

**SCHEDULE 21
MASTER AGREEMENT**

See attached.

ATTACHMENT A
AMENDED AND RESTATED MASTER AGREEMENT
FOR
NEXT GENERATION
KENTUCKY INFORMATION HIGHWAY (NG-KIH) INITIATIVE
CONCESSIONAIRE PARTNER
BETWEEN
THE COMMONWEALTH OF KENTUCKY Finance and Administration
Cabinet
AND
MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC
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New York, New York 10019

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MA 758 1500000563

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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, K-12 education 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" or "Project") to serve the public sector, private interests and Kentucky's citizens;

WHEREAS, the NG-KIH 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 Infrastructure Developments, LLC ("Contractor"), having acknowledged and accepted, as of the date of submission of Contractor's 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, Contractor has extensive experience in the design, implementation, financing and operation of complex public-private telecommunications projects and was awarded the contract;

WHEREAS, this Agreement is an amendment and restatement of that certain Master Agreement for Next Generation Kentucky Information Highway Initiative Concessionaire Partner between the Commonwealth and the Contractor dated December 19, 2014 to reflect, among other amendments, the inclusion of LTS as a contributor to the Work Product, to establish an Interim Milestone availability proposal and to reflect the terms and conditions applicable to certain early works (Phase 1), which will form part of the scope of the Concession Agreement, but will be performed by LTS and OCI (or through a joint venture entity once formed between LTS and OCI or any of their affiliates) (individually or collectively referred to herein as the "DB

Contractors”) in advance of the effective date of the Concession Agreement in order to maintain the anticipated project schedule;

WHEREAS, the Commonwealth and the Contractor have agreed to further amend this Agreement to reflect the terms and conditions applicable to certain further early works (Phase 2), which will form part of the scope of the Concession Agreement, but will be performed by the DB Contractors in advance of the effective date of the Concession Agreement in order to maintain the anticipated project schedule;

WHEREAS, following execution of the Master Agreement executed December 19, 2014, with feedback from placement agents and underwriters, a viable financing plan utilizing tax-exempt and taxable municipal securities was identified as an alternative to the corporate (taxable) financing that had previously been the basis of the Contractor’s financial plan;

WHEREAS, in connection with the adoption of this financial plan, the Commonwealth and the Contractor agree to enter into this Fourth Amended and Restated Master 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 Commonwealth and Contractor (collectively referred to as “Parties”), hereby covenant and agree as follows:

This Amended and Restated Master Agreement (“Agreement”) is entered into, by and between the Commonwealth and Contractor.

The Commonwealth and Contractor agree to the following:

I. Scope of Contract

The purpose of this Agreement is to engage Contractor to explore the feasibility of the finance, design, construction, operation, maintenance, and refreshing of the NG-KIH initiative (the feasibility phase being the “Initial Project” and the ultimate implementation of the NG-KIH under the Concession Agreement being the “Project”) and to exclusively negotiate the Concession Agreement between the Parties governing the Project.

II. Contract Components and Order of Precedence

The Commonwealth’s acceptance of Contractor’s proposal in response to Solicitation RFP 758 1500000003, indicated by the issuance of a Contract Award by the Office of Procurement Services, shall create a valid agreement between the Parties consisting of the following:

- A. procurement statutes, regulations and policies (adopted as regulations or otherwise incorporated therein pursuant to KRS Chapter 13A);
- B. any written agreements between the Parties;

- C. any addenda to Solicitation RFP 758 1500000003;
- D. Solicitation RFP 758 1500000003 and all attachments;
- E. any Best and Final Offer;
- F. any clarifications concerning the Contractor's proposal in response to Solicitation RFP 758 1500000003;
- G. Contractor's proposal, as finally amended and agreed to, in response to Solicitation RFP 758 1500000003.

In the event of any conflict between or among the provisions contained in the foregoing, the order of precedence shall be as enumerated above. With respect to items C, D, E, F and G above, the Solicitation and associated RFP process is complete and there will be no further amendments thereto.

III. Negotiated Items

- 1. Definitions as used herein, capitalized terms shall have the meanings set forth in Attachment C or as further defined in the Agreement.
 - 2. Milestones
- **The Parties agree to work cooperatively and in good faith to achieve three (3) Milestones, as further defined in Attachment D: (1) Guaranteed Maximum Pricing; (2) Interim Milestone; and (3) Financial Close Milestone.**

The indicative timeline for the Milestones is as follows:

- Contractor shall deliver a Guaranteed Maximum Pricing proposal on or before March 28, 2015, or such later date as the Parties agree, acting reasonably. The Commonwealth acknowledges receipt of such proposal on such date;
 - Contractor shall deliver an Interim Milestone availability payment proposal on May 31, 2015, or such later date as the Parties agree, acting reasonably; and
 - The Parties shall seek to achieve the Financial Close Milestone within two (2) months of the Contractor's delivery to the Commonwealth of the Interim Milestone availability payment proposal and the Financial Close Milestone Workplan, or such longer period as the Parties agree, acting reasonably.
- a. The Parties agree to work cooperatively and in good faith to finalize the scope, budget, deliverables and time line, as may be applicable, for each Milestone as described in the "Milestone Workplan." The Milestone Workplans are set forth at Attachment D. However, the

Parties agree to negotiate in good faith as to the final Milestone Workplan for each Milestone.

- b. At or prior to the conclusion of the previous Milestone, Contractor shall submit the Milestone Workplan for the subsequent Milestone, or in the case of the Financial Close Milestone, the Financial Close Milestone deliverables as set forth in Attachment D (the "Deliverables"), to the Commonwealth for approval. Within ten (10) days of the Commonwealth's receipt of the Milestone Workplan or the Deliverables, the Commonwealth must either formally accept or reject the Milestone Workplan or the Deliverables, as applicable. During this ten (10) day review period, the Contractor may, in consultation with the Commonwealth, continue developing plans and taking reasonable and appropriate actions to advance to the next Milestone, however it is under no obligation to do so. If the Commonwealth accepts the Milestone Workplan, then the Commonwealth shall provide Contractor with a notice that it may proceed based on the Milestone Workplan (the "Notice to Proceed"). If the Commonwealth does not formally accept or reject the Milestone Workplan within ten (10) days, then Contractor may, in its sole discretion, either (a) continue to develop the Project and work toward Financial Close or (b) treat inaction as a "Default" subject to cure as set forth in Section III.8. of this Agreement. In the event that Contractor continues to develop the Project in its sole discretion, all provisions of this Agreement continue in full force and effect. In the case of the Deliverables, if the Commonwealth accepts the Deliverables, then the Commonwealth shall provide Contractor with notice that it accepts all Deliverables and request executed versions of all executable Deliverables. If the Commonwealth does not formally accept or reject the Deliverables within ten (10) days, then Contractor may, in its sole discretion, treat inaction as a "Default" subject to cure as set forth in Section III.8. of this Agreement. Should the Commonwealth not formally accept or reject a proposed Milestone Workplan or the Deliverables within ten (10) days of receipt, such Milestone Workplan or Deliverables shall be subject to change, including without limitation the proposed financial close schedule, construction schedule, and any cost proposals. Furthermore, should the Commonwealth accept or not formally reject a proposed Milestone Workplan or the Deliverables within ten (10) days of receipt, the project proposals therein, including the price and schedule proposals, shall supersede prior milestone proposals. The Commonwealth acknowledges that the GMP Milestone was submitted and delivered in compliance with the obligations and requirements set out in this Agreement.
- c. At the conclusion of the GMP Milestone, Contractor shall submit a summary of the conclusions and results of the Milestone ("Working

Assumptions"). The Parties acknowledge that these Working Assumptions are the basis for the subsequent Milestones and commit to apply the Working Assumptions to the subsequent Milestones and the Concession Agreement.

- d. For purposes of workload planning, the Commonwealth shall use good faith efforts to accommodate and adapt to Contractor's proposed Milestone Workplan, within the practical limitations on availability of the Commonwealth's personnel appropriate for performing the types of services in question. Contractor shall accommodate and adapt its proposed Milestone Workplan to the practical limitations on availability of personnel of the Commonwealth.
- e. Upon Completion of each Milestone set forth in the Milestone Workplan in Attachment D, the Commonwealth and Contractor agree to review this Agreement to determine if any amendments or modifications are necessary.
- f. Contractor agrees that the costs of each Milestone shall not exceed the Total Costs as set forth in Attachment D. Provided, however, subsequent Milestone budgets may be amended by mutual agreement of the Parties.

3. Open Book Process

The Parties commit to an Open Book Process for developing the costs and financing terms for the Project. Contractor will share the proposals it receives from third parties and will provide the Commonwealth the opportunity to review, comment on and reasonably approve all Costs. Contractor intends to run competitive best value processes for selection of legal, technical and other advisors and for selection of lenders or other debt providers.

4. Contractor's Obligations

Contractor shall:

- a. use commercially reasonable efforts to achieve each Milestone in accordance with the Milestone Workplan;
- b. design the Initial Project and each Milestone, as applicable, in accordance herewith and all applicable laws, regulations and ordinances;
- c. advance all incurred External Costs and incurred Internal Costs as set forth in the Milestone Workplan;

- d. In the event that Contractor will not be able to achieve a Milestone in accordance with the budget and/or schedule set forth in the Milestone Workplan, provide reasonable notice of not less than seven (7) days to the Commonwealth and negotiate in good faith with the Commonwealth as to a revised budget and/or schedule;
- e. Conduct a weekly conference call to provide the Commonwealth with progress reports regarding the current Milestone;
- f. Ensure that there is sufficient auditing capability to track actions taken by Contractor and its staff; and
- g. As needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with Commonwealth representatives at a mutually agreed upon location.

