

**BUSINESS DEVELOPMENT AGREEMENT**  
**FOR**  
**NEXT GENERATION**  
**KENTUCKY INFORMATION HIGHWAY (NG-KIH) INITIATIVE**  
**WHOLESALE PARTNER**  
**BETWEEN**  
**THE COMMONWEALTH OF KENTUCKY**  
**AND**  
**MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC**  
**(“Macquarie”)**  
**AND**  
**OPENFIBER KENTUCKY COMPANY, LLC**  
**(the “Wholesaler”)**  
**AND**  
**KENTUCKYWIRED OPERATIONS COMPANY, LLC**  
**(“Operations Co”)**

**MA 758 1500000563**

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Attachment A – Secretary’s Order

Attachment B – Definitions

WHEREAS, pursuant to KRS 45A.605, the Commonwealth of Kentucky, by and through the Finance and Administration Cabinet (the “Commonwealth”), has the authority to enter into contracts for the development of an information highway on behalf of state agencies and other specified entities;

WHEREAS, the Commonwealth has established networks for the use of state government, institutions of higher learning, educational institutions and local governments;

WHEREAS, the Commonwealth, through its government agencies, educational entities, local government and other stakeholders, supports the finance, design, construction, operation, maintenance and refreshing of the Next Generation Kentucky Information Highway middle mile infrastructure ("NG-KIH System" or "Project") to serve the public sector, private interests and Kentucky's citizens;

WHEREAS, the NG-KIH System will consist of a statewide dark fiber middle-mile network constructed to provide communication services based on an optical fiber backbone which will improve the quality, reliability, and access to network services across the Commonwealth;

WHEREAS, the Commonwealth issued RFP 758 1500000003-5 ("RFP" or "Solicitation") through a competitive bidding process to select a long-term vendor/partner to assist with this Project;

WHEREAS, Macquarie, having acknowledged and accepted, as of the date of submission of its proposal, the initial terms and scope of the Project as set forth in the RFP, as amended, bid upon the Solicitation and continues to design and develop all aspects of the Project in cooperation with the Commonwealth;

WHEREAS, the Commonwealth has concluded, based on the proposal and subsequent negotiations, that the provision of communications services to the Commonwealth through the Project and the commercialization of additional capacity made available by the Project for third party users ("Additional Capacity") should be organized under separate contracts and through separate companies;

WHEREAS, Operations Co has been formed to enter into a project implementation agreement to design, build, operate and maintain the NG-KIH System for the Commonwealth;

WHEREAS, Macquarie and First Solutions P3, Inc. ("First Solutions") have established the Wholesaler to assist the Commonwealth in commercializing the Additional Capacity;

WHEREAS, the Commonwealth, the Wholesaler and Operations Co desire to enter into an agreement to set out the respective rights and obligations of each of them related to the commercialization of the Additional Capacity (the "Wholesaler Agreement");

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties hereby covenant and agree as follows:

This Business Development Agreement (this "Agreement") is entered into by and amongst the Parties.

The Parties agree to the following:

## **I. Scope of Contract**

The purpose of this Agreement is to:

- a) engage the Wholesaler to develop the Wholesaler Agreement;
- b) engage the Wholesaler to act as the entity with the exclusive right to commercialize Additional Capacity in the Project with immediate effect from date of execution of this Agreement;
- c) allow the Wholesaler to undertake all activities contemplated hereunder, including but not limited to:
  - i) entering into the Management Services Agreement between Operations Co and the Wholesaler;
  - ii) hiring staff, including the two positions contemplated under the Management Services Agreement;
  - iii) entering into negotiations with potential third party users of the Additional Capacity, and keeping the Parties closely updated on such negotiations taking into account the likelihood that such negotiations will assist in informing development of the Wholesaler Agreement; and
  - iv) executing contracts for the use of Additional Capacity, subject to the approval of the Parties, such approval not to be unreasonably withheld; and
- d) establish the relationship between Operations Co and the Wholesaler.

## **II. Timetable and Milestones**

The Parties agree to work cooperatively and in good faith to achieve the following three Milestones. The indicative timeline for the Milestones is as follows:

- a) the Wholesaler will deliver a draft Wholesaler Agreement on or before September 30, 2015, or such later date as the Parties agree, acting reasonably;
- b) the Parties, together with First Solutions, will endeavor to finalize an interim Wholesaler Agreement by October 31, 2015, or such later date as the Parties agree, acting reasonably; and
- c) the Parties, together with First Solutions, will endeavor to finalize the final Wholesaler Agreement by December 31, 2015, or such later date as the Parties agree, acting reasonably.

