gov**

**If to the Wholesaler:**

OpenFiber Kentucky Company, LLC  
101 Helm Street, Suite 150  
Lexington, KY 40505

**Attention: Nick Hann**  
**Email: Nick.Hann@macquarie.com**

**If to Operations Co:**

KentuckyWired Operations Company, LLC  
101 Helm Street, Suite 150  
Lexington, KY 40505

**Attention: Rob Morphonios**  
**Email: Robert.Morphonios@kentuckywired.com**

or to such other address or electronic mail address as any party may, from time to time, designate in the manner set out above.

Any such notice or communication will be considered to have been received:

- (a) if delivered by hand during business hours (and in any event, at or before 3:00 pm local time in the place of receipt) on a Business Day, upon receipt by a responsible representative of the receiver, and if not delivered during business hours, upon the commencement of business hours on the next Business Day; and
- (b) if delivered by electronic mail during business hours (and in any event, at or before 3:00 pm local time in the place of receipt) on a Business Day, upon receipt, and if not delivered during business hours, upon the commencement of business hours on the next Business Day provided that:
  - (1) the receiving party has, by electronic mail or by hand delivery, acknowledged to the notifying party that it has received such notice; or
  - (2) within 24 hours after sending the notice, the notifying party has also delivered a copy of such notice to the receiving party by hand delivery.

#### **18.7 Further Assurances**

The parties will do, execute and deliver, or will cause to be done, executed and delivered, all such further acts, documents (including certificates, declarations, affidavits, reports and opinions) and things as the other may reasonably request for the purpose of giving effect to this Wholesaler Agreement or for the purpose of establishing compliance with the representations, warranties and obligations of this Wholesaler Agreement.

#### **18.8 Counterparts**

This Wholesaler Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, and this has the same effect as if the signatures on the counterparts were on a single copy of this Wholesaler Agreement so that it will not be necessary in making proof of this Wholesaler Agreement to produce or account for more than one such counterpart.

#### **18.9 No Partnership**

Nothing contained in this Wholesaler Agreement nor any action taken pursuant hereto or thereto will be deemed to constitute the Authority, the Wholesaler and Operations Co a partnership, joint venture or any other similar such entity.

#### **18.10 Survival**

Notwithstanding any other provision of this Wholesaler Agreement, the provisions of Section 3.1(b) (except if this Wholesaler Agreement is terminated pursuant to Section 2.1(b) in connection with a Wholesaler Event of Default), Section 3.4 (Revenue Sharing) (solely in respect of Ancillary Revenues generated prior to the Termination Date), Section 11 (Indemnities and Remedies), Section 14 (Wholesaler Put Right), Section 15 (Authority Failure to Provide Access), Section 16 (Dispute Resolution), Section 18.1 (Confidentiality) and Schedule 2 [Dispute Resolution Procedure] will survive the expiration or any earlier termination of this Wholesaler Agreement.

[signature page follows]

IN WITNESS WHEREOF the parties hereto have executed this Wholesaler Agreement as of the day and year first above written.

**THE COMMONWEALTH OF KENTUCKY**

Per: William M. Landrum

Name: WILLIAM M. LANDRUM  
Title: Secretary, Fin. Admin. Cabinet

I have the authority to bind the Commonwealth.

**OPENFIBER KENTUCKY COMPANY, LLC**

Per: Nicholas Ham

Name: NICHOLAS HAM  
Title: MANAGER

Per: Michael Turner

Name: MICHAEL TURNER  
Title: MANAGER

We have the authority to bind the company.

**KENTUCKYWIRED OPERATIONS COMPANY, LLC**

Per: Robert G. Morphonios

Name: Robert G. Morphonios  
Title: C.E.O.

We have the authority to bind the company.

SCHEDULE 1

CHANGES AND MINOR WORKS

1. DEFINITIONS

In this Schedule 1, in addition to the terms defined in Section 1.1 of this Wholesaler Agreement:

**“Change”** means an NG-KIH System Change or an Operations Co Services Change as the context requires;

**“Change Certificate”** means a certificate issued by the Wholesaler to Operations Co describing and authorizing a Change and the value or method of valuation of the Change;

**“Change Mark-Up”** has the meaning given in Section 2.10 of this Schedule 1;

**“Change Report”** means a written report prepared by Operations Co in response to a Preliminary Change Instruction, containing the information described in Section 2.6 of this Schedule 1;

**“Change Report Costs”** has the meaning set out in Section 2.5(b)(3)(A) of this Schedule 1;

**“Minor Works”** means a Change that is requested by the Wholesaler at any time during the Operating Period with a value that does not exceed \$25,000 (Index Linked);