5. Commonwealth's Obligations

The Commonwealth shall:

- a. Provide Contractor with support as mutually agreed upon and reasonably necessary for Contractor 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 Contractor or its subcontractors;
- c. Provide timely feedback on all plans and proposals submitted to the Commonwealth by Contractor, including without limitation the Milestone Workplan;
- d. In the event of termination as provided herein, reimburse Contractor; pursuant to this Agreement and 200 Ky. Admin. Reg. 5:312.
- e. In the event that Contractor will not be able to achieve a Milestone in accordance with the budget and/or schedule set forth in the Milestone Workplan, negotiate in good faith with the Contractor as to a revised budget and/or schedule;
- f. Participate in weekly conference calls regarding Milestone progress reports;
- g. As needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with Contractor representatives at a mutually agreed upon location;

6. Work Product/Ownership

- a. Upon the earlier of Financial Close or a termination prior to Financial Close, the Commonwealth will assume ownership of all Work Product so that future development of the NG-KIH can be leveraged from the analysis already undertaken, but not for any commercial sale to third parties. "Work Product" refers to all materials presented by Contractor and its subcontractors to the Commonwealth, except for the Models, plans, specifications and related design information created by Fujitsu Network Communications, Inc. and its affiliates (collectively, "FNC"), Overland Contracting, Inc. and its affiliates (collectively "OCI") and LTS Managed Technical Services, LLC and its affiliates (collectively "LTS") (the "FNC Design", "OCI Design" and "LTS Design", respectively). Further, Work Product includes, but is not limited to, all network design and engineering information, contract drafts, reports from third party advisors, cost estimates, and financial models, etc. Contractor shall be granted a non-exclusive license to use such Work Product after the transfer of ownership (subject to any lawful public disclosure requirements). Furthermore, following a termination prior to Financial Close, the Commonwealth shall not be permitted to provide such Work Product to another concessionaire for use in a "Similar Project," subject to the Parties' negotiations. The Commonwealth acknowledges and agrees that in the event that the Commonwealth provides the Work Product to a third party, the Contractor, FNC, OCI and LTS, as applicable, shall not be liable for and the Commonwealth expressly waives any claim for any fees, penalties, claims, obligations, damages, costs, expenses, fines, demands and causes of action arising in connection with or related to the Commonwealth's or such third party's use of the Work Product.
- b. Prior to the earlier of Financial Close or termination, all Work Product, and all copies thereof, shall remain exclusively the property of Contractor and its subcontractors, including FNC, OCI and LTS, as applicable, notwithstanding any delivery of copies thereof to the Commonwealth.
- c. Contractor may prepare one or more financial models in connection with this Agreement and/or the Initial Project ("Models"). The Models may include financial models developed for consideration and potential use by the Contractor, Commonwealth and capital providers and advisers to the Project. The Models are anticipated to show forward estimates of future cash flows and are based on Contractor's best understanding of future outcomes at the current time.

While the Models will be prepared in good faith, unless and until expressly included within the Concession Agreement, neither Contractor nor any of its affiliates, nor their respective directors, officers, employees, advisors or agents, nor any other person, have made, or are making, any representation or warranty as to the completeness, accuracy, reliability or appropriateness of the Models or any of their respective contents or outputs, and no legal or other commitments or obligations shall arise by reason of the provision of the Models or their respective contents, or any outputs derived. The information contained in the Models will not be independently verified by Contractor. Accordingly, neither Contractor nor any of its affiliates, nor their respective directors, officers, employees, advisors or agents, nor any other person, shall be liable for any direct, indirect or consequential loss suffered by any person as a result of relying on any statement in or omission from the Models or any other information provided in connection therewith.

- d. Notwithstanding any other provision in this Agreement, Contractor, FNC, OCI and LTS, respectively, will retain all of their respective intellectual property rights in relation to the Models and the underlying technology and engineering specifications set forth in the FNC Design, OCI Design and LTS Design, as applicable, including patent, trademark, copyright and rights to confidential information, but excluding any agency or other third party intellectual property rights. However, Contractor and any of its subcontractors, as applicable, will grant the Commonwealth a royalty-free, perpetual, irrevocable license to use the Models, and such technology. As set forth in the Solicitation, Contractor, FNC, OCI, LTS and any other subcontractors agree to maintain an archival copy in data store of any software or other intellectual property, as applicable, that shall be available to the Commonwealth in the event the Contractor, FNC, OCI, LTS or any other subcontractors are unable to continue the business for financial or other business reasons.
- e. The Commonwealth may insert other variables or assumptions to consider alternative scenarios or outcomes. However, Contractor will not be responsible for failure of a Model or for output errors resulting from incorrect or inappropriate inputs by Commonwealth. Notwithstanding the foregoing, the Commonwealth may not use, reproduce or adapt any Model other than in relation to the Initial Project, including all expansions thereto, without Contractor's prior written consent. In addition, data, outcomes and estimates and forecasts contained in or derived from Models shall only be disseminated beyond the Commonwealth's directors, officers, employees and advisors of the Initial Project in accordance with a joint and collaborative plan derived by the mutual cooperation of

the parties. Contractor does not represent that estimates or forecasts derived from any Model will actually be achieved or that the assumptions, variables and other inputs used in any Model are reasonable, reliable or accurate.

- f. The Models may contain forward-looking statements, forecasts, estimates, projections and opinions ("Forward Statements"). No representation is made or will be made that any Forward Statements will be achieved or will prove correct. Actual future results and operations could vary materially from the Forward Statements. Similarly no representation is given that the assumptions disclosed in the Models upon which Forward Statements may be based are reasonable. The Commonwealth acknowledges that circumstances may change and the contents of the Models may become outdated as a result.
- g. In further consideration of Contractor allowing the Commonwealth access to the Models and the information contained therein, the Commonwealth agrees that the Commonwealth will make no claim against Contractor, its partners (including LTS, OCI and FNC), employees or affiliates, that relates in any way to any Model, any information contained therein, or the Commonwealth' access to any Model.
- h. The Commonwealth shall not disclose records identified and prominently marked as such by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto, in response to a request made pursuant to the Open Records Act as such records are exempt under KRS 61.878(1)(c). The Commonwealth shall assert such exemption in response to any request for disclosure of the records identified by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto. Furthermore, the Commonwealth shall give Contractor reasonable notice of any such record request and give the Contractor the right to defend its information against disclosure. The Commonwealth and Contractor shall cooperate with each other and participate if requested by the other in any appeal based upon an exemption contained within KRS 68.878(1)(c).

7. **Web-Based Data Site**

A secure web-based data site will be used as an electronic repository of the Work Product and Models, and will be available to approved transaction participants, including anyone the Commonwealth reasonably approves to receive any portion of the Work Product and Models for use in connection with the Project. This will be the means by which all Work Product and Models will be transmitted and made available to the Commonwealth. All

Work Product and Models will be made available in real-time subject to reasonable practicalities. The web-based data site shall be constructed, administered and hosted by Contractor.

The Commonwealth shall not disclose records identified by Contractor and prominently marked as such by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto, in response to a request made pursuant to the Open Records Act as such records are exempt under KRS 61.878(1)(c). The Commonwealth shall assert such exemption in response to any request for disclosure of the records identified by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto. Furthermore, the Commonwealth shall give Contractor reasonable notice of any such record request and give the Contractor the right to defend its information against disclosure. The Commonwealth and the Contractor shall cooperate with each other and participate if requested by the other Party in any appeal based upon an exemption contained within KRS 68.878(1)(c).

8. *Right to Cure*

In the event of the occurrence and continuance of a Default by either Party, the Commonwealth or Contractor, as applicable, 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 as set forth in Section III.26.

9. *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.

10. *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. Contractor shall at all times remain an independent contractor of Commonwealth.

11. *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 party of the termination of such event.

The Party invoking the Force Majeure Event shall provide to the other Party 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 Party may likewise suspend the performance of all or part of its obligations hereunder to the extent that such suspension is commercially reasonable.

12. Letter of Credit

Upon Financial Close, with regards to Contractor's performance, Contractor will provide a letter of credit with commercially reasonable terms ("Letter of Credit") or at the option of the Contractor an alternative security package, in form and substance reasonably acceptable to the Commonwealth. The alternative security package shall also provide that the Commonwealth is a co-obligee in addition to the lenders provided therein.

- a. From Financial Close until completion of the Project, the Contractor shall provide the alternative security package referenced in III.12, for at a minimum, an amount equal to \$10,000,000.00.
- b. The Letter of Credit shall be in the form of an irrevocable letter of credit from an approved bank, as may amended in the Concession Agreement, and must be presentable for payment in New York City. The Letter of Credit shall only be transferable in its entirety (but not in part) to the lenders, the collateral agent or agencies of the Commonwealth. The Commonwealth shall only provide a Transfer Letter of Credit to the issuing bank for transfers to agencies of the Commonwealth, the collateral agent or lenders, as may be modified in the Concession Agreement.
- c. The Letter of Credit (or a replacement letter of credit provided prior to the expiration or termination of the Letter of Credit)

shall be in full force and effect from the date provided to Commonwealth until the applicable date referenced in Section III. The Commonwealth, or the subsequent beneficiary, shall provide a Reduction Notice to the issuing bank of the Letter of Credit, with a copy to Contractor, in the commercial customary form within two business days of the Substantial Completion Date and the Final Acceptance Date, respectively, adjusting the amount of the Letter of Credit as provided in Section III.