For purposes of workload planning, the Commonwealth shall use good faith efforts to accommodate and adapt to the Wholesaler's proposed schedule, within the practical

limitations on availability of the Commonwealth's personnel appropriate for performing the types of services in question. The Wholesaler shall accommodate and adapt its proposed schedule to the practical limitations on availability of personnel of the Commonwealth. Upon completion of each Milestone, the Parties agree to review this Agreement to determine if any amendments or modifications are necessary. The Parties acknowledge and agree that the Kentucky Communications Network Authority and the Kentucky Communications Network Authority Board will be involved in the process of finalizing the Wholesaler Agreement.

### **III. Costs and Payments**

Each Party shall bear its own costs in connection with this Agreement and the negotiation and development of the Wholesaler Agreement.

### **IV. Negotiated Items**

#### **1. Definitions**

As used herein, capitalized terms shall have the meanings set forth in Attachment B or as further defined in this Agreement.

#### **2. Wholesaler's Obligations**

The Wholesaler shall:

- a. use commercially reasonable efforts to achieve each Milestone in accordance with this Agreement;
- b. conduct a weekly conference call to provide the Commonwealth with progress reports regarding the current Milestone;
- c. ensure that there is sufficient auditing capability to track actions taken by the Wholesaler and its staff; and
- d. as needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with the Commonwealth's representatives at a mutually agreed upon location.

#### **3. Commonwealth's Obligations**

The Commonwealth shall:

- a. provide the Wholesaler with support as mutually agreed upon and reasonably necessary for the Wholesaler to achieve the Milestones, including, without limitation, providing reasonable access to Commonwealth staff, key stakeholders, permitting agencies and other relevant parties;

- b. provide any relevant information requested by the Wholesaler or its subcontractors;
- c. provide timely feedback on all plans and proposals submitted to the Commonwealth by the Wholesaler;
- d. in the event of termination as provided herein, reimburse the Wholesaler pursuant to 200 Ky. Admin. Reg. 5:312;
- e. in the event that the Wholesaler will not be able to achieve a Milestone in accordance with this Agreement, negotiate in good faith with the Wholesaler as to any required revisions to this Agreement;
- f. participate in weekly conference calls regarding Milestone progress reports; and
- g. as needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with the Wholesaler's representatives at a mutually agreed upon location.

4. Right to Cure

In the event of the occurrence and continuance of a Default by any Party, any other Party may in writing request a thirty (30) day period in which to cure the Default. If the Party is unable to cure the Default within that period, the Default may be considered as a basis to terminate this Agreement.

5. No Third Party Beneficiaries

Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

6. No Joint Venture, Partnership or Alter Ego; Independent Contractor

Nothing contained in this Agreement, any document executed in connection herewith or any other agreement with any other party shall be construed as making the Parties joint partners, joint venturers or alter egos of each other or any other entity. Each of Macquarie, the Wholesaler and Operations Co shall at all times remain independent contractors of the Commonwealth.

7. Notice, Confirmation of Force Majeure Event; Suspension of Performance

Upon giving written notice to the other Party, a Party affected by a Force Majeure Event shall be released without any liability on its part from the performance of its obligations under this Agreement, but only to the extent and only for the period that its performance of such obligations is prevented by a Force Majeure Event. Such notice shall include a description of the nature of the Force Majeure Event, and its cause and possible consequences. The Party claiming a Force Majeure Event shall promptly notify the other Parties of the termination of such event.

The Party invoking the Force Majeure Event shall provide to the other Parties confirmation of the existence of the circumstances constituting a Force Majeure Event. Such evidence may consist of a statement or certificate of an appropriate governmental department or agency where available, or a statement describing in detail the facts claimed to constitute a Force Majeure Event.

During the period that the performance by one of the Parties of its obligations under this Agreement has been suspended by reason of a Force Majeure Event, the other Parties may likewise suspend the performance of all or part of its obligations hereunder to the extent that such suspension is commercially reasonable.

8. Agreement Claims

The Parties acknowledge that KRS 45A.225 to 45A.290 governs contract claims.

9. Limitation of Liability

The liability of the Commonwealth related to contractual damages is set forth in KRS 45A.245.