**“Minor Works Rates”** has the meaning set out in the Project Implementation Agreement;

**“Net Change Value”** has the meaning set out in Section 2.9 of this Schedule 1;

**“NG-KIH System Change”** means a change, including an addition, demolition, alteration, reconstruction or otherwise, to the NG-KIH System or any part thereof;

**“Operations Co Services Change”** means a change, including an addition, deletion, alteration, substitution or otherwise, to Operations Co’s obligations to provide the Operations Co Services under this Wholesaler Agreement;

**“PPP Change”** means a Change (as defined in the Project Agreement);

**“PPP Change Certificate”** means a Change Certificate (as defined in the Project Agreement);

**“Preliminary Change Instruction”** has the meaning set out in Section 2.3 of this Schedule 1; and

**“Preliminary Estimate”** has the meaning set out in Section 2.5(b)(1) of this Schedule 1.



## 2. CHANGES

### 2.1 Changes Requested by the Wholesaler

The Wholesaler may propose Changes in accordance with this Schedule 1. Subject to the terms and conditions set forth in this Schedule 1, Operations Co will implement each Change in accordance with the terms set forth in the Change Certificate in respect of such Change.

### 2.2 [Not Used]

### 2.3 Preliminary Change Instruction

The Wholesaler may, at any time during the Term, issue to Operations Co an instruction (a "**Preliminary Change Instruction**") describing a potential Change that the Wholesaler is considering. A Preliminary Change Instruction will include sufficient description of the contemplated Change to permit Operations Co to prepare a Change Report.

### 2.4 Restrictions on Changes

- (a) The parties acknowledge and agree that Operations Co may refuse to implement a Change:
  - (1) that would reasonably be expected to have a negative impact on the performance of Operations Co's obligations under the Project Implementation Agreement; or
  - (2) if, despite having used commercially reasonable efforts, Operations Co is unable to find a contractor (including either Project Contractor) willing to implement such Change on satisfactory terms.
- (b) The parties acknowledge and agree that no Change that would result in a PPP Change shall come into effect unless and until the Authority issues a PPP Change Certificate in respect of such PPP Change in accordance with Schedule 6 to the Project Agreement.
- (c) The Wholesaler acknowledges that the Senior Financing Agreements contain certain restrictions on Operations Co's ability to implement Changes.

### 2.5 Delivery of Change Report

Subject to Section 2.4 of this Schedule 1:

- (a) as soon as practicable and, in any event, to the extent reasonably possible, within 15 Business Days after receipt of a Preliminary Change Instruction, or such other period as the Wholesaler and Operations Co agree, acting reasonably, Operations Co will, at its cost, prepare and deliver to the Wholesaler

a Change Report, signed by Operations Co's Representative, for the contemplated Change described in the Preliminary Change Instruction; or

- (b) if the Net Change Value of the contemplated Change is likely to be more than \$50,000 (Index Linked) or if the costs of preparing a Change Report are likely to be more than \$5,000 (Index Linked), then:
- (1) Operations Co may, at its election within 5 Business Days after receipt of the Preliminary Change Instruction for such contemplated Change, or shall, if requested by the Wholesaler, give notice to the Wholesaler that it intends to first prepare and deliver a preliminary estimate (the "**Preliminary Estimate**") of the net cost of the contemplated Change;
  - (2) if Operations Co has given notice as described in Section 2.5(b)(1), then, within 10 Business Days after provision of such notice, Operations Co will, at its cost, prepare and deliver to the Wholesaler an order of magnitude estimate of the net cost of the contemplated Change, and the Wholesaler may give notice to Operations Co to proceed with Section 2.5(b)(3) or, alternatively, to proceed with the preparation of the Change Report for the contemplated Change and Operations Co will prepare and deliver the Change Report as soon as practicable and, in any event, to the extent reasonably possible, within 15 Business Days after receipt of such notice or such longer period as the Wholesaler and Operations Co agree acting reasonably;
  - (3) if the Wholesaler has given notice to proceed as described in Section 2.5(b)(2), then, within 10 Business Days after receipt of such notice, Operations Co will, at its cost, prepare and deliver to the Wholesaler:
    - (A) a reasonable estimate of the out-of-pocket costs (the "**Change Report Costs**") that Operations Co would incur to prepare the Change Report; and
    - (B) a Preliminary Estimate of the contemplated Change in sufficient detail and accuracy to permit the Wholesaler to make an informed decision as to whether to proceed with the contemplated Change, including, as appropriate:
      - (i) a preliminary cost estimate of the main elements of the contemplated Change;
      - (ii) a preliminary implementation schedule and work plan for the implementation of the contemplated Change; and