- d. The Letter of Credit may be drawn upon by Commonwealth, or subsequent beneficiary, in Dollars in the United States of America from time to time (a) to the extent amounts are due and owing under the Concession Agreement from Contractor to the Commonwealth under Section III as may be amended in the Concession Agreement, (b) at any time when there are fewer than thirty (30) days remaining prior to the expiration of such Letter of Credit and the expiring letter of credit has not been replaced by a new letter of credit to be effective no later than such expiration; provided that a letter of credit is still required to be in place under this Section, as may be amended in the Concession Agreement, (c) at any time when the credit rating of the institution providing the Letter of Credit has been downgraded (or withdrawn) such that it no longer qualifies as an approved bank, and Contractor has not replaced such Letter of Credit with a new letter of credit from an approved bank within 15 business days after the date of the relevant downgrade or (d) at any time, if a Contractor Default has occurred and is continuing.
- e. Contractor's sole remedy in connection with an improper draw on the Letter of Credit shall be to obtain from the Commonwealth, or subsequent beneficiary, a refund of the proceeds of such improper draw and the reasonable costs Contractor incurs as a result of such improper draw; provided that at the time of such refund Contractor increases the amount of the Letter of Credit to the amount then required under applicable provisions of the Concession Agreement. Contractor acknowledges that an improper draw on the Letter of Credit could not under any circumstances cause Contractor injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Contractor covenants (a) not to request or instruct the issuer of the Letter of Credit to refrain from paying any legitimate sight draft presented with respect to the Letter of Credit and (b) not to commence or pursue any legal proceeding seeking, and Contractor irrevocably waives and relinquishes

any right, to enjoin, restrain, prevent, stop or delay any legitimate draw on the Letter of Credit.

- f. To the extent the Commonwealth, or subsequent beneficiary, draws on the Letter of Credit under the circumstances set forth in Section III. and the basis for such draw is subsequently cured, The Commonwealth, or subsequent beneficiary, shall return to Contractor the funds so drawn (to the extent not applied as part of such cure) and the Letter of Credit will be restored for the full amount of such draw prior to the return of such funds, if such Letter of Credit was not already replaced as part of the cure.

13. Agreement Claims

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

14. Limitation of Liability

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

15. Changes and Modifications to the Agreement

Pursuant to KRS 45A.210 (1) and 200 KAR 5:311, no modification or change of any provision in this Contract shall be made, or construed to have been made, unless such modification is mutually agreed to in writing by the Contractor and the Commonwealth, and incorporated as a written amendment to this Contract and processed through the Office of Procurement Services and approved by the Finance and Administration Cabinet prior to the effective date of such modification or change pursuant to KRS 45A.210(1) and 200 KAR 5:311. Memoranda of understanding, written clarifications, and/or correspondence shall not be construed as amendments to this Agreement. The Parties shall establish a detailed change order process prior to Financial Close to accommodate any required changes to the Project, and such change order process shall also be part of the Concession Agreement.

If the Contractor finds at any time that existing conditions make modification of this Agreement necessary, it shall promptly report such matters to the Commonwealth for consideration and decision.

16. Changes in Scope

The Commonwealth may, at any time by written order, make changes within the general scope of this Agreement. No changes in scope are to be conducted except with the approval of the Commonwealth.

Notwithstanding the foregoing, Contractor shall not be bound by any unilateral material changes in scope, and any change in scope, unilateral or agreed upon, must provide for additional compensation to the Contractor, in form and substance, as mutually agreed to by the Parties in writing.

17. Assignment

This Agreement shall not be assigned in whole or in part without the prior written consent of the non-assigning Party. Notwithstanding the foregoing, the Commonwealth consents to Contractor assigning its rights and obligations hereunder to an appropriate Affiliate or a special purpose entity to carry out the terms of this Agreement, provided that the Contractor requires the Affiliate to be bound by the terms of this Agreement pursuant to a written agreement.. In the event of the Affiliate transferee's insolvency, involuntary or voluntary bankruptcy, dissolution or the termination of this Agreement for Contractor's failure to perform, the Commonwealth may step in and assume responsibility for, and control of, the Project, subject to coordination with secured lenders in connection with the exercise of remedies upon default. The Parties will develop detailed default and termination provisions with respect to the foregoing sentence in the Concession Agreement.

18. Payment

The Commonwealth will make payment within thirty (30) working days of receipt of Contractor's invoice or of acceptance of goods and/or services in accordance with KRS 45.453 and KRS 45.454.

Payments are predicated upon successful completion and acceptance of the described work, services, supplies, or commodities, and delivery of the required documentation. Invoices for payment shall be submitted to the Commonwealth's designated representative.

19. Contractor Cooperation in Related Efforts

The Commonwealth may undertake or award other contracts for additional or related work, services, supplies, or commodities, and the Contractor shall fully cooperate with such other contractors and Commonwealth employees. The Contractor shall not commit or permit any act that will materially interfere with the performance of work by any other contractor or by Commonwealth employees. The Commonwealth shall ensure that such other contractor or its employees will not commit or permit any act that will materially interfere with Contractor's work performance.

20. Contractor Affiliation

"Affiliate" shall mean an entity that controls or is under common control with Contractor together with any fund or investment vehicle managed or advised by any such entity, or a fund or investment vehicle which has delegated to any such entity responsibility for the management of its interest in the Project. If any Affiliate directly involved in the Project shall take any action related to this Agreement that, if done by the Contractor, would constitute a material breach of this Agreement and would also materially impair Contractor's or the Commonwealth's ability to perform the Agreement, the same shall be deemed a breach by Contractor. Actions by Affiliates that do not relate to or adversely impact the Parties' rights and obligations under this Agreement shall not be considered breaches.

21. Commonwealth Property

The Contractor shall be responsible for the proper custody and care of any Commonwealth-owned property furnished for Contractor's use in connections with the performance of this Agreement. The Contractor shall reimburse the Commonwealth for its actual loss or damage, normal wear and tear excepted.

22. Confidentiality of Agreement Terms

The Contractor and the Commonwealth 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, 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

The Contractor shall have an appropriate agreement with its subcontractors extending these confidentiality requirements to all subcontractors' employees.

23. Confidential Information

a. If either Party provides or has provided Confidential Information prominently designated as such to the other Party, the receiving Party 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 Party only for the intended purposes set forth in this

Agreement. Except as otherwise required by law, after the receiving Party's 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 Party 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 Party 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. Contractor 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 Contractor. All Federal and State Regulations and Statutes related to confidentiality shall be applicable to the Contractor. The Contractor 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 or 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 Contractor.

24. Permits, Licenses, Taxes and Commonwealth Registration

The Contractor shall procure all necessary permits and licenses and abide by all applicable laws, regulations, and ordinances of all Federal, State, and local governments in which work under this Agreement is performed.

The Contractor shall maintain certification of authority to conduct business in the Commonwealth of Kentucky during the term of this Agreement. Such registration is obtained from the Secretary of State, who will also provide the certification thereof. Additional local registration or license may be required.

The Contractor shall pay any sales, use, and personal property taxes arising out of this Agreement and the transaction contemplated hereby. Any other taxes levied upon this Agreement, the transaction, or the

equipment or services delivered pursuant hereto shall be borne by the Contractor, or as otherwise mutually agreed to in the Concession Agreement.

25. Provisions for Termination of the Contract

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

26. Reimbursement of Costs

In the event of a termination that does not arise from a material default solely by Contractor, in accordance with 200 Ky. Admin. Reg. 5:312 the Contractor may request reimbursement of its costs. Provided, however, the costs Contractor may recover shall not exceed the Total Costs set forth in Exhibit A. The Parties agree to establish a cost process to be utilized during each Milestone to permit the Parties to monitor the costs incurred.

27. Bankruptcy

In the event the Contractor becomes the subject debtor in a case pending under the Federal Bankruptcy Code, the Commonwealth's right to terminate this Agreement may be subject to the rights of a trustee in bankruptcy to assume or assign this Agreement. The trustee shall not have the right to assume or assign this Agreement unless the trustee (a) promptly cures all defaults under this Agreement; (b) promptly compensates the Commonwealth for the monetary damages incurred as a result of such default, and (c) provides adequate assurance of future performance, as determined by the Commonwealth.

28. Conformance with Commonwealth & Federal Laws/Regulations

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

29. Access to Records

Contractor constitutes a "contractor," as defined in KRS 45A.030 (9) and agrees 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, including

without limitation the Models, Work Product, trade secrets, any information related to the web-based secure data site and all other Confidential Information, 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. The contractor 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 Contractor 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 B).

30. Prohibitions of Certain Conflicts of Interest

In accordance with KRS 45A.340, the Parties mutually represent and warrant, and each of the Parties rely upon such representation and warranty, that to the best of their respective knowledge neither party presently has any actual identifiable interest and shall not acquire any actual identifiable interest, which would directly conflict with the performance of their respective obligations under this Agreement.