10. Assignment

This Agreement shall not be assigned in whole or in part without the prior written consent of the non-assigning Parties. Notwithstanding the foregoing, the Commonwealth consents to Macquarie assigning all of their rights and obligations hereunder to the Wholesaler, provided that the Wholesaler remains bound by the terms of this Agreement.

11. Confidentiality of Agreement Terms

The Parties agree that all information communicated between them before the effective date of this Agreement shall be received in strict confidence and shall not be disclosed by the receiving party, its agents, or employees

without prior written consent of the other party. Such material will be kept confidential subject to Commonwealth and Federal public information disclosure laws.

Upon signing of this Agreement by all Parties, the terms of this Agreement become available to the public, pursuant to the provisions of the Kentucky Revised Statutes, subject to any exemptions to disclosure set forth in KRS 61.878, which the Commonwealth agrees to assert.

12. Confidential Information

a. If any Party provides or has provided Confidential Information prominently designated as such to the other Parties, the receiving Parties shall hold such information in confidence and shall afford it the same care and protection that it affords to its own confidential and proprietary information (which in any case shall be not less than reasonable care) to avoid disclosure to or unauthorized use by any third party, except as otherwise provided below. All Confidential Information shall be used by the receiving Parties only for the intended purposes set forth in this Agreement. Except as otherwise required by law, after the receiving Parties' need for Confidential Information has expired, or upon the reasonable request of the disclosing Party, or promptly following the termination or expiration of this Agreement, the receiving Parties shall destroy or return to the disclosing Party all Confidential Information, including all copies of such information, and all notes, summaries, or other writings reflecting Confidential Information. The receiving Parties shall not reproduce Confidential Information, except to the extent reasonably necessary to perform under this Agreement, or as otherwise may be permitted in writing by the disclosing Party.

b. The Wholesaler shall comply with the provisions of the Privacy Act of 1974 and instruct its employees to use the same degree of care as it uses with its own data to keep confidential information concerning client data, the business of the Commonwealth, its financial affairs, its relations with its citizens and its employees, as well as any other information which may be specifically classified as confidential by the Commonwealth in writing to the Wholesaler. All Federal and State Regulations and Statutes related to confidentiality shall be applicable to the Wholesaler. The Wholesaler shall have an appropriate agreement with its employees, and any subcontractor employees, to that effect, provided however, that the foregoing will not apply to:

i. information which the Commonwealth has released in writing from being maintained in confidence;

ii. information which at the time of disclosure is in the public domain by having been printed and published and available to the public in libraries or other public places where such data is usually collected; or

iii. information, which, after disclosure, becomes part of the public domain as defined above, through no act of the Wholesaler.

13. Provisions for Termination of this Agreement

This Agreement shall be subject to the termination provisions set forth in 200 Ky. Admin. Reg. 5:312.

14. Conformance with Commonwealth & Federal Laws/Regulations

This Agreement is subject to the laws of the Commonwealth of Kentucky and where applicable Federal law. Any litigation with respect to this Agreement shall be brought in state court in Franklin County, Kentucky in accordance with KRS 45A.245.

15. Access to Records

Macquarie, the Wholesaler and Operations Co each constitute a "contractor" as defined in KRS 45A.030 (9) and agree that the contracting agency, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this Agreement for the purpose of financial audit or program review. Records and other prequalification information confidentially disclosed as part of the bid process, including, without limitation, items identified as proprietary or confidential, shall not be deemed as directly pertinent to this Agreement and shall be exempt from disclosure as provided in KRS 61.878(1)(c), or any other applicable exemption contained with KRS 61.878. Macquarie, the Wholesaler and Operations Co each also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit or program review shall be subject to the Open Records Act, KRS 61.870 to 61.884, including the exemption from disclosure contained in KRS 61.878, which the Commonwealth agrees to assert.

In the event of a dispute between any of Macquarie, the Wholesaler or Operations Co and the contracting agency, the Attorney General or the Auditor of Public Accounts over documents that are eligible for production and review, the Finance and Administration Cabinet shall review the dispute and issue a determination, in accordance with Secretary's Order 11-004. (See Attachment A).