- (iii) a description of the impact of the contemplated Change on the NG-KIH System during implementation or in the use of the NG-KIH System, if any;
- (4) the Wholesaler may, within 10 Business Days following receipt of the Preliminary Estimate, or at any time if Operations Co fails to comply with the time requirements set out in this Section 2.5(b), give notice to Operations Co to proceed with the preparation of the Change Report for the contemplated Change and Operations Co will prepare and deliver the Change Report as soon as practicable and, in any event, to the extent reasonably possible, within 15 Business Days after receipt of such notice, or such longer period as the Wholesaler and Operations Co agree acting reasonably;

If Operations Co prepares and delivers to the Wholesaler a Change Report pursuant to Section 2.5(b)(4) of this Schedule 1 and the Wholesaler elects not to proceed with the corresponding Change, then the Wholesaler will pay Operations Co's substantiated Change Report Costs. If Operations Co prepares and delivers to the Wholesaler a Change Report pursuant to Section 2.5(b)(4) of this Schedule 1 and Operations Co refuses to implement corresponding Change, then any Change Report Costs shall be for the account of Operations Co. The Authority will not be responsible for any Change Report Costs.

## **2.6 Change Report Contents**

A Change Report will include:

- (a) if and to the extent a contemplated Change is an NG-KIH System Change:
  - (1) a description of the scope of the contemplated Change with respect to the NG-KIH System;
  - (2) impact of the contemplated Change on the capacity of the NG-KIH System;
  - (3) subject to Section 2.11 of this Schedule 1, a description of any delays in achieving the Project Schedule, including to any Target Site Completion Date, any Target Ring Completion Date, any Outside Ring Completion Date or the Target System Completion Date, which Operations Co anticipates will result from the implementation of the contemplated Change and any compensation required pursuant to Section 2.9(c) of this Schedule 1; and
  - (4) a description of any impact of the contemplated Change on the performance of Operations Co's obligations under the Project Implementation Agreement, including the PPP Services, or the Operations Co Services;

- (b) if and to the extent a contemplated Change is an Operations Co Services Change, a description of the scope of the contemplated Change with respect to the PPP Services (if any) and the Operations Co Services; and
- (c) for all contemplated Changes (in addition to the requirements of Section 2.6(a) or 2.6(b) of this Schedule 1, as applicable):
  - (1) an estimate of all costs, if any, reasonably necessary for and directly associated with the contemplated Change, supported by quotations from the applicable Project Contractor and Sub-Contractors;
  - (2) a description of any payments that are required to reflect the costs referred to Section 2.6(c)(1);
  - (3) the value of the loss or reduction of benefits resulting from the contemplated Change;
  - (4) a description of any additional consents or approvals required, including amendments, if any, of any Permits required to implement the contemplated Change;
  - (5) a description of any impact on the obligations of Operations Co under the Project Implementation Agreement or the Project Contracts;
  - (6) a description of the extent to which the contemplated Change would interfere with Operations Co's ability to comply with any of its obligations under this Wholesaler Agreement, the Project Implementation Agreement, the Project Contracts, any Sub-Contracts and any Permits;
  - (7) the name of the Sub-Contractor(s) (if any) which Operations Co intends to engage for the purposes of implementing the contemplated Change, together with a description of the qualifications of any such Sub-Contractor(s) so as to demonstrate the ability of such Sub-Contractor(s) to implement the contemplated Change;
  - (8) a description of any further effects (including benefits and impairments) that Operations Co foresees as being likely to result from the contemplated Change;
  - (9) a description of any actions that would be reasonably required by the Wholesaler to implement the contemplated Change;
  - (10) a description of the steps Operations Co will take to implement the contemplated Change, in such detail as is reasonable and appropriate in all the circumstances;

- (11) a description of any impact on expected usage of utilities for the current Contract Year and subsequent Contract Years;
- (12) a description of the extent to which the contemplated Change may impact the ability of any Third Party Infrastructure Provider to perform any of its obligations under the relevant Third Party Infrastructure Agreement; and
- (13) a description of any other costs that the contemplated Change may impact.

All of the costs described in this Section 2.6 will be provided in current applicable dollar amounts.

## **2.7 Justification and Supporting Documentation for Contemplated Change Estimates**

The cost estimates included in a Change Report will be in sufficient detail to allow evaluation by the Wholesaler and will include such supporting information and justification as is necessary to demonstrate that:

- (a) Operations Co has used all reasonable efforts, including utilizing competitive quotes or tenders, to minimize the cost of a contemplated Change and maximize potential related cost savings;
- (b) the full amount of any and all expenditures that have been reduced or avoided (including any Capital Expenditure) have been fully taken into account; and
- (c) Operations Co has mitigated or will mitigate the impact of the contemplated Change, including on the Project Schedule, the performance of the PPP Services, the expected usage of utilities and the direct costs to be incurred.