The Parties further mutually represent and warrant that in the performance of the Agreement, no person having any such interest shall be employed by either party. In accordance with KRS 45A.340 and KRS 11A.040 (4), the Parties both agree that they 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 this Agreement prior to the completion of this Agreement.

31. Intentionally Left Blank

32. Agencies to Be Served

This Agreement shall be for use by all Agencies of the Commonwealth of Kentucky as defined in 45A.605.

33. Extending the Contract Use to Other Agencies

The Commonwealth reserves the right, with the consent of the Contractor, to offer this Agreement to other state agencies and stakeholders.

34. Term of Agreement

The term of this Agreement shall begin on December 19, 2014, and at Financial Close shall continue upon completion of the Concession Agreement for a period of thirty (30) years.

Notwithstanding the foregoing, if the Commonwealth fails to approve any Milestone Work Plan as envisioned in Section III.2.c., or fails to consummate Financial Close on agreed upon terms, Contractor may terminate this Agreement, subject to Section III.8., and seek reimbursement for Costs in accordance with Section III.27.

Upon final termination of the Concession Agreement, Contractor shall provide all relevant data in a form that can be practically converted to any subsequent system of the Commonwealth's reasonable choice in accordance with the Concession Agreement. The Commonwealth and Contractor will cooperate to this end with any subsequent vendor of the Commonwealth's choice, in a timely and efficient manner.

35. 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

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

36. Subcontractors

Contractor is permitted to make subcontract(s) with any other party for furnishing any of the work or services herein. Contractor shall be solely responsible for performance of the entire Agreement whether or not subcontractors are used. The Commonwealth shall not be involved in the relationship between Contractor and any subcontractor. Any issues that arise as a result of this relationship shall be resolved by Contractor. All references to the Contractor shall be construed to encompass both the Contractor and any subcontractors of the Contractor.

37. Reporting Requirements

In conjunction with and in addition to all specific reports and notices required in the Agreement, the Contractor shall be required to provide the following reporting to the Commonwealth:

- a. Weekly progress reports regarding the current Milestone, including but not limited to, a report of any material events, developments or circumstances arising in relation to issues identified by the Commonwealth, including but not limited to, the Project schedule and budget, since the last weekly report;
- b. On a frequency to be reasonably determined by the Commonwealth, provide reports detailing the fulfillment of all contractual obligations to include, but not be limited to, acquisition of required insurances, mandated licenses and permits, executed financial documentation, and audited financial model;
- c. On a frequency to be reasonably determined by the Commonwealth, provide compliance reports itemizing safeguards in place to ensure adherence to the NIST Special Publication 800-53 Security Control Framework;
- d. Such other periodic reports as the Commonwealth may from time to time reasonably require; and
- e. Throughout each Milestone, a response delivered in a timely manner to any inquiry reasonably made by the Commonwealth in relation to any aspect of the relevant business of the Contractor, the Project, the O&M, or this Agreement.

Provided that, to the extent that such reporting includes sensitive data, as defined by the enterprise standards, it must be delivered to the Commonwealth in a confidential manner. All electronic transmissions of sensitive data must, at a minimum, comply with the Commonwealth Office of Technology Enterprise Standard 5100 documented at [https://Qotsource.kv.Qov/docushare/dsweb/Get/Document-30111 o/](https://Qotsource.kv.Qov/docushare/dsweb/Get/Document-30111%20/).

The Parties agree that this is not an extensive list of reporting requirements governing the entire Agreement. The Parties agree further that future reporting requirements will be addressed by the Commonwealth and Contractor as the need arises based on the Milestone objectives agreed to by both Parties. Specific metrics and deliverables requisite to achieve the corresponding reporting will be implemented at that time.

IV. PHASE 1 EARLY WORKS

1. Phase 1 Early Works

The Commonwealth hereby authorizes the Contractor to engage the DB Contractors to proceed with the Phase 1 Early Works in an amount not to exceed the Phase 1 Early Works Price and in accordance with the other terms and conditions set out in this Section IV. The scope of the Phase 1 Early Works will not be modified without the agreement in writing of the Commonwealth and the Contractor. The Commonwealth acknowledges that the DB Contractors may subcontract certain aspects of the Phase 1 Early Works.

2. Phase 1 Early Works Term

The Phase 1 Early Works will be performed from June 15, 2015, to July 15, 2015 (the "Phase 1 Early Works Term").

3. Applicable Terms

Notwithstanding any provision to the contrary, the Commonwealth and the Contractor acknowledge and agree that only the following Sections in this Agreement will be applicable to the Phase 1 Early Works: Section III.5(d), III.6(h), III.8 (excluding a payment breach), III.9-11, III.13, III.15 (excluding the last sentence of the first paragraph), III.16, III.17, III.18, III.19, III.21, III.22-25, III.26, III.27, III.28, III.29, III.30, III.35, III.36, Section V, Section VI and Schedule C [Definitions] to the extent that capitalized terms used in this Section IV are not otherwise defined in this Section IV.

4. Access

The Commonwealth hereby permits the Contractor to provide the DB Contractors a non-exclusive license to access any of the lands that the Commonwealth owns or controls, including any right-of-ways, in order to complete any of the Phase 1 Early Works.

5. Representation by the Commonwealth

The Commonwealth represents and warrants to the Contractor that as of the date of this Agreement the Commonwealth has the power, capacity and authority to

enter into this Agreement and to observe and perform all the covenants, agreements, terms and conditions to be observed and performed by the Commonwealth in accordance with the terms of this Agreement.

6. Termination

Upon the occurrence of Financial Close:

- a. This Section IV of the Agreement will be deemed to be terminated and of no force and effect; and
- b. all Early Works undertaken under this Agreement in advance of Financial Close will be deemed to have been undertaken by or on behalf of the Concessionaire pursuant to the Concession Agreement.

7. Termination of the Project

If for any reason prior to Financial Close the Commonwealth gives written notice to the Contractor that Financial Close will not be achieved, or Financial Close has not occurred by September 10, 2015, or that either the Commonwealth or the Contractor is terminating its efforts to achieve Financial Close, then upon such notice this Section IV will be deemed to be terminated and of no force and effect (except for payment obligations arising out of such termination) and the Contractor will immediately, in consultation with the Commonwealth, take all reasonable steps to ensure that the DB Contractors wind up all outstanding Phase 1 Early Works at minimum cost.

8. The Commonwealth's Discretion to Terminate all or a portion of the Phase 1 Early Works

At any time prior to Financial Close, and for any reason, the Commonwealth may direct the Contractor, upon five (5) days' written notice, to cease the undertaking of some or all of the Phase 1 Early Works, in which event the Contractor will immediately, in consultation with the Commonwealth, take all reasonable steps to wind up such Early Works at minimum cost.

9. Ownership of Phase 1 Early Works After Termination

If the Phase 1 Early Works are terminated for any reason prior to Financial Close, then the Commonwealth will be entitled to the full benefit of any Phase 1 Early Works for which the Commonwealth has made payment pursuant to this Agreement, including:

- a. any design drawings, calculations, survey mapping, and other design and routing information; and

- b. any contractual rights for the procurement of fiber and/or cable (collectively, the “Early Works Product”)

and in that event the Contractor will use reasonable efforts to obtain from the DB Contractor a formal assignment, transfer or other documentation, if applicable, or take other steps as the Commonwealth may reasonably request in order for the Commonwealth to obtain and receive such benefit. The transfer and delivery of the Early Works Product shall be on an ‘as is where is basis’ and the Contractor will prepare the Early Works Product in good faith based on the information that is available to the Contractor at the time the Early Works Product is prepared.

10. Limitation of Liability

Notwithstanding any provision to the contrary in this Section IV or any other applicable provision in this Agreement, and specifically in relation to the Phase 1 Early Works, the Commonwealth will only be required to pay the Phase 1 Early Works Price and those other applicable payments on termination set out in Section IV paragraph 12 of this Agreement to the Contractor. For clarity, such amounts will not exceed the Phase 1 Early Works Price and the Demobilization Threshold but will be in addition to the Total Costs set forth in Exhibit A. If the Phase 1 Early Works are terminated for any reason prior to Financial Close, the Contractor’s liability will be limited to the Phase 1 Early Works Price.

11. Payment – Termination by Financial Close

If the Phase 1 Early Works are terminated upon reaching Financial Close as provided by paragraph 6 of this Section IV, then no payment will be required under this Agreement, and the payment obligations under the Concession Agreement shall apply.

12. Payment – Termination other than by Financial Close

If the Phase 1 Early Works are terminated other than due to the occurrence of Financial Close, the Commonwealth will pay to the Contractor (and the Contractor will immediately pay to the DB Contractors) an amount calculated based on the portion of the Phase 1 Early Works Price attributable to the portion of the Phase 1 Early Works that has been completed plus a reasonable amount for demobilization costs and termination costs to subcontractors, the amount of such demobilization costs and termination costs not to exceed 7.5% of the Phase 1 Early Works Price (the “Demobilization Threshold”).