16. Prohibitions of Certain Conflicts of Interest

In accordance with KRS 45A.340, each Party represents and warrants, and each other Party relies upon such representation and warranty, that, to the best of its knowledge, it has no actual identifiable interest and shall not acquire any actual identifiable interest, which would directly conflict with the performance of its obligations under this Agreement. Each Party further represents and warrants that, in the performance of this Agreement, no person having any such interest shall be employed by such Party. In accordance with KRS 45A.340 and KRS 11A.040 (4), each Party agrees that it shall not knowingly allow any official or employee of the Commonwealth who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Agreement to voluntarily acquire any ownership interest, direct or indirect, in such Party prior to the completion of this Agreement.

17. Term of Agreement

The term of this Agreement shall begin on the date hereof and shall continue until terminated by any Party or upon the execution of the Wholesaler Agreement.

18. Notices

All programmatic communications with regard to day-to-day performance under this Agreement are to be made to the agency technical contact(s) identified below.

Mike Hayden, Director  
Finance and Administration Cabinet  
Room 456  
Capitol Annex  
Frankfort, KY 40601  
502-564-782-2535  
[mike.hayden@ky.gov](mailto:mike.hayden@ky.gov)

All communications of a contractual or legal nature are to be made to the Commonwealth buyer. The Commonwealth reserves the right to change the contacts throughout the life cycle of any agreement awarded as a result of this RFP.

Stephanie R. Williams, CPPO, CPPS, MPA  
Assistant Director  
Finance and Administration Cabinet  
Office of Procurement Services (OPS)  
Division of Technology Services Procurement

(502) 564-8621  
[stephanier.williams@ky.gov](mailto:stephanier.williams@ky.gov)

19. Entire Agreement

This Agreement and the Attachments to this Agreement constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement.

VI. Approvals

This Agreement is subject to the terms and conditions as stated. By executing this Agreement, the Parties verify that they are authorized to bind this Agreement and that they accept the terms of this Agreement.

This Agreement may be executed electronically in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same agreement.

This Agreement is invalid until properly approved and executed by the Finance and Administration Cabinet.

**[signature page follows]**

**1st Party: MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC**

NICK BUTCHER

MANAGER

Printed name

Title

Nick Butcher

8/28/15

Signature

Date

ANDREW ANCONE

MANAGER

Printed name

Title

Andrew Ancone

08/28/15

Signature

Date

**2nd Party: COMMONWEALTH OF KENTUCKY**

Lori Hudson Flanery

Secretary, Finance & Administration Cabinet

Printed name

Title

Lori Hudson Flanery

Signature

\_\_\_\_\_

Date

**Approved by the Finance and Administration Cabinet, Office of Procurement Services**

Donald R. Speer

Executive Director

Printed name

Title

Donald R. Speer

Signature

\_\_\_\_\_

Date

Approved as to form and legality

Heri Grogby

**3rd Party: OPENFIBER KENTUCKY COMPANY, LLC**

Eliot Jamison

Manager

Printed name

Title



Signature

Date

Printed name

Title

Signature

Date

**3rd Party: OPENFIBER KENTUCKY COMPANY, LLC**

Nicholas Hann

Manager

Printed name

Title

*Nicholas Hann*

Signature

Date

Printed name

Title

Signature

Date

**4th Party: KENTUCKYWIRED OPERATIONS COMPANY, LLC**

Eliot Jamison

Manager

Printed name

Title



Signature

Date

Printed name

Title

Signature

Date

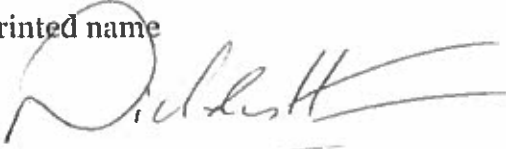
**4th Party: KENTUCKYWIRE OPERATIONS COMPANY, LLC**

Nicholas Hann

Manager

Printed name

Title



Signature

Date

Printed name

Title

Signature

Date



**ATTACHMENT A**

**SECRETARY'S ORDER 11-004**

**FINANCE AND ADMINISTRATION CABINET**

**Vendor Document Disclosure**

WHEREAS, in order to promote accountability and transparency in governmental operations, the Finance and Administration Cabinet believes that a mechanism should be created which would provide for review and assistance to an Executive Branch agency if said agency cannot obtain access to documents that it deems necessary to conduct a review of the records of a private vendor that holds a contract to provide goods and/or services to the Commonwealth; and