Operations Co acknowledges that the Wholesaler may, at any time and in its sole discretion, seek competing cost estimates or alternative change estimates from contractors who are qualified to perform the contemplated Change for purposes of comparing and evaluating the cost estimates provided by Operations Co. The Wholesaler shall bear its own costs for seeking such estimates.

## **2.8 Valuation of and Payment for Changes**

The value and method of valuation of a Change will be as agreed by the Wholesaler and Operations Co. Failing agreement, the value of the Change will be deemed to be the net cost (or saving) of implementing the Change, calculated in accordance with Section 2.9 of this Schedule 1. If a Change has a net cost (a positive Net Change Value), then Wholesaler will pay Operations Co the Net Change Value and any amounts due under Section 2.9(c) of this Schedule 1. If a Change has a net cost savings (a negative Net Change Value), then Operations Co will pay the Wholesaler the Net Change Value. Unless otherwise agreed between the Wholesaler and Operations Co, the Wholesaler will pay for any Change that

requires a Capital Expenditure by way of lump sum payment or progress payments as such costs are incurred.

## 2.9 Net Change Value

The value of a Change (the “**Net Change Value**”) is the aggregate of the incremental costs (minus the aggregate cost savings) reasonably incurred to implement the Change, supported by invoices, purchase orders, time sheets and other customary industry documentation, subject to the following:

- (a) any costs related to expenses that would have been incurred had the Change not taken place (to the extent such costs are not increased as a result of the Change) will not be considered directly attributable to the Change;
- (b) the rates and charges will be no greater than the market rates prevailing at the time of the implementation of the Change paid between arm’s length contracting parties; and
- (c) if a Change causes a delay in Site Completion, Ring Completion or System Completion, the cost of the Change will include an amount calculated on the basis that Operations Co will be placed in no better or worse position than it would have been in had the Change and the delay in Site Completion, Ring Completion or System Completion not occurred and taking into consideration the following (without duplication):
  - (1) any net increase or decrease in the costs of Operations Co performing its obligations under the Project Implementation Agreement resulting solely from the Change and the delay;
  - (2) the payments that would have otherwise been payable to Operations Co pursuant to the provisions of the Project Implementation Agreement; and
  - (3) no amount will be payable for Avoidable Costs or Indirect Losses.

## 2.10 Mark-Up on Changes

If the Change has a positive Net Change Value, the Wholesaler will pay a mark-up of 10% of the Net Change Value (the “**Change Mark-Up**”) to cover Operations Co’s indirect, head office and other costs and profit. For the avoidance of doubt, the Change Mark-Up will be applicable only to costs incurred directly by Operations Co to implement the Change and shall not include any costs incurred independently by the Wholesaler in relation to such Change and shall not limit any mark-up charged to Operations Co by the Project Contractors or any other Sub-Contractors.

### **2.11 Effect on the Project Schedule or Delays to Services**

Operations Co will use all reasonable efforts to minimize the effect of a Change on the Project Schedule (including the Target Site Completion Dates, the Target Ring Completion Dates, the Outside Ring Completion Dates and the Target System Completion Date) and the performance or availability of the PPP Services. No Change that has an impact on the Project Schedule shall come into effect unless and until the Authority issues a PPP Change Certificate.

### **2.12 Agreement on a Change**

Following receipt by the Wholesaler of a Change Report prepared in accordance with Section 2.6 of this Schedule 1:

- (a) as soon as practicable and, in any event within 15 Business Days after the Wholesaler receives the Change Report or such longer period as the Wholesaler and Operations Co agree acting reasonably, the Wholesaler will deliver to Operations Co any requests for clarifications or amendments, and representatives of the Wholesaler and Operations Co will meet and use all reasonable efforts to agree to the Change Report, including the costs, payments (including payment of costs and monthly payments, if any) and other information contained in the Change Report; and
- (b) Operations Co acknowledges that the Wholesaler may, in writing, modify a Preliminary Change Instruction at any time prior to the Wholesaler and Operations Co reaching an agreement on the Change Report for any matter relating to the Change Report or arising from the discussions in relation thereto, in which case Operations Co will, as soon as practicable and, in any event, not more than 10 Business Days after receipt of such modification (or such longer period as the Wholesaler and Operations Co may agree acting reasonably), notify the Wholesaler of any consequential changes to the Change Report.