The Contractor will pass through the itemized invoice that it receives from the DB Contractor to the Commonwealth for the amount payable under this paragraph 12 (if any), and provide reasonable supporting documentation for the Commonwealth to consider pursuant to 200 KAR 5:312. The Commonwealth will approve and pay the Contractor (and the Contractor will immediately pay the DB Contractor) within 30 days after receipt of the invoice. The Commonwealth

acknowledges that if a portion of the invoice provided by the Contractor is in dispute, the Commonwealth will approve and pay the undisputed portion of the invoice within the 30 days. Notwithstanding any provision to the contrary in this Section IV or any other applicable provision in this Agreement, and specifically in relation to the Phase 1 Early Works, this paragraph 12 will apply in the event of termination for any reason of this Agreement prior to Financial Close.

The Commonwealth acknowledges and agrees that if Phase 1 Early Works is terminated early subject to this paragraph 12 or some or all of the scope of the Phase 1 Early Works cease in accordance with Section IV paragraph 8, then schedule and costs associated with any of the Milestones or proposals as set forth in this Agreement may be subject to change, subject to the Commonwealth's approval of such changes, not to be unreasonably withheld, and subject to such changes being as a direct result of changes to or termination of the Phase 1 Early Works. Should the Commonwealth not approve proposed changes to schedule and costs contemplated in this paragraph 12, and prepared by the Contractor acting reasonably, then paragraph 7 of this Section IV shall apply. In the event that the Commonwealth intends to terminate the Phase 1 Early Works pursuant to this paragraph 12 or cease some or all of the Phase 1 Early Works in accordance with Section IV paragraph 8, it shall provide notice to the Contractor. Within three (3) Business Days of receipt of such notice from the Commonwealth, the Contractor will provide the Commonwealth with an estimate of the impact on the schedule and costs associated with the termination of the Phase 1 Early Works pursuant to this paragraph 12 or cease some or all of the Phase 1 Early Works in accordance with Section IV paragraph 8.

13. Monthly Payment Certificates

Each of the DB Contractors will, within 10 days after the end of each month, provide the Commonwealth a statement of the Phase 1 Early Works completed for that month and the relevant amount that would be payable under paragraph 12 of this Section IV in respect of such Phase 1 Early Works, calculated based on the portion of the Phase 1 Early Works Price attributable to the portion of the Phase 1 Early Works that has been completed. For greater certainty, this paragraph 13 does not require payment by the Commonwealth.

V. Phase 2 Early Works

1. Phase 2 Early Works

The Commonwealth hereby authorizes the Contractor to engage the DB Contractors to proceed with the Phase 2 Early Works in an amount not to exceed the Phase 2 Early Works Price and in accordance with the other terms and conditions set out in this Section V. The Phase 2 Early Works will be performed in accordance with the requirements set out in Attachment H [Design and Construction Protocols]. The scope of the Phase 2 Early Works will not be modified without the agreement in writing of the Commonwealth and the

Contractor. The Commonwealth acknowledges that the DB Contractors may subcontract certain aspects of the Phase 2 Early Works. The Commonwealth further acknowledges that a component of the Phase 2 Early Works is the pole make-ready applications which will require the Commonwealth to enter into various pole attachment agreements in order to further the make-ready construction required that is also part of the Phase 2 Early Works. The Commonwealth agrees to execute any pole attachment agreement that the Contractor provides to the Commonwealth within 3 Business Days of receiving such agreements.

2. Phase 2 Early Works Term

The Phase 2 Early Works will be performed from July 16, 2015 to September 3, 2015 (the "Phase 2 Early Works Term").

3. Applicable Terms

Notwithstanding any provision to the contrary, the Commonwealth and the Contractor acknowledge and agree that Section IV.3 (and specifically only those sections referenced therein), IV.4, IV.6, IV.7 (and the reference to Section IV therein will also be a reference to this Section V), IV.8, IV.9, and IV.11 will be applicable to Phase 2 Early Works. References in such sections to Phase 1 Early Works will also be read to include Phase 2 Early Works.

4. Access

The Commonwealth hereby permits the Contractor to provide the DB Contractors a non-exclusive license to access any of the lands that the Commonwealth owns or controls, including any right-of-ways, in order to complete any of the Phase 2 Early Works.

5. Limitation of Liability

Notwithstanding any provision to the contrary in this Section V or any other applicable provision in this Agreement, and specifically in relation to the Phase 2 Early Works, the Commonwealth will only be required to pay the Phase 2 Early Works Price and those other applicable payments on termination set out in Section V, paragraph 6 of this Agreement to the Contractor. For clarity, such amounts will not exceed the Phase 2 Early Works Price and the Demobilization Phase 2 Threshold but will be in addition to the Total Costs set forth in Exhibit A.

If the Phase 2 Early Works are terminated for any reason prior to Financial Close, the Contractor's liability will be limited to Phase 2 Early Works Price.

Neither party will be liable to the 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 in relation to the Phase 2 Early Works.

6. Payment – Termination other than Financial Close

If the Phase 2 Early Works are terminated other than due to the occurrence of Financial Close, the Commonwealth will pay to the Contractor, into a client account specified by the Contractor, (and the Contractor will immediately pay to the DB Contractors) an amount calculated based on the portion of the Phase 2 Early Works Price attributable to the portion of the Phase 2 Early Works that has been completed plus a reasonable amount for demobilization costs and termination costs to subcontractors, the amount of such demobilization costs and termination costs not to exceed 7.5% of the Phase 2 Early Works Price (the “Demobilization Phase 2 Threshold”).

The Contractor will pass through the itemized invoice that it receives from the DB Contractor to the Commonwealth for the amount payable under this paragraph 5 (if any), and provide reasonable supporting documentation for the Commonwealth to consider pursuant to 200 KAR 5:312. The Commonwealth will approve and pay the Contractor (and the Contractor will immediately pay the DB Contractor) within 30 days after receipt of the invoice. The Commonwealth acknowledges that if a portion of the invoice provided by the Contractor is in dispute, the Commonwealth will approve and pay the undisputed portion of the invoice within the 30 days. Notwithstanding any provision to the contrary in this Section V or any other applicable provision in this Agreement, and specifically in relation to the Phase 2 Early Works, this paragraph 6 will apply in the event of termination for any reason of this Agreement prior to Financial Close.

The Commonwealth acknowledges and agrees that if Phase 2 Early Works is terminated early subject to this paragraph 6 or some or all of the scope of the Phase 2 Early Works cease in accordance with Section IV paragraph 8, then schedule and costs associated with any of the Milestones or proposals as set forth in this Agreement may be subject to change, subject to the Commonwealth’s approval of such changes, not to be unreasonably withheld, and subject to such changes being as a direct result of changes to or termination of the Phase 2 Early Works. Should the Commonwealth not approve proposed changes to schedule and costs contemplated in this paragraph 6, and prepared by the Contractor acting reasonably, then paragraph 7 of Section IV shall apply. In the event that the Commonwealth intends to terminate the Phase 2 Early Works pursuant to this paragraph 6 or cease some or all of the Phase 2 Early Works in accordance with Section IV paragraph 8, it shall provide notice to the Contractor. Within three (3) Business Days of receipt of such notice from the Commonwealth, the Contractor will provide the Commonwealth with an estimate of the impact on the schedule and costs associated with the termination of the Phase 2 Early Works pursuant to this paragraph 6 or cease some or all of the Phase 2 Early Works in accordance with Section IV paragraph 8.

7. Monthly Payment Certificates

Each of the DB Contractors will, within 10 days after the end of each month, provide the Commonwealth a statement of the Phase 2 Early Works completed for that month and the relevant amount that would be payable under paragraph 7 of this Section V in respect of such Phase 2 Early Works, calculated based on the portion of the Phase 2 Early Works Price attributable to the portion of the Phase 2 Early Works that has been completed. For greater certainty, this paragraph 7 does not require payment by the Commonwealth.

8. Insurance

The Contractor will require the DB Contractors to place the insurance coverage described in Attachment G [Insurance] in the amounts and on the terms stated in Attachment G and for the Phase 2 Early Works Term.

VI. Relationship of the Parties

The Contractor agrees to cooperate and support the Commonwealth's efforts to procure financing for the Project. The Commonwealth acknowledges and agrees that (i) any discussions, communications, conferences, negotiations and undertakings by the Contractor in connection with the financing of the Project will be effected and negotiated in an arm's length commercial transaction between the Commonwealth, Project Co and the Contractor, (ii) in connection with any offer or sale of municipal securities to finance the Project and with the process leading to such transaction, the Contractor is acting solely as a principal and is not the agent or fiduciary of the Commonwealth or Project Co., and (iii) the Commonwealth has its own and legal and financial advisors. The Contractor intends to be a purchaser of a portion of the bonds and has financial and other interests that differ from those of the Commonwealth and Project Co. It is expressly understood and agreed between the Commonwealth and the Contractor that the Contractor is not acting as an underwriter or selling agent for the Commonwealth or Project Co in connection with any issuance or sale of municipal securities.

VII. Entire Agreement

This Agreement and the attached Exhibits 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.

VII. 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.

1st Party: MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC, as Contracting Agent ("Contractor ")

Nick Butcher
Printed name

Manager
Title



September 1, 2015

Signature

Date

Andrew Ancone
Printed name

Manager
Title



September 1, 2015

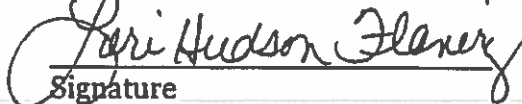
Signature

Date

2nd Party: COMMONWEALTH OF KENTUCKY, FINANCE AND ADMINISTRATION CABINET ("Commonwealth")

Lori Hudson Flanery
Printed name

Secretary, Finance Cabinet
Title



September 2, 2015
Date

Signature

Date

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

Donald R. Speer

Printed name

Donald R. Speer

Signature

Executive Director

Title

9/2/15

Date

Approved as to form and legality

Geni Gingsby

ATTACHMENT B

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 C DEFINITIONS

"Business Day" means any day that is not a weekend or a holiday in the Commonwealth of Kentucky.