WHEREAS, in order to promote accountability and transparency in governmental operations, the Finance and Administration Cabinet believes that a mechanism should be created which would provide for review and assistance to an Executive Branch agency if said agency cannot obtain access to documents that it deems necessary during the course of an audit, investigation or any other inquiry by an Executive Branch agency that involves the review of documents; and

WHEREAS, KRS 42.014 and KRS 12.270 authorizes the Secretary of the Finance and Administration Cabinet to establish the internal organization and assignment of functions which are not established by statute relating to the Finance and Administration Cabinet; further, KRS Chapter 45A.050 and 45A.230 authorizes the Secretary of the Finance and Administration Cabinet to procure, manage and control all supplies and services that are procured by the Commonwealth and to intervene in controversies among vendors and state agencies; and

NOW, THEREFORE, pursuant to the authority vested in me by KRS 42.014, KRS 12.270, KRS 45A.050, and 45A.230, I, Lori H. Flanery, Secretary of the Finance and Administration Cabinet, do hereby order and direct the following:

- I. Upon the request of an Executive Branch agency, the Finance and Administration Cabinet ("FAC") shall formally review any dispute arising where the agency has requested documents from a private vendor that holds a state contract and the vendor has refused access to said documents under a claim that said documents are not directly pertinent or relevant to the agency's inquiry upon which the document request was predicated.
- II. Upon the request of an Executive Branch agency, the FAC shall formally review any situation where the agency has requested documents that the agency deems necessary to conduct audits, investigations or any other formal inquiry where a dispute has arisen as to what documents are necessary to conclude the inquiry.

- III. Upon receipt of a request by a state agency pursuant to Sections I & II, the FAC shall consider the request from the Executive Branch agency and the position of the vendor or party opposing the disclosure of the documents, applying any and all relevant law to the facts and circumstances of the matter in controversy. After FAC's review is complete, FAC shall issue a Determination which sets out FAC's position as to what documents and/or records, if any, should be disclosed to the requesting agency. The Determination shall be issued within 30 days of receipt of the request from the agency. This time period may be extended for good cause.
- IV. If the Determination concludes that documents are being wrongfully withheld by the private vendor or other party opposing the disclosure from the state agency, the private vendor shall immediately comply with the FAC's Determination. Should the private vendor or other party refuse to comply with FAC's Determination, then the FAC, in concert with the requesting agency, shall effectuate any and all options that it possesses to obtain the documents in question, including, but not limited to, jointly initiating an action in the appropriate court for relief.
- V. Any provisions of any prior Order that conflicts with the provisions of this Order shall be deemed null and void.

## ATTACHMENT B

### DEFINITIONS

“Confidential Information” means all commercially sensitive, secret, or otherwise confidential business, financial, marketing, or technical information, and other confidential information belonging to a Party, including, but not limited to, the terms of this Agreement. Confidential Information shall not include information that (a) is or becomes (other than by disclosure by the other Party) publicly known, (b) is furnished by the Party to others without restrictions similar to those imposed by this Agreement, (c) is rightfully in the other Party’s possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement, (d) is obtained from a source other than the Party without the obligation of confidentiality, (e) is disclosed with the written consent of the Party or (f) is independently developed by employees or agents of the other Party who can be shown to have had no access to the Confidential Information. Any reports or other documents or items (including software) that result from the use of the Confidential Information by the other Party shall be treated with respect to confidentiality in the same manner as the Confidential Information.

“Default” shall have the definition set out in 200 Ky. Admin. Reg. 5:312 or shall mean that any Party fails to timely perform any material covenant, condition, agreement, and/or provision contained in this Agreement.

“Force Majeure Event” means, without limitation, the following: acts of God; strikes, lockouts or other industrial disturbances; acts of public enemies and terrorists; orders or restraints of the Federal Government of the United States, or any of their departments, agencies or officials; insurrections; riots; landslides; earthquakes; storms; droughts; floods; explosions; breakage or accidents to transmission pipes or canals; or any other cause or event not reasonably within the control of either party and not due to their respective negligence.

“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 Agreement or the Project.

“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 in the Commonwealth of Kentucky and the United States of America.

“Management Services Agreement” means the management services agreement between Operations Co and the Wholesaler.

“Milestone” means one of the three milestones described in Section II.

“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 Commonwealth.

“Notice” means any written notice required hereunder, which shall be delivered in accordance with this Agreement.

“Open Records Act” means the Kentucky Open Records Act set forth at Kentucky Revised Statute 61.870 et. seq.