### **2.13 Change Certificate**

A Change will come into effect by the Wholesaler issuing to Operations Co a Change Certificate signed by an authorized representative of the Wholesaler, provided, however, that no Change that would result in a PPP Change shall come into effect unless and until the Authority issues a PPP Change Certificate in respect of such PPP Change in accordance with Schedule 6 to the Project Agreement. Operations Co acknowledges that (i) if the Wholesaler has agreed to the Change Report without amendment, it is sufficient for the Change Certificate to be signed by an authorized representative of the Wholesaler and, (ii) subject to Section 2.14 of this Schedule 1, if the Change Report requires amendment, the Change Certificate comes into effect when signed by authorized representatives of the Wholesaler and Operations Co.

Operations Co will not proceed with a Change prior to receiving a signed Change Certificate from the Wholesaler. A Change Certificate issued in accordance with this Section 2.13 will be binding upon the Wholesaler and Operations Co. Subject to Section 2.4 of this Schedule 1, upon receipt of a Change Certificate, Operations Co will implement the Change.



## **2.14 Disagreement on Change Report**

If the Wholesaler and Operations Co do not agree on a Change Report, then the Wholesaler may:

- (a) elect not to proceed with the Change described in the Preliminary Change Instruction; or
- (b) request that the Authority issue a Change Directive (as defined in the Project Agreement) in accordance with Schedule 6 to the Project Agreement requiring Project Co and Operations Co to implement the relevant Change. If the Authority, in its sole discretion, issues such Change Directive, the Wholesaler shall be responsible for any payment obligations of the Authority to Project Co pursuant to the PPP Change Certificate issued as a result of such Change Directive.

## **2.15 Modification of Processes and Procedures**

Nothing in this Schedule 1 shall limit the ability of the parties to mutually, in writing, modify, simplify or waive some or all of the processes and procedures outlined in this Schedule 1 in respect of Changes.

## **3. MINOR WORKS**

### **3.1 Minor Works Rates**

The Minor Works Rates will be established in accordance with the Project Implementation Agreement.

### **3.2 Direction for Minor Works**

Subject to Section 2.4, the Wholesaler may, at any time during the Operating Period, request that Operations Co perform Minor Works as follows:

- (a) within 10 Business Days of a request in writing for Minor Works, Operations Co will, at its own cost, prepare and deliver to the Wholesaler a written price estimate covering the full scope of the requested Minor Works, based on the applicable Minor Works Rates or, if and to the extent the Minor Works Rates are not applicable, at cost plus 10%;
- (b) a Preliminary Change Instruction and a Change Report will not be required for Minor Works;
- (c) within 5 Business Days of receipt of the written price estimate from Operations Co, the Wholesaler will either:

- (1) provide written direction for Operations Co to proceed with the Minor Works, in which case, Operations Co will, in a timely manner, carry out the Minor Works; or
  - (2) provide written notice to Operations Co that the Wholesaler will not proceed with the Minor Works; and
- (d) subject to any payment required in accordance with Section 3.4 of this Schedule 1, Operations Co will be responsible for providing Operations Co Services related to the completed Minor Works.

Operations Co will not be entitled to charge the Wholesaler for preparing a written price estimate in accordance with Section 3.2(a) above.

For greater certainty and without limiting Section 2.4, the parties acknowledge and agree that Operations Co may refuse to implement any Minor Works that would reasonably be expected to have a negative impact on the performance of Operations Co's obligations under the Project Implementation Agreement, or, if, despite having used commercially reasonable efforts, Operations Co is unable to find a contractor (including either Project Contractor) willing to implement such Minor Works on satisfactory terms.

### **3.3 Operations Co to Minimize Inconvenience**

Prior to commencing any Minor Works, Operations Co will notify the Wholesaler of the estimated duration of the Minor Works so that the Wholesaler and Operations Co can agree upon a convenient time for carrying out the Minor Works in a manner that minimizes and mitigates inconvenience and disruption to the use of the NG-KIH System. Operations Co will use all reasonable efforts to minimize the duration of any Minor Works and will schedule Minor Works as reasonably requested by the Wholesaler, including doing works outside normal operating hours.

### **3.4 Payment for Minor Works**

Operations Co will, as of the end of a calendar month, invoice the Wholesaler for Minor Works completed in the calendar month, supported by appropriate invoices and work records. The Wholesaler will pay Operations Co all undisputed amounts for Minor Works performed in the previous calendar month within 10 Business Days of receipt of the relevant invoice from Operations Co.

### **3.5 Minor Works Disputes**

Any Dispute arising in connection with Minor Works, including the price to be paid for Minor Works, will be resolved in accordance with the Dispute Resolution Procedure.