"Completion" means the completion of a Milestone in accordance with the respective scope and deliverables for each Milestone outlined in this Agreement.

"Concessionaire" means the entity, other than the Commonwealth, that enters into the Concession Agreement.

"Concession Agreement" means the long-term agreement between the Commonwealth and the Contractor pursuant to which the Commonwealth procures the Contractor's services to design, build, finance, operate and maintain the state-wide fiber-optic middle-mile network to be called the Next Generation Kentucky Information Highway.

"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.

"Costs" shall mean the sum of External Costs and Internal Costs.

"Customary Industry Practice" means using standards, practices, methods and procedures to a good commercial standard, conforming to Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a qualified, skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances.

"DB Contractors" has the meaning set out in the recitals of this Agreement.

"Demobilization Threshold: has the meaning set out in Section IV paragraph 12 of this Agreement.

"Default" shall (i) have the same definition as in 200 Ky. Admin. Reg. 5:312 or (ii) either Party fails to timely perform any material covenant, condition, agreement, and/or provision contained in this Agreement, subject to Section III.26 of this Agreement.

"Deficiency" means any defect or fault, including omission, in the NG-KIH System which is the result of a failure by Project Co to comply with the Design and/or Construction obligations under this Agreement.

"Design" means everything required for the design of the NG-KIH System in connection with the Phase 1 Early Works and the Phase 2 Early Works.

"External Costs" are costs incurred by the Contractor relating to discrete workstreams undertaken by third party consultants, as well as the Contractor's and its subcontractors' out of pocket expenses, as required by the Milestone Workplan to achieve each Milestone, and as set forth in such Milestone's pre-agreed upon budget. In the absence of any updates thereto, Milestone budgets shall be those outlined in Exhibit A of this Agreement.

"Field Locations" means those locations on the Lands that are not Site Locations.

"Financial Close" means the when the Project financing is secured, the Parties have entered into the Concession Agreement, and the Project formally commences.

"Financial Close Milestone" means the delivery by the Contractor to the Commonwealth of the Deliverables set out in Attachment D.

"Force Majeure Event" means, without limitation, the following: acts of God; strikes, lockouts or other industrial disturbances; the inability of Contractor to access Community Anchor Institutions sites; 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 machinery, 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.

"Guaranteed Maximum Pricing" means a not-to-exceed dollar amount of the availability payment required for the Project, as agreed to by the Parties.

"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) Contractor or any director, officer, employee or agent of Contractor, in each case acting as such; or

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

and shall be deemed not to include the Phase 1 Early Works Price or the Phase 2 Early Works Price or other amounts expressly payable by one party to the other under this Agreement.

"Interim Milestone" means the delivery by Contractor to the Commonwealth of an updated availability payment reflecting the viability of third-party transactions, if such transactions are viable from both a risk and cost perspective, and incorporates refinements to the greenfield project proposal, with a specific focus on the key drivers set out in Attachment D.

"Internal Costs" are the Contractor's pre-agreed lump sums for internal staff time cost incurred in connection with a Milestone on the Project, and which expenses are set forth in a Milestone's budget in advance and pre-agreed upon by all Parties in writing before the beginning such Milestone.

"Lands" means the right-of-way owned or controlled by the Client in which a portion of the NG-KIH System will be constructed, all Site Locations and all Field Locations.

"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, including, for greater certainty, those related to the issuance of Permits and any building codes.

"Milestone" means a discrete subpart of the Initial Project with deliverables, budgets, and deadlines, all as pre-agreed upon by the Parties in accordance with this Agreement, and following which there may exist certain opportunities for either Party to terminate this Agreement, subject to any applicable termination conditions. The Milestones are set forth in Section III. 2. of this Agreement.

"Models" has the meaning set forth in Section III. 6.

"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 Client.

"Notice" means any written notice required hereunder, which shall be delivered in accordance with Section III.35 of this Agreement.

"Open Book Process" means full transparency for the Commonwealth into the Contractor's proposed models, financial vehicles, cost proposals, technical specifications, operational role and responsibilities, and any other aspect of the Project, such that the Commonwealth fully understands each aspect of the Project, including profit and direct and indirect expenses. As between the Parties there shall be no aspect

of or information related to Project which is not shared, with the exception of proprietary information, information that consists of internal drafts or relates to Contractor's internal approvals process required to arrange and potentially provide financing for the Project.

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

"Project Co" means KentuckyWired Infrastructure Company, LLC.

"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 Project in accordance with this 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.

"Phase 1 Early Works" has the meaning set out in Attachment E [Phase 1 Early Works].

"Phase 1 Early Works Term" has the meaning set out in Section IV paragraph 2.

"Phase 1 Early Works Price" has the meaning set out in Attachment E [Phase 1 Early Works].

"Phase 2 Early Works" has the meaning set out in Attachment F [Phase 2 Early Works].

"Phase 2 Early Works Term" has the meaning set out in Section V paragraph 2.

"Phase 2 Early Works Price" has the meaning set out in Attachment F [Phase 2 Early Works].

"Similar Project" means a project to design, build, finance, operate and maintain, under a long term concession agreement, a regional or statewide information highway infrastructure of similar scope, terms and conditions to the Project for the use and benefit of the Commonwealth, its agencies or subsections of government, or any commercial user in addition thereto.

"Site Locations" means each of the site locations more particularly described in Attachment I [Site Locations].

"Working Assumptions" has the meaning set forth in Section II.2(d) of this Agreement.

ATTACHMENT D
MILESTONE WORKPLAN

Milestone	Details
I-Guaranteed Maximum Price ("GMP")	<p>Contractor will provide the Commonwealth a not-to-exceed dollar amount of the availability payment required for the NGKIH. The availability payment will be based on a detailed list of Working Assumptions.</p> <p>The scope items for this Milestone will be:</p> <ul style="list-style-type: none"> • Engage all necessary advisors for this Milestone; • List of Working Assumptions on which the not-to exceed availability payment is based, including the actions that the Parties can take, individually or together, to reduce the GMP; • Negotiated, detailed term sheet for the Concession Agreement; • Proposed detailed scope, schedule and budget to reach Commercial Close; • Provide the Commonwealth a proposal summarizing the above deliverables and providing a not-to-exceed availability payment; • For the avoidance of doubt the Working Assumptions will include reasonable assumptions regarding the financing terms, including interest rates, applicable to debt sourced for the Project but changes in the financing terms, including the interest rates, post the GMP will result in upward or downward adjustments to the not to exceed GMP; and • Commonwealth to confirm that it has the legal authority to enter into the transaction. <p>This Milestone has been completed.</p>
II - Interim Milestone	<p>During this Milestone, the Contractor will work to provide the Commonwealth an updated availability payment that reflects the viability of third-party transactions, if such transactions are viable from both a risk and cost perspective, and incorporates refinements to the greenfield project proposal, based on diligence completed at such time</p> <p>The scope items for this Milestone will be:</p> <ul style="list-style-type: none"> • Refine greenfield project proposal through continued diligence and design work; • Pursue third party contracts which improve the affordability of the project; • Engage all necessary advisors for the Initial Project; • Proposed detailed scope, schedule and budget to reach Financial Close

	<p>Contractor's obligations under the Milestone will be considered complete once Contractor submits an updated availability payment estimate to the Commonwealth, which includes evidence, including without limitation letters of intent, term sheets, etc., reasonably satisfactory to the Commonwealth of any third party transaction to be considered as part of the updated availability payment.</p>
<p>III - Financial Close Milestone ("FC")</p>	<p>During this Milestone, final, executable contracts (including the Concession Agreement, DB Contract and O&M Contract and Interface Agreement) will be negotiated and provided to the Commonwealth, and all financing will be arranged for the transaction.</p> <p>The deliverables for this Milestone will be:</p> <ul style="list-style-type: none"> • Due diligence reports from Contractor advisors; • Executable fixed price, date certain, design-build agreement (the "DB Contract"); • Executable fixed price long-term operating, maintenance and refresh agreement (the "O&M Contract"); • Executable Concession Agreement, including without limitation a performance standards regime, and project design build schedule; • Detailed term sheet of a Wholesaler Agreement, including without limitation a revenue sharing mechanism; • Executable financing documentation; • Audited financial model; and • Proof of required insurances. <p>Contractor's obligations under this Milestone will be complete once the Contractor has satisfied the above deliverables.</p>

EXHIBIT A
MILESTONE BUDGETS
(assuming Tax Exempt Financing)