#### **4. RESPONSIBILITY AND PAYMENT FOR CHANGES**

##### **4.1 Responsibility for Changes and Minor Works**

Except as specifically provided in this Wholesaler Agreement, the Wholesaler will bear no liability to Operations Co whatsoever arising from any Change or Minor Works other than the liability to make payment in connection therewith. Notwithstanding the previous sentence, the Wholesaler will pay to Operations Co increased costs or any Direct Losses suffered by Operations Co as a result of any particular design, materials, goods, workmanship or method of construction which the Wholesaler specifies must be incorporated in a Change and which is subsequently shown to be defective (other than as a result of the default or negligence of Operations Co or any Operations Co Person), if Operations Co objected in writing to the incorporation of such item prior to the issue of the relevant Change Certificate and such objection was rejected by the Wholesaler.

##### **4.2 Payments in Respect of Changes and Minor Works**

Subject to Section 2.8 of this Schedule 1, any payments between the Wholesaler and Operations Co in respect of Changes and Minor Works will be made in accordance with any agreed basis for payment set out in the Change Certificate.



**SCHEDULE 2  
DISPUTE RESOLUTION PROCEDURE**

**1. DEFINITIONS**

In this Schedule 2, in addition to the terms defined in Schedule 1 [Definitions and Interpretation]:

“**Dispute Notice**” has the meaning set out in Section 2.2 of this Schedule 2;

“**Dispute Party**” means a party to a Dispute and “**Dispute Parties**” means all of the parties to such Dispute;

“**Dispute Resolution Procedure**” has the meaning set out in Section 2.1 of this Schedule 2;

“**Referee**” has the meaning set out in Section 2.5 of this Schedule 2;

“**Referee Agreement**” has the meaning set out in Section 2.5(d) of this Schedule 2;

“**Referee Notice**” has the meaning set out in Section 2.5 of this Schedule 2; and

“**Senior Executive**” means an executive who, subject only to approval of the board of directors or similar governing body, has full authority to resolve and settle a Dispute.

**2. DISPUTE RESOLUTION**

**2.1 Procedure**

Subject to KRS 45A.225-45A.290, and unless all parties otherwise agree, all Disputes will be resolved in accordance with the provisions of this Schedule 2 (the “**Dispute Resolution Procedure**”).

**2.2 Dispute Notice**

The Dispute Resolution Procedure may be commenced by any party giving written notice to the other party or parties (the “**Dispute Notice**”) in accordance with Section 18.6 of the Wholesaler Agreement briefly setting out the pertinent facts, the remedy or relief sought and the grounds on which such remedy or relief is sought.

**2.3 Representative Negotiation**

Within 5 Business Days of a party receiving a Dispute Notice from another party, or such longer period as the Dispute Parties may agree, a representative of each Dispute Party will meet and make good faith efforts to resolve the Dispute. These negotiations will be without prejudice to the rights of a Dispute Party provided under the Wholesale Agreement or any schedule thereto.

**2.4 Senior Executive Negotiation**

If the Dispute is not resolved pursuant to Section 2.3 of this Schedule 2 within 5 Business Days (or such longer period as the Dispute Parties may agree) of the first meeting of the representatives of the Dispute Parties, a Senior Executive of each Dispute Party will meet and make good faith efforts to resolve the Dispute. These negotiations will be without prejudice to the rights of a Dispute Party provided under the Wholesale Agreement or any schedule thereto.

## 2.5 Fast Track Referee Process

If the Dispute is not resolved pursuant to Section **Error! Reference source not found.** of this Schedule 2 within 5 Business Days (or such longer period as may be required by Law or agreed upon by the Dispute Parties) of the first meeting of the Advisory Board, any Dispute Party may, by written notice to the other Dispute Parties in accordance with Section 18.6 of the Wholesale Agreement (a "**Referee Notice**"), request the appointment of a referee (the "**Referee**") as provided under the terms of this Section 2.5. The Referee will be appointed as an expert to resolve the Dispute and will participate in the resolution of the Dispute as set out below:

- (a) within 2 Business Days of the delivery of a Referee Notice, each Dispute Party will submit in writing to the other Dispute Parties the names of no more than 2 candidates for Referee who are independent of the parties, experienced in the resolution of similar disputes and immediately available to perform the role of Referee in respect of the Dispute at hand;
- (b) if a Dispute Party has an objection to a proposed candidate, it will give written notice of such objection with reasons to the other Dispute Parties;
- (c) if, for any reason, within 5 Business Days of the delivery of a Referee Notice, a Referee has not been appointed, then any Dispute Party may apply to a judge of the state court in Franklin County, Kentucky to select a Referee in relation to the Dispute;
- (d) the Dispute Parties will enter into an agreement with the Referee generally in the form attached as Appendix 2A (the "**Referee Agreement**"), such agreement to be entered into no later than 2 Business Days after the Referee's appointment (or such longer period as may be required by Law or agreed upon by the Dispute Parties);
- (e) the Referee's fees and expenses will be shared equally by the Dispute Parties, provided that the Dispute Party that requested the appointment of a Referee will pay the full amount of the Referee's fees and expenses on the day that such fees and expenses are due (including any advances on fees and expenses) in accordance with the Referee Agreement and each other Dispute Party will reimburse such party for its share of all such fees and expenses within 5 Business Days of receipt of a written demand therefor (or such longer period as may be required by Law or agreed upon by the Dispute Parties);
- (f) the Referee will conduct an impartial review of the Dispute in such manner as the Referee thinks fit, including carrying out on-site inspections and interviews with any persons that the Referee thinks fit;
- (g) the parties will comply with all reasonable requests from the Referee for additional information, documents and access to personnel which the Referee considers necessary for the review;
- (h) any submission or documentation in respect of the Dispute provided to the Referee by a party will also be provided to the other Dispute Parties;

- (i) the Referee may, with the written approval of all Dispute Parties, retain other professional persons or experts to assist with the review and will pay due regard to any request by a Dispute Party for him to retain such other professional persons or experts;
- (j) the Referee will not be obliged to conduct his inquiries in the presence of the Dispute Parties or receive submissions from the Dispute Parties, except to the extent that the Referee thinks fit, and may render his decision notwithstanding the failure of a party to participate in the proceedings;
- (k) the Referee will render a brief, written, reasoned and impartial decision on the Dispute, with copies to all Dispute Parties within 5 Business Days of the signing by the Referee and all Dispute Parties of the Referee Agreement referred to in Section 2.5(d) of this Schedule 4, or such longer period as agreed to in writing by the Dispute Parties;
- (l) the Referee's decision will be in the form of a proposed determination of the rights of the relevant parties having regard to the Referee's understanding of the relevant contractual provisions, the applicable law and the facts as agreed by the Dispute Parties or as best the Referee is able to determine them;
- (m) each party acknowledges the value of having the Referee render a timely decision regarding the Dispute and, if the Referee is unable to render his decision within the time set or as extended by mutual agreement of the Dispute Parties, then the Dispute Parties will request that the Referee provide to the Dispute Parties within such time such analysis of the Dispute as the Referee is able to make within that time and describe the further work the Referee recommends would be required in order to arrive at a reasoned decision;
- (n) subject to the provisions of Section 3.3 of this Schedule 2, a decision of a Referee is not binding on the Dispute Parties but is intended to assist the Dispute Parties to reach agreement with respect to the Dispute;
- (o) subject to the Kentucky Open Records Act, the proceedings under this Section 2.5 will be confidential and all information, data or documentation disclosed or delivered by any party to the Referee as a result of or in connection with his duties as Referee will be treated as confidential and none of the parties nor the Referee will, except as would be permitted under Section 18.1 of the Wholesaler Agreement, disclose to any Person any such information, data or documentation unless the parties otherwise agree in writing, provided that nothing contained in this provision will prevent the submission in any subsequent proceedings of any evidence other than evidence that came into existence for the express purpose of submission to, or assistance of, the Referee; and
- (p) the proceedings by or before a Referee will be without prejudice in any subsequent proceedings.

## **2.6 Commencement of Proceedings**

If the Dispute is not completely resolved by agreement between the Dispute Parties within 10 Business Days of the receipt of the Referee's decision or analysis pursuant to Section 2.5 of this



Schedule 2 (or such longer period as the Dispute Parties may agree) or within 10 Business Days of the date on which the Referee's decision or analysis ought to have been received under Section 2.5 of this Schedule 2, any Dispute Party may, pursuant to KRS 45A.230, present the Dispute to the Secretary of the Finance and Administration Cabinet for resolution. If the Secretary is unable to resolve the Dispute to the mutual satisfaction of the parties within 120 days, the provisions of KRS 45A.235 shall apply and any Dispute Party may commence proceedings in respect of the Dispute in state court in Franklin County, Kentucky in accordance with KRS 45A.245 and, for clarity, the provisions of Section 18.4 of this Wholesaler Agreement will apply to any such proceedings

### **3. GENERAL**

#### **3.1 Other Remedies**

Nothing contained in this Schedule 2 will preclude a party from initiating a proceeding in state court in Franklin County, Kentucky for the purpose of obtaining an effective emergency, injunctive, or provisional remedy to protect its rights as necessary in the circumstances, including obtaining temporary and preliminary injunctive relief and other orders, whether before or after the Dispute has been initiated by a Dispute Notice.

#### **3.2 Strict Compliance with Time Limits**

The parties acknowledge that timely resolution of Disputes is mutually beneficial and the time limits set out in this Schedule 2, or as otherwise required by Law or agreed by the parties, will therefore be strictly complied with and enforced.