External Costs	GMP (actual)	Interim Milestone	To FC	At FC	Total
Project Counsel	160	450	368	545	1,523
Local Counsel	28	100	100	100	328
Underwriters' Counsel	-	100	250	-	350
Sponsors' Bond Counsel	-	55	275	-	330
Issuer Bond Counsel	-	-	100	-	100
Subcontractor Counsel (Ledcor)	-	120	120	-	240
Lenders' Technical Advisor	-	150	50	-	200
Sponsors Insurance	-	40	-	(40)	0
Lenders Insurance	-	20	-	-	20
Rating Agencies	-	300	-	210	510
Tax Advisor	-	75	75	-	150
Accounting Advisor	-	25	25	-	50
Model Audit	-	-	65	-	65
Stakeholder Relations	25	25	-	150	200
Out of Pockets	82	60	60	-	202
Contingency	-	184	103	-	287
External Total	295	1,704	1,591	965	4,554
Internal Costs	(actual)	Milestone	To FC	At FC	Total
Macquane	(5)	250	300	-	545
First Solutions	100	255	170	-	525
Ledcor	-	205	205	-	410
Fujitsu	100	151	227	-	477
Black & Veatch	200	536	528	-	1,264
Internal Total	395	1,397	1,430	-	3,221
Total Cost	690	3,101	3,020	965	7,775

- Fiber Order 104 miles
- Purchase Orders for Make Ready Materials
- Subcontracts with contractors
- Confirmed delivery dates for long lead items

Phase 1 Early Works Price

The Phase 1 Early Works Price is \$2,957,000.00 and is broken down as follows:

Early Works	Phase 1	
	Jun 15-30	July 1-15
Labor - Eng, Proc., PMO, CM	940,000	988,000
Material - Fiber, Make-ready	-	207,000
Field Engineering Sub	335,000	130,000
Subcontractor		
Expenses - Travel, Per Diem, Vehicles	182,000	175,000
Total	1,457,000	1,500,000
	Phase 1 Total	2,957,000

For clarity, the Phase 1 Early Works Price is in addition to the Total Costs (set out in Exhibit A) that may be payable by the Commonwealth to the Contractor in accordance with this Agreement and the Phase 1 Early Works can be completed during the Phase 2 Early Works Term to the extent that the Phase 1 Early Works are not completed during Phase 1 Early Works Term but only up to, and not exceeding, the Phase 1 Early Works Price.

Attachment F Phase 2 Early Works

The Phase 2 Early Works will consist of services and procurement scope as set out below in connection with the Project.

Engineering

Engineering activity will be a continuation of the engineering work started in Phase 1 Early Works. During Phase 2 Early Works, the work will expand beyond the I-75 spine and Ring 1B to include Ring 1A.

Deliverables:

- Pole Make-Ready Applications
- Detail Design Drawings
- Anchor location field engineering
- Permit Drawings
- Permit Applications for Ring 1A & 1B
- Make-Ready estimate approval

Procurement

The Phase 2 Early Works activity will be a continuation of the procurement started in Phase 1 Early Works. Additional fiber and make-ready material orders will be issued as the engineering progresses. Similar to Phase 1 Early Works, the cost exposure for the fiber order is estimated at a 15% restocking fee. Full cost exposure would occur upon shipment of the material. The fiber order can be cancelled 30 days prior to delivery.

Deliverables:

- Purchase Orders for Long Lead items
 - Fiber Order 314 miles
 - Purchase Orders for Make Ready Materials
- Subcontracts with contractors
- Confirmed delivery dates for long lead items

Construction

The make-ready construction will commence as Utilities return aerial make-ready applications with approved estimates.

Deliverables:

- Make-ready construction
 - Make-ready subcontracts issued
 - Initial 85 miles of make-ready construction in progress
- Begin placement of strand along routes as make-ready is cleared

Phase 2 Early Works Price

The Phase 2 Early Works Price is \$4,895,000 and is broken down as follows:

Early Works	Phase 2	
	July 16-31	Aug 1-15
Labor - Eng, Proc., PMO, CM	988,000	1,122,000
Material - Fiber, Make-ready	311,000	646,000
Field Engineering Sub	130,000	
Subcontractor	660,000	660,000
Expenses - Travel, Per Diem, Vehicles	175,000	203,000
Total	2,264,000	2,631,000
	Phase 2 Total	4,895,000

The Client acknowledges that the Phase 2 Early Works Price may be exceeded in the Phase 2 Early Works Term but only to the extent that a portion of the Phase 1 Early Works Price was not expended in the Phase 1 Early Works Term in connection with Phase 1 Early Works. Further, the Client confirms that if either the Phase 1 Early Works Price or the Phase 2 Early Works Price has not been expended by the Contractor, then the Contractor may include the costs incurred in respect of the insurance coverage obtained for the Phase 2 Early Works, but only if this Agreement is terminated and costs are incurred for terminating any insurance coverage that was bound in the Phase 2 Early Works Term.

- change in ordinance, including demolition, increased cost of repairs and replacement – minimum \$15,000,000 sublimit;
- valuable papers – minimum \$500,000 sublimit;
- accounts receivable;
- contamination clean-up or removal – minimum \$250,000 sublimit;
- \$31.2 million of recurring soft costs;
- margin of profit for contractors;
- off premises services interruption (minimum 4 weeks);
- civil authority (minimum 4 weeks);
- prevention of ingress / egress (minimum 4 weeks);
- underground services, temporary buildings and structures, temporary boilers and pressure vessels, scaffolding, false work, forms, excavation, site preparation, landscaping and similar work;
- electronic data processing equipment and media, including the cost to restore from the application of by-laws or ordinances;
- non-vitiation;
- waiver of subrogation in favor of all named and unnamed insureds, including but not limited to Project Co, the Authority, Operations Co, the Project Contractors, the Collateral Agent, the Sub-Contractors, consultants and design professionals, except where a loss is caused by or resulting from any error in the Design or any other design professional error or omission; and
- permit use and occupancy of the incomplete NG-KIH System by Project Co, Operations Co, the Project Contractors, the Sub-Contractors and the Authority prior to the relevant Site Completion Date, Lateral Completion Date or Ring Completion Date, as applicable;
- delay in start-up coverage: in an amount not less than \$31.2 million sufficient to compensate Project Co for additional capital payments, additional interest for the extension of financing necessary for the completion of the Design and Construction, legal and accounting expenses, insurance premiums, building permits and other miscellaneous costs, various incurred fees, fixed operation and maintenance expenses, additional commissions, advertising, margin of profit for Operations Co,

caused by the delay in Site Completion, Ring Completion or System Completion resulting from any perils insured under (a) above;

- having an indemnity period not less than 12 months in respect of the NG-KIH System; and
- having a waiting period of not greater than 14 days;
- deductibles, per occurrence, not exceeding the following amounts;
- flood – \$500,000;
- earthquake – \$250,000;
- LEG 3 – \$250,000;
- for all other insured perils – \$100,000; and
- if more than one event occurs, only the highest deductible applies;

Include, as named insureds, as their interests may appear the following entities: KentuckyWired Infrastructure Company, Inc. ("Project Co"); The Commonwealth of Kentucky (referred to herein as the Commonwealth); KentuckyWired Operations Company, LLC ("Operations Co"); NG-KIH Design-Builder LLC (the joint venture to be formed by the DB Contractors and also referred to as the Design-Builder in connection with the Project); LTS Kentucky Managed Technical Services LLC (also referred to as the Service Provider in connection with the Project; and all sub-contractors of the Design-Builder or the Service Provider in connection with the Project, consultants and sub-consultants as their interests may appear.

Include Lender Endorsements substantially in the form agreed to by the parties including, without limitation, naming the U.S. Bank National Association ("Collateral Agent") as additional insured and loss payee, and, with respect to the delay in start-up coverage referred to above in this Attachment G, name the Client and the Collateral Agent as the exclusive loss payees.

Commercial General Liability Insurance

During the Early Works Phase 2, Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, commercial general liability insurance, which will include the following terms:

- coverage in an amount of \$2,000,000 per occurrence and \$4,000,000 in the annual aggregate for bodily injury, death and damage to property, including loss of use thereof, subject to the following principle extensions and sublimits:
-
- products & completed operations ongoing operations coverage during the warranty period;

- medical payments;
- contractual liability;
- personal injury and advertising;
- cross liability, separation of insureds and/or severability of interests;
- hazardous operation XCU (excavating / underpinning / pile driving / shoring / caisson work / work below ground surface / tunneling / grading and similar operations);
- waiver of subrogation in favor of all additional insureds as required by contract, including but not limited to Project Co, the Authority, Operations Co, the Project Contractors and the Collateral Agent;
- a deductible not exceeding \$500,000 per occurrence;

Include, as additional insureds, using the appropriate endorsements, KentuckyWired Infrastructure Company, Inc. ("Project Co"), the Commonwealth of Kentucky (also referred to as the Client), and KentuckyWired Operations Company, LLC ("Operations Co").

Worker's Compensation

During the Early Works Phase 2, Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, worker's compensation insurance for each employee in conformance with applicable Law, which will include the following terms:

- a voluntary compensation endorsement;
- an alternative employer endorsement;
- an endorsement extending coverage to all states operations on an "in any" basis; and
- if any work is over or adjacent to navigable waters, coverage for any claims arising from the Longshore and Harbor Workers' Compensation Act and/or the Merchant Marine Act of 1920.

Employer's Liability

During the Early Works Phase 2, Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, employer's liability insurance, which will include the following terms:

- coverage in the amount of \$1,000,000 per claim and in the aggregate against liability for death, bodily injury, illness or disease for all employees

working on or about any Lands or otherwise engaged in the Design and Construction; and

- a deductible not exceeding \$1,000,000 per claim.

Automobile Liability

During the Early Works Phase 2, Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, automobile liability coverage, which will include the following terms:

- coverage in the amount of \$1,000,000 combined single limit, inclusive of defense, for accidental death, bodily injury, and property damage liability arising from the ownership, maintenance or use of all owned, non-owned, and hired vehicles used in the performance of the Design and Construction, including loading and unloading; and
- a deductible not exceeding \$1,000,000 per claim.

Include KentuckyWired Infrastructure Company, Inc., the Commonwealth of Kentucky (also referred to as the Client) and KentuckyWired Operations Company, LLC ("Operations Co") as additional insureds.

Excess Liability

During the Early Works Phase 2, the Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, umbrella/excess liability insurance in the amount of \$50,000,000 per occurrence/annual aggregate. Such policy or policies shall be excess of and follow form over the primary insurance required in this Schedule 2D.

Professional Liability

During the Early Works Phase 2, DB Contractors will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, which will include the following terms:

- coverage in an amount of not less than \$15,000,000 per claim and in the aggregate (inclusive of defense and related costs and supplementary payments) for all architectural, engineering, land surveying, environmental, landscape architectural, interior design /space planning, soil and material testing services, geotechnical services and procurement services, including their replacements and/or sub-consultants of any tier subject to the following principle extensions:
- primary insurance extension;
- include as insureds any present or former partner, executive officer, director, shareholder of any named insured while acting within their scope of duties for the named insured;

- claim defined as a written or oral demand for money or a written or oral allegation of liability or responsibility for a breach of professional duty in the rendering or failure to render professional services by an insured and resulting from a single error, omission or negligent act;
- lawyer fees and associated expenses incurred in the investigation, defense, settlement, arbitration or litigation of claims;
- duty to defend, even if the allegations are groundless, false or fraudulent;
- a deductible not exceeding \$500,000 per claim.

Contractors Pollution Liability

During the Early Works Phase 2, Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, contractor's pollution liability insurance, which will include the following terms:

- coverage in the amount of not less than \$25,000,000 per claim and in the aggregate inclusive of defense and all costs and expenses subject to the following principle extensions:
- third party bodily injury and third party contamination;
- hazardous substances released completed operations period; and
- waiver of subrogation in favor of all additional insureds, including but not limited to any and all indemnified parties where required by contract and the Collateral Agent; and
- a deductible not exceeding \$1,000,000 per claim.

Include, as additional insureds, the following entities: KentuckyWired Infrastructure Company, Inc. ("Project Co"); The Commonwealth of Kentucky (also referred to herein as the "Client"); and KentuckyWired Operations Company, LLC ("Operations Co").

Include Lender Endorsements substantially in the form as mutually agreed to by the parties, including, without limitation, naming the U.S. Bank National Association ("Collateral Agent") as additional insured.

For clarity, the pollution liability insurance shall only include coverage for environmental risks relating to the exacerbation of pre-existing contamination and any new pollutants related to the Project. The remediation of pre-existing contamination shall be the responsibility of the Client.

Employee Dishonesty (Crime)

During the Early Works Phase 2, Macquarie will take out, maintain in force and extend, or cause to be taken out, maintained in force and extended, employee dishonesty insurance against the fraudulent acts of employees of KentuckyWired Infrastructure Company, Inc. ("Project Co"), which will include coverage in the amount of not less than \$1,000,000 per claim and will include the following principal extensions:

- broad form money and securities;
- money orders and counterfeit paper;
- depositors' forgery;
- computer fraud and funds transfer fraud;
- audit expenses; and
- credit card forgery.

Attachment H

Design and Construction Protocols

1. RESPONSIBILITIES

1.1 Phase 1 Early Works and Phase 2 Early Works Responsibility

Notwithstanding any other provision of this Agreement, Contractor will:

- (a) have complete responsibility for and control over the Phase 1 Early Works and the Phase 2 Early Works; and
- (b) perform and complete the Phase 1 Early Works and the Phase 2 Early Works in accordance with this Attachment H.

1.2 Grant of License by Client

During the Phase 2 Early Works Term, until termination of the this Agreement, the Client shall grant or shall cause to be granted to Contractor a non-exclusive license of use and access to, on, under and over the Lands and the NG-KIH System to the extent required by Contractor to carry out the Project in accordance with this Agreement (the "License").

For clarity, the Client will be responsible for ensuring that it has or will have such rights and interests in and to the Lands sufficient to permit the grant of the License free and clear of all encumbrances, restrictions or limitations, except for any encumbrances, restrictions or limitations which do not adversely affect, financially or otherwise, the License and the ability of Contractor to perform any of its obligations under this Agreement, including the ability to conduct the Phase 1 Early Works and the Phase 2 Early Works.

1.3 TERMS AFFECTING THE LICENSE GRANT

Without limiting the other provisions of this Attachment, the following terms and conditions apply to the License:

- (a) no legal demise or other interest in land, and no interest in the NG-KIH System or any other improvements, is granted to Contractor or created by this Agreement; and
- (b) the License is non-exclusive and no right to exclusive possession of the Lands or the NG-KIH System is granted to Contractor.

1.4 Deficiencies in Phase 1 Early Works and Phase 2 Early Works

Contractor will, without cost to the Client, correct any Deficiency that becomes apparent at any time during the Phase 1 Early Works or the Phase 2 Early Works.

1.5 Compliance with Laws

Contractor will undertake and perform the Phase 1 Early Works and the Phase 2 Early Works in accordance with applicable Laws, and so that all applicable elements of the Phase 1 Early Works and the Phase 2 Early Works, including all workmanship, construction equipment and materials meet the requirements of applicable Laws.

1.6 Permits for Phase 1 Early Works and Phase 2 Early Works

- (a) Contractor is responsible to obtain all Permits that are required for the performance of the Phase 1 Early Works and the Phase 2 Early Works.
- (b) Contractor assumes all risk and costs arising in relation to all Permits arising from delays in obtaining Permits or inability to obtain Permits, conditions of obtaining Permits or amendments to Permits as may be required.
- (c) Client will provide Contractor with such information within the Client's possession, and co-operate with Contractor, as Contractor reasonably requires in relation to all Permits.

2. DESIGN

2.1 Additional Design Considerations

During the Phase 1 Early Works Term and the Phase 2 Early Works Term, Contractor will undertake and perform the Design so that the Design is undertaken by a design team exercising such degree of care, skill and diligence as would reasonably be expected from consultants qualified to perform services similar in scope, nature and complexity to the Design and Contractor will appoint a design team that:

- (a) is so qualified;
- (b) includes (as required by applicable Law or Customary Industry Practice) licensed or registered professional engineers and architects;
- (c) has sufficient expertise and experience to expeditiously and efficiently perform all of the Design in a proper and professional manner to the standard set out in this Attachment H; and
- (d) has sufficient expertise and experience designing, constructing, operating and maintaining infrastructure in similar environmental and geotechnical conditions as in the Lands.

3. MAKE-READY CONSTRUCTION

3.1 Skilled Workers

Contractor will employ a sufficient number of sufficiently skilled workers to perform the Phase 1 Early Works and the Phase 2 Early Works in compliance with this Attachment

H. Trades and other workers will be licensed or registered as required by applicable Law or Customary Industry Practice.

3.2 Control of Phase 1 Early Works and Phase 2 Early Works

Contractor will have total control of the Phase 1 Early Works and the Phase 2 Early Works and will effectively direct and supervise such work so that it is undertaken in compliance with the terms of this Attachment H. Contractor will be responsible for all construction means, methods, techniques, sequences and procedures with respect to the Phase 1 Early Works and the Phase 2 Early Works and for coordinating the various elements of such work, and nothing in this Attachment H will be interpreted as giving any responsibility for the above to the Client or any representative or agent of the Client.

3.3 Existing Utilities and Services

Contractor will confirm the location of, and protect all existing utilities and services that may be affected by the Phase 1 Early Works or the Phase 2 Early Works.

3.4 Route and Lands Issues

Contractor will:

- (a) perform all Phase 1 Early Works and Phase 2 Early Works activities within lands for which the Contractor has been granted the License in accordance with this Attachment or for which Contractor has otherwise obtained sufficient rights of access;
- (b) if the Contractor performs any Phase 1 Early Works or Phase 2 Early Works-related activities outside of the Lands, without limiting any other provisions of this Agreement, will comply with all relevant Laws.

3.5 Safety

Contractor will be solely responsible for safety, during the Phase 1 Early Works Term and Phase 2 Early Works Term, including the safety of all persons on the Lands and any other location where the Phase 1 Early Works or Phase 2 Early Works is performed (whether on the Lands or any other location, lawfully or not) and members of the public, and will comply with the requirements of applicable Laws, including applicable construction safety legislation, regulations and codes.

3.6 Protection of the Environment and Property

Contractor will:

- (a) follow all environmental protection requirements and restrictions while performing the Phase 1 Early Works and Phase 2 Early Works; and
- (b) protect the Client's property (and any third party's property) from damage caused by the Phase 1 Early Works and Phase 2 Early Works, including buildings, roadways, drainage systems, landscaping, surfaces, services and infrastructure.

4. QUALITY ASSURANCE

4.1 Quality of Phase 1 Early Works and Phase 2 Early Works

Contractor is solely responsible for the quality of the Phase 1 Early Works and the Phase 2 Early Works.