#### **3.3 Interim Decision**

If a Dispute occurs then the parties will in good faith carry out their respective obligations under this Wholesaler Agreement pending resolution of the Dispute pursuant to the Dispute Resolution Procedure.

**APPENDIX 2A  
REFEREE AGREEMENT**

**BETWEEN:**

**[Referee Agreement to be modified, as appropriate, to reflect that only the Referee and the Dispute Parties will enter into the Referee Agreement.]**

**[Name of Referee] (the "Referee")**

**AND:**

**The Commonwealth of Kentucky (the "Authority")**

**AND:**

**OpenFiber Kentucky Company, LLC (the "Wholesaler")**

**AND:**

**KentuckyWired Operations Company, LLC ("Operations Co")**

We write to confirm your appointment as a Referee under the Wholesaler Agreement dated ■, 2017 between the Authority, the Wholesaler and Operations Co (the "**Wholesaler Agreement**"). The terms of your appointment are as contained in Section 2.5 of Schedule 2 [Dispute Resolution Procedure] to the Wholesaler Agreement.

We confirm our agreement for you to review the Dispute(s) described in the Dispute Notice in accordance with the provisions of the Wholesaler Agreement, and to perform the functions of a Referee as described in Section 2.5 of Schedule 2 [Dispute Resolution Procedure] to the Wholesaler Agreement.

A copy of the Wholesaler Agreement and related materials will be forwarded to you shortly.

We confirm that your daily/hourly rate for fees is \$ \_\_\_\_\_. In addition to your invoiced fees, \_\_\_\_\_ **[insert name of Dispute Party who requested the appointment of a Referee]** will pay any and all reasonable disbursements incurred in providing your services. Please submit your invoices on a monthly basis directly to \_\_\_\_\_ (the "**Representative**"). The Representative will arrange for payment within 30 calendar days of receipt.

Please confirm your agreement to the terms as set out in this letter by signing a copy of the enclosed letter and returning it to the Representative.

Yours truly,

\_\_\_\_\_  
Authorized Signatory of the Referee

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Signatory of the Authority

\_\_\_\_\_  
Date

APPENDIX 2A  
SCHEDULE 2 - DISPUTE RESOLUTION PROCEDURE

_____ Authorized Signatory of the Wholesaler	_____ Date
_____ Authorized Signatory of Operations Co	_____ Date

**SCHEDULE 3  
PERFORMANCE STANDARDS**

**1. PERFORMANCE STANDARDS**

**1.1 Network Reports**

- (a) Wholesaler will provide the financial information necessary for the Authority and Project Co to comply with reporting obligations of the tax-exempt bonds in a timely fashion;
- (b) Wholesaler will maintain a written record of all Change Certificates providing the Wholesaler access to the Ancillary PPP Network Assets;
- (c) Wholesaler will maintain an inventory of Wholesaler Assets purchased, divested and retired during each reporting period;
- (d) Wholesaler will calculate and retain a record of all revenue share proceeds to be paid to the Authority on a quarterly basis;
- (e) Wholesaler shall maintain a record of all economic development requests made by the Authority, including the status of negotiations, if such development initiative was undertaken, and on what terms;
- (f) Wholesaler shall retain a record of the minutes from meetings with any Advisory Board established by the Authority;
- (g) Wholesaler shall provide to the Authority a draft template User Agreement;
- (h) Wholesaler shall provide to the Authority a draft template IRU Agreement;
- (i) Wholesaler shall provide to the Authority its certification to undertake business activities in the Commonwealth of Kentucky;
- (j) Wholesaler shall comply with the reporting timelines of Schedule 1 [Changes and Minor Works];

**1.2 User Agreements**

- (a) Wholesaler will not enter into any User Agreement that is discriminatory in favor of any Affiliate of the Wholesaler;
- (b) Wholesaler will not enter into any individual IRU Agreement with a User that has a term in excess of thirty (30) years;
- (c) Wholesaler will not enter into any individual IRU Agreement with a User that provides the User to use more than two (2) strands on a particular Ring;

### **1.3 Payments**

- (a) Wholesaler shall remit quarterly revenue share proceeds to the Authority no later than 30 days following the end of each calendar quarter;
- (b) Wholesaler shall use commercially reasonable efforts to collect IRU Fees from Users that have executed IRU Agreements;
- (c) Wholesaler shall use commercially reasonable efforts to collect Transport Fees from Users that have executed User Agreements;

### **1.4 Network Operations**

- (a) Wholesaler has, in its provision of Wholesaler Services, not infringed on any applicable Laws;
- (b) Provision of Wholesaler Services by the Wholesaler has not had a material impact on the interoperability of the NG-KIH